

TO: CDRR Subcommittee (Claude DuCloux and Amy Bresnen)
FROM: Vincent R. Johnson, Dean, St. Mary's University School of Law
RE: Public Comments Related to the Proposed Advertising Rules

July 22, 2019

The recent public comments received by the CDRR suggest that our draft can be improved by simplifying the structure of the proposed rules. Specifically, it would be useful to eliminate references to "public media" and to minimize references to communications "substantially motivated by pecuniary gain." The redlined draft below indicates how the rules might be changed.

If these changes are implemented, there would be only three categories of communications about legal services:

Category (1): Communications that either do not (a) offer or promote a lawyer's services, or (b) are not motivated by pecuniary gain, or (c) both. Communications in this category would be subject to Rule 7.01 (no false or misleading statements) and Rule 7.07 (no trade names).

Category (2): Communications that (a) offer or promote a lawyer's services, and (b) are motivated by pecuniary gain, and (c) are directed to persons the lawyer neither knows nor reasonably should know need legal services in particular matters. Communications in this category would be subject to Rule 7.01 (no false or misleading statements), Rule 7.02 (advertising), Rule 7.03(c) (no duress, no deceptive legal format, must be labeled as advertising); Rule 7.04 (filing requirements)), Rule 7.05 (exemptions from filing requirements), and Rule 7.07 (no trade names).

Category (3): Communications that (a) offer or promote a lawyer's services, and (b) are motivated by pecuniary gain, and (c) are directed to persons the lawyer knows nor reasonably should know need legal services in particular matters. Communications in this category would be subject to Rule 7.01 (no false or misleading statements), Rule 7.03 (solicitation and other prohibitions), Rule 7.04 (filing requirements)), Rule 7.05 (exemptions from filing requirements), and Rule 7.07 (no trade names).

The proposed rules address a number of other matters, such as liability for the acts of others and payments to third persons or prospective clients, but those matters turn upon acts other than communication about legal services. All communications about legal services fall within the three categories outlined above.

If the proposed simplifications are adopted, it become unnecessary to determine whether a statement posted on social media involves use of a public medium or a private medium. The key questions are simply whether (1) the communication promoted or offered

the lawyer's legal services, (2) the lawyer was substantially motivated by pecuniary gain, and (3) the lawyer knew (or had no reason to know) that the recipient needed legal services in a particular matter.

The categories also resolve the issue of targeted mail that is sent to persons the lawyers do not have reason to know need legal services. This type of communication is treated as advertising, not solicitation, and therefore falls with category 2.

Here are my proposed revisions:

VII. INFORMATION ABOUT LEGAL SERVICES

Proposed Rules (Redlined by VRJ)

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 a lawyer or law firm. Information about legal services must be truthful and nondeceptive. 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. 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, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve.

(b) This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. For purposes of Rules 7.01 to 7.07:

(1) An "advertisement" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters.

(2) A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter.

(c) A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. 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. A law firm with an office 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.

(d) A statement or disclaimer required by these rules shall be sufficiently clear that it can reasonably be understood by an ordinary person and made in each language used in the communication. A statement that a language is spoken or understood does not require a statement or disclaimer in that language.

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

(f) A lawyer may state or imply that the lawyer practices in a partnership or other business entity only when that is accurate.

(g) If a lawyer who advertises the amount of a verdict secured on behalf of a client knows that the verdict was later reduced or reversed, or that the case was settled for a lesser amount, the lawyer must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that was ultimately received by the client.

Rule 7.02 Advertisements ~~Disseminated by Public Media~~

(a) An advertisement of legal services ~~in public media~~ shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location.

(b) A lawyer who advertises ~~in the public media~~ may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization -- Texas Board of Legal Specialization;" and

(2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

(c) If an advertisement by a lawyer discloses a 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 the costs of litigation.

(d) A lawyer who advertises ~~in public media~~ a specific fee or range of fees for an identified 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.

Rule 7.03 Solicitation ~~for Pecuniary Gain~~ and Other Prohibited Communications

(a) The following definitions apply to this Rule:

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

(2) A lawyer “solicits” employment by making a “solicitation communication,” as that term is defined in Rule 7.01(b)(2).

(b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is:

(1) another lawyer;

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

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

(c) A lawyer ~~substantially motivate by pecuniary gain~~ shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a ~~solicitation~~ communication to a prospective client, if:

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

(2) the communication is designed to resemble a legal pleading or other legal document and is likely to deceive the other person; or

(3) the communication is not plainly marked or clearly designated an “ADVERTISEMENT” unless the target of the communication solicitation is:

(i) another lawyer;

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

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

(d) A lawyer ~~substantially motivated by pecuniary gain~~ 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 professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

(1) 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.

(2) A lawyer may 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;
- (ii) clients are informed of the existence and nature of the agreement; and
- (iii) the lawyer exercises independent professional judgment in making referrals.

(e) A lawyer ~~substantially motivated by pecuniary gain~~, shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value.

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

Rule 7.04 Filing Requirements for ~~Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitation Communications~~

(a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services ~~via public media~~, or ten (10) days after the date of a solicitation communication sent by any means:

- (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 authorized by the Board of Directors.

(b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication.

(c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party.

Rule 7.05 Communications Exempt from Filing Requirements

(a) The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03:

- (1) any communication ~~that is not substantially motivated by pecuniary gain, including publications~~ of a bona fide nonprofit legal aid organization that are used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services;
- (2) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing;
- (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 law firm, or a business card;
- (5) a professional newsletter in any media that it is sent, delivered, or transmitted only to:
 - (i) existing or former clients;
 - (ii) other lawyers or professionals;
 - (iii) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;
 - (iv) members of a nonprofit organization which has requested that members receive the newsletter; or
 - (v) persons who have asked to receive the newsletter;
- (6) a solicitation communication directed by a lawyer to:
 - (i) another lawyer;
 - (ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or
 - (iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;
- (7) a communication on a professional social media website to the extent that it contains only resume-type information;
- (8) an advertisement ~~in public media~~ that:
 - (i) identifies a lawyer or a firm as a contributor or sponsor of a 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, contact information, and the fact of the contribution or sponsorship;
- (9) communications that contain only the following types of information:
 - (i) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and 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 areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice;
 - (iii) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction;
 - (iv) the educational background of the lawyer;
 - (v) technical and professional licenses granted by this state and other recognized licensing authorities;
 - (vi) foreign language abilities;
 - (vii) areas of law in which a lawyer in the law firm is certified by the Texas Board of Legal Specialization or by an organization has been accredited 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) fees charged for an initial consultation or routine legal services;
- (xi) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event;
- (xii) any disclosure or statement required by these rules; and
- (xiii) any other information specified in orders promulgated by the Supreme Court of Texas.

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 Rules 7.01 through 7.04, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by another 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 Rules 7.01 through 7.04, 8.04(a)(2), or 8.04(a)(9), engaged in by another 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 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 Rules 7.01 through 7.04, 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.

Rule 7.07 Trade Names

A lawyer in private practice ~~substantially motivated by pecuniary gain~~ shall not practice under a trade name.

Proposed Comment to Proposed Rule 7.07

[1] American lawyers have traditionally been prohibited from practicing law under trade names. In some jurisdictions, such restrictions have been abandoned, modified, or invalidated by judicial decisions. Rule 7.07 follows the traditional rