

Advertising Supplemental Materials
Committee on Disciplinary Rules and Referenda

DATE: Tuesday, September 4, 2018

TIME: 10:30 a.m. – 2:30 p.m.

1. 7.01 (Page 2-4)
2. 7.02 (Page 5-7)
3. 7.03 - Original (Page 8-10)
4. 7.03 (Page 11-13)
5. 7.04 (Page 14-15)
6. 7.05 (Page 16-18)
7. 7.06 (Page 19-20)

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.01

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

ARC Proposed Rule 7.01:

The SBOT Advertising Review Committee has proposed the following Rule:

Rule 7.01 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. Whatever means are used to disseminate information about a lawyer's services, statements, including trade names must be truthful and non-deceptive.

(b) A lawyer in private practice may practice under a trade name, including in its name of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession

1. provided the trade name does not imply a connection with a public or charitable legal services organization, or governmental agency or entity; or
2. utilizes the name of a non-lawyer, or a lawyer not associated with the firm.

(c) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

(d) Shall not create or imply an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law.

CDRR Subcommittee Proposed Rule 7.01:

Minor changes have been made to the ARC draft by the CDRR subcommittee to strengthen and clarify the proposed Rule, and new language has been added as noted below. The paragraphs of CDRR Subcommittee Proposed Rule 7.01 deal with the following topics:

- Paragraph (a): General Rule Against False or Misleading Statements
- Paragraph (b): Trade Names
- Paragraph (c): Language of Disclaimers

- Paragraph (d): Achieving Results by Unlawful Means
- Paragraph (e): Falsely Stating or Implying the Existence of a Partnership

Rule 7.01 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of any lawyer or law firm.¹ Information about legal services must be truthful and non-deceptive.² 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.³ A statement is 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,⁴ or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve.⁵ This Rule governs all communications about a lawyer's services, including, but not limited to, advertisements and solicitation communications.⁶

(b) A lawyer may practice law under a non-misleading trade name, including a trade name that includes the name of one or more deceased or retired members of the firm, or of a predecessor firm if there has been a succession in the firm's identity. A trade name may not imply a connection with a public or charitable legal services organization or a governmental entity, or utilize the name of a non-lawyer or a lawyer not associated with the firm.⁷ 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.⁸ 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.⁹

¹ This sentence is based on the first sentence of ARC Proposed Rule 7.01(a).

² This sentence is based on the third sentence of ARC Proposed Rule 7.01(a), but is worded more strongly. The ARC reference to trade names has been omitted because trade names are now dealt in paragraph (b).

³ This sentence is taken from Model Rules of Professional Conduct R. 7.1 (2017). Similar language can be found in TDRPC Rule 7.01(a) (2018), which currently states, "A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

⁴ This clause is based on Model Rules of Professional Conduct R. 7.1 cmt. 2 (2017). Similar language can be found in TDRPC Rule 7.01 cmt. 3 (2018), which currently states, "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."

⁵ This clause is based on the first part of ARC Proposed Rule 7.1(d).

⁶ This sentence more clearly states the ideas set forth in the second sentence of ARC Proposed Rule 7.01(a).

⁷ This provision has divided the one long sentence in ARC Proposed Rule 7.01(b) into two shorter, more manageable sentences. The substance is the same.

⁸ This sentence is identical to Model Rules of Professional Conduct R. 7.5(c) (2017). The rule has been added to this draft because it has been followed in Texas and addresses an issue of recurring importance. TDRPC Rule 7.01(c) (2018) currently states, "The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm."

⁹ This sentence is identical to Model Rules of Professional Conduct R. 7.5 (b) (2017). It addresses an issue of continuing importance as national law firms open offices in Texas. Similar language is contained in TDRPC Rule 7.01(b) (2018) The failed 2011 Texas Referendum had proposed that similar language be retained as part of the Texas Disciplinary Rules as Rule 7.01(b).

(c) Any statement or disclaimer required by these rules shall be made in each language used in the communication. However, the mere statement that a language is spoken or understood does not by itself require a statement or disclaimer in that language.

(d) A lawyer shall not state or imply that the lawyer can achieve results by means that violate these Rules or other law.¹⁰

(e) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.¹¹

¹⁰ The reference in ARC Proposed Rule 7.01(d) to unjustified expectations has been moved to CDRR Proposed Rule 7.01(a), because it explains why some statements are misleading. The remaining prohibition against stating or implying that a lawyer can achieve results by unlawful means is now separately stated in CDRR Proposed Rule 7.01(d). It echoes the current language of TDRPC 8.04(a)(5), which provides that it is professional misconduct for a lawyer to “state or imply an ability to influence improperly a government agency or official.”

¹¹ The language in CDRR Subcommittee Proposed Rule 7.02(e) is identical to Model Rules of Professional Conduct R. 7.5(d) (2017). Falsely stating or implying the existence of a partnership violates the general rule against false or misleading statements set down in CDRR Proposed Rule 7.01(a).

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.02

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

ARC Proposed Rule 7.02:

The SBOT Advertising Review Committee has proposed the following Rule:

Rule 7.02 Advertisements and Solicitation Communications Disseminated in the Public

(a) A lawyer who advertises in the public media: (1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and the lawyers primary practice location; (2) may include a statement that the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization.

(b) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(2) the communication contains information prohibited by Rule 7.01.

(3) the communication is to resemble legal pleadings or other legal documents

(4) the solicitation communication shall, regardless of the media utilized, be plainly marked "ADVERTISEMENT" unless the recipient:

(a) is a lawyer,

(b) has a familial, personal or prior professional relationship with the lawyer,

(c) has or had an attorney client relationship,

(c) If an advertisement or solicitation communication by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, it must state the client will be obligated to pay for other expenses.

(d) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer

bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(e) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

- (1) states that the advertisement is paid for by the cooperating lawyers;
- (2) names each of the cooperating lawyers;

(f) Neither Rule 7.01 nor Rule 7.02 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

CDRR Subcommittee Proposed Rule 7.02:

Paragraph (b) of ARC Proposed Rule 7.02 deals with types of client solicitation that involve private, rather than public, means of communication. Therefore, the material relating to paragraph (b) of ARC Proposed Rule 7.02 has been moved to CDRR Subcommittee Proposed Rule 7.03, which deals with client solicitation. Similarly, paragraph (f) of ARC Proposed Rule 7.02 has been omitted here because it more logically relates to the material on solicitation discussed in Proposed Rule 7.03.

Other minor changes to ARC Proposed Rule 7.02 have been made by the Subcommittee to strengthen and clarify the proposed Rule. Specifically: (1) the title of the rule has been changed; (2) references to “in the public media” have been changed to “in public media” because there is no finite list of types of public media, and new forms of public media (e.g., Twitter and Reddit) continue to evolve; and (3) ARC Proposed Rule 7.02(a) has been broken into two provisions (CDRR Subcommittee Proposed Rule 7.02(a) and (b)) which deal separately with the very different topics of responsibility for the content of an advertisement and disclosure of board certification.

Finally, the CDRR Subcommittee has rejected the rule set forth in ARC Proposed Rule 7.02(e). That provision, which appears to be condensation of rules currently set forth in TDRPC Rule 7.04(o),¹ would do little to protect potential clients from harm. In place of ARC Proposed Rule 7.02(e), the CDRR Subcommittee has substituted the traditional prohibition against implying that a partnership exists where that is not the case. However, that rule is not part of CDRR Proposed Rule 7.02, which deals only with statements in public media. Rather, it is set down as CDRR Proposed Rule 7.01(e) because it illustrates how lawyers may violate the general rule against false or misleading statements concerning legal services.

The paragraphs of CDRR Subcommittee Proposed Rule 7.02 now deal with the following topics:

- Paragraph (a): Responsibility for advertising content;
- Paragraph (b): Disclosure of board certification and areas of practice;
- Paragraph (c): Responsibility for costs of litigation;

¹ TDRPC Rule 7.04 (o) (2018) now provides:

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

- (1) states that the advertisement is paid for by the cooperating lawyers;
- (2) names each of the cooperating lawyers;
- (3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;
- (4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and
- (5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

- Paragraph (d): Honoring advertised fees.

Rule 7.02 Communications Disseminated by Public Media

(a) A lawyer who advertises in public media shall publish or broadcast the name of at least one lawyer who is responsible for the content of the advertisement and disclose the lawyer's primary practice location.

(b) A lawyer who advertises in public media may include a statement that the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization. A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.²

(c) If an advertisement by a lawyer discloses willingness, or potential willingness, to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as costs of litigation.³

(d) A lawyer who advertises in public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so.⁴

² This sentence is quoted from Model Rules of Professional Conduct R. 7.4(a) (2017). It has been added because it clarifies an issue that has been a continuing concern to lawyers for several decades.

³ The final clause has been added to the ARC draft as a useful illustration. This advertising rule is consistent with obligations imposed by the current disciplinary rule governing attorney's fees. *See* TDRPC Rule 1.04(d) (2018) ("A contingent fee agreement . . . shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.").

⁴ The final clause has been added on the assumption that if an express promise has been made by a lawyer to abide by a stated fee for a longer period of time, it would not be unfair to hold the lawyer to that promise.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.03

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

ARC Proposed Rule 7.03:

The SBOT Advertising Review Committee has proposed the following Rule:

Rule 7.03 Employment and Fees

(a) A lawyer shall not seek in person, professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a non-client who has not sought the lawyer's advice or employment.

(b) A lawyer shall not by regulated telephone, social media or other electronic contact as defined by this rule, seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or non-client who has not sought the lawyer's advice regarding employment.

(1) "regulated telephone, social media or other electronic contact" means any social media or electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person(s) contacted communicating in a live, or electronic interactive manner. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

(c) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients.

(d) Except as otherwise permitted, A lawyer, for the specific purpose of soliciting for professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value as an inducement to the client, other than actual litigation expenses and other financial assistance as permitted, to a prospective client. This does not prohibit a lawyer from paying reasonable fees for advertising and public relations services rendered in accordance with this Rule and shall pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(e) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of the Rules.

(f) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of the Rules.

(g) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a – d).

CDRR Subcommittee Proposed Rule 7.03:

The title of this Rule has been changed to “Solicitation of Employment.” Paragraph (b) of ARC Proposed Rule 7.02 deals with types of client solicitation. Therefore, the material relating to paragraph (b) of ARC Proposed Rule 7.02 has been moved to CDRR Proposed Rule 7.03 and inserted as paragraph (e).

Paragraph (f) of ARC Proposed Rule 7.02 was omitted from CDRR Subcommittee Proposed Rule 7.02 because it logically relates to the material on solicitation discussed in Proposed Rule 7.03. The relevant language has been inserted here as paragraph (f).

Paragraphs (e), (f), and (g) of ARC Proposed Rule 7.03 so severely condensed the corresponding material now found in TDRPC Rule 7.06¹ that the provisions became unclear and confusing. These issues are now addressed in CDRR Subcommittee Proposed Rule 7.06.

Other minor changes to the ARC draft have been made by the subcommittee to strengthen and clarify the proposed Rule. The paragraphs of CDRR Subcommittee Proposed Rule 7.03 now deal with the following topics:

- Paragraph (a): In-person solicitation of persons likely to need representation;
- Paragraph (b): Solicitation by electronic means of persons likely to need representation;
- Paragraph (c): Solicitation and referrals involving payments to nonlawyers;
- Paragraph (d): Solicitation involving payments to prospective clients;
- Paragraph (e): Other forms of prohibited communication; and
- Paragraph (f): Communications related to class actions.

Rule 7.03 Solicitation of Paid Professional Employment

(a) A lawyer shall not, through in-person contact, seek paid professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a non-client who has not sought the lawyer’s advice or employment.

(b) A lawyer shall not, by regulated telephone, social media or other electronic contact, seek paid professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a non-client who has not sought the lawyer’s advice or employment.

¹ TDRPC Rule 7.06 (2018) currently provides:

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

(1) “Regulated telephone, social media or other electronic contact” means any telephone, social media, or electronic communication initiated by a lawyer, or by any person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) This Rule does not apply if a non-client merely accesses a lawyer’s website because in such instances the non-client, rather than the lawyer, has initiated the contact.

(c) A lawyer shall not pay, give, or offer to pay or give, anything of value to a person not licensed to practice law for soliciting or referring prospective clients for paid professional employment.

(d) Except as otherwise permitted, a lawyer shall not, for the purpose of securing professional employment, pay, give, or advance, or offer to pay, give, or advance, anything of value to a prospective client, other than actual litigation expenses or financial assistance expressly permitted by law.² This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Occupations Code Title 5, Subtitle B, Chapter 952.

(e) A lawyer shall not, for the purpose of obtaining paid professional employment, send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client who has not sought the lawyer’s advice or employment, if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, or undue influence, or contains a false, fraudulent, misleading, deceptive, or unfair statement or claim;

(2) the communication contains information false or misleading information prohibited by Rule 7.01;

(3) the communication is designed to resemble legal pleadings or other legal documents; or

(4) the communication is not plainly marked “ADVERTISEMENT,” unless the recipient (i) is a lawyer, (ii) has a familial, personal, or prior professional relationship with the lawyer, or (iii) has, or previously had, an attorney-client relationship with the lawyer.

(f) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

² Under TDRPC Rule 1.08 (d) (2018), “(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that: (1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter. . .”).

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 30, 2018
Re: Third Re-Write of Rule 7.03

New ABA Rule 7.3 (Aug. 2018):

The new advertising rules recently adopted by the ABA House of Delegates provide:

Model Rule 7.3: Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

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

(1) is a lawyer; or

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

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

~~(b)(c)~~ (c) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

~~(c)~~ Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

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

~~(d)~~ (e) Notwithstanding the prohibitions in this Rule paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone live person-to-person contact to solicit enrollments or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

CDRR Third Re-Write of Proposed Texas Rule 7.03:

Rule 7.03 Solicitation of Paid Professional Employment¹

(a) The following definitions apply to this rule:

(1) “Regulated telephone, social media, or other electronic contact” means any telephone, social media, or electronic communication initiated by a lawyer, or by any person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.²

(b) Unless the target of a solicitation is a lawyer, a person who has a family, close personal, or prior business or professional relationship with the lawyer, or a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters, a lawyer shall not, for pecuniary gain, solicit through in-person contact or regulated telephone, social media, or electronic communication professional employment from a non-client who has not sought the lawyer’s advice or employment.

(c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client, if:

(1) the communication involves coercion, duress, overreaching, intimidation, or undue influence;³

(2) the communication is designed to resemble legal pleadings or other legal documents; or

(3) unless the prospective client falls under one of the specific exceptions set forth in the first sentence of paragraph (b) above, the communication is not plainly marked “ADVERTISEMENT” or otherwise clearly so designated.⁴

¹ A prior CDRR subcommittee draft of this rule contained this language: “This Rule does not apply if a non-client merely accesses a lawyer’s website because in such instances the non-client, rather than the lawyer, has initiated the contact.” That language has been removed from the blackletter text of Proposed Rule 7.03 with the assumption that it would be better located in the Comment to 7.03.

² This section (Proposed Texas Rule 7.03(a)(2)) is identical to Model Rule 7.3 of the new ABA Model Rules of Professional Conduct (2018) dealing with advertising. Stating that “the lawyer knows or reasonably should know [that the nonclient] needs legal services in a particular matter” allows the CDRR to eliminate from the ARC draft the awkward, repetitive, and not entirely clear references to “communication concerning a matter arising out of a particular occurrence or event, or series of occurrences or events.”

³ The ARC draft of Rule 7.03 had referred to a communication involving “coercion, duress, fraud, overreaching, intimidation, or undue influence, or contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.” The references to false or misleading statements have been eliminated from the text because Proposed Rule 7.01 applies to all communications about legal services and already bars false and misleading statements. The reference to “unfair statement or claim” has been dropped because it is vague and subject to abuse by complainants. As revised, paragraph (c)(1) comes close to the parallel language in the new ABA model rule, Model Rules of Professional Conduct R. 7.3(c)(2) (2018) (“coercion, duress or harassment”).

⁴ The subparagraph of an earlier draft of Proposed Rule 7.03 prohibiting a communication that “contains false or misleading information prohibited by Rule 7.01” has been eliminated. Rule 7.01 already applies to all

(d) A lawyer shall not pay, give, or offer to pay or give, anything of value to a person not licensed to practice law for soliciting or referring prospective clients for paid professional employment.

(e) Except as otherwise permitted, a lawyer shall not, for the purpose of securing professional employment, pay, give, or advance, or offer to pay, give, or advance, anything of value to a prospective client, other than actual litigation expenses or financial assistance expressly permitted by law. This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Occupations Code Title 5, Subtitle B, Chapter 952.

(f) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

communications about legal services; the cross reference is unnecessary. At the end of subparagraph (3), the words "or otherwise clearly so designated" have been added because they make more sense when applied to non-written communications.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.04

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

ARC Proposed Rule 7.04:

The SBOT Advertising Review Committee has proposed the following Rule:

Rule 7.04 Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) A lawyer shall file with the State Bar staff of the Advertising Review Committee of the State Bar of Texas no later than the dissemination of an advertisement via any media used to disseminate information for the purpose of obtaining professional employment, or a solicitation communication sent by any means, including social media, for the purpose of obtaining professional employment:

- (1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appears or will appear upon dissemination;
- (2) a completed lawyer advertising and solicitation communication application; and
- (3) payable to the State Bar of Texas a fee set by the Board of Directors.
- (4) a copy of the advertisement or solicitation communication in the form in which it appears or will appear upon dissemination;

(b) If requested by the staff or the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.

CDRR Subcommittee Proposed Rule 7.04:

Minor changes to the ARC draft have been made by the subcommittee to strengthen and clarify the proposed Rule.

Rule 7.04 Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) A lawyer shall file with the staff of the Advertising Review Committee of the State Bar of Texas, no later than the date of dissemination of an advertisement of legal services via public media, or the date of a solicitation communication sent by any means, including social media, for the purpose of obtaining professional employment:

- (1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination;
- (2) a completed lawyer advertising and solicitation communication application; and
- (3) payment to the State Bar of Texas of a fee set by the Board of Directors.

(b) If requested by the staff of¹ the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement or written, recorded, electronic, or digital solicitation communication.

¹ ARC Proposed Rule 7.04 said “or” not “of.”

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.05

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

ARC Proposed Rule 7.05:

The SBOT Advertising Review Committee has proposed the following Rule:

Rule 7.05 Exempt Communications

(a) The filing requirements of these rules do not extend to any of the following materials, provided those materials comply with Rule 7.01

(1) an advertisement in the public media that contains only part or all of the following information,

- (i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";
- (ii) the particular areas of law in which the lawyer or firm practices or
- (iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
- (iv) the educational background of the lawyer or lawyers;
- (v) technical and professional licenses granted by this state and other recognized licensing authorities;
- (vi) foreign language ability;
- (vii) particular areas of law in which one or more lawyers are certified or approved by the Texas Board of Legal Specialization
- (viii) identification of prepaid or group legal service plans in which the lawyer participates;
- (ix) the acceptance or nonacceptance of credit cards;
- (x) any fee for initial consultation and fee schedule;
- (xi) in the case of a website, links to other websites;
- (xii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;
- (xii) any disclosure or statement required by these rules; and

- (xiii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;
- (2) an advertisement in the public media that:
 - (i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and
 - (ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;
- (3) a listing or entry in a regularly published law list;
- (4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;
- (5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:
 - (i) existing or former clients;
 - (ii) other lawyers or professionals; or
 - (iii) members of a nonprofit organization that meets the following conditions:
 - the primary purposes of the organization do not include the rendition of legal services;
 - the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization;
 - the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and
 - the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization.

CDRR Subcommittee Proposed Rule 7.05:

Minor changes to the ARC draft, including changes to the title, have been made by the subcommittee.

Rule 7.05 Communications Exempt from Filing Requirements

(a) The filing requirements of these rules do not extend to any of the following materials, provided those materials comply with Rule 7.01:

- (1) an advertisement in public media that contains only part or all of the following information,
 - (i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";
 - (ii) the particular areas of law in which the lawyer or firm practices or
 - (iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
 - (iv) the educational background of the lawyer or lawyers;
 - (v) technical and professional licenses granted by this state and other recognized licensing authorities;
 - (vi) foreign language abilities;

(vii) particular areas of law in which one or more lawyers are certified by the Texas Board of Legal Specialization

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or nonacceptance of credit cards;

(x) any fee for initial consultation and fee schedule;

(xi) in the case of a website, links to other websites;

(xii) sponsorship by the lawyer or firm of a charitable, civic, or community program or event, or sponsorship of a public service announcement;

(xiii) any disclosure or statement required by these rules; and

(xiv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: August 8, 2018
Re: Rule 7.06

Request for Initiation of the Rule Proposal Process:

By resolution adopted June 20, 2018, the State Bar of Texas Board of Directors approved the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requested initiation of the rule proposal process on the lawyer advertising rules.

Current Texas Disciplinary Rule 7.06:

Rule 7.06 of the Texas Disciplinary Rules of Professional Conduct now provides:

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

ARC Proposal:

The ARC Proposal would eliminate current Texas Rule 7.06 and substitute the follow language as part of ARC Proposed Rule 7.03:

(e) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of the Rules.

(f) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of the Rules.

(g) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a – d).

CDRR Subcommittee Proposal:

The subcommittee believes that Texas Rule 7.06 should be retained in its present form. As written, the current Texas Rule deals clearly with three different situations of recurring importance. First, paragraph (a) addresses situations where the lawyer in question has violated advertising rules or other specified provisions (dealing with serious crimes and barratry). The rule makes clear that the offending lawyer cannot accept or continue to provide representation.

Second, paragraph (b) then addresses whether other lawyers in the firm can provide representation if someone else in the firm has violated the advertising rules or other specified provisions. The rule clearly indicates that they cannot, which effectively means the disqualification that arises from a violation of advertising rules and other specified provisions is imputed to other members of the firm.

Third, paragraph (c) deals with situations where a lawyer discovers that a case referred to the lawyer was procured by violation of the advertising rules and other specified provisions. The rule makes clear that the lawyer can continue to provide representation, but may not pay a referral fee to the referring lawyer.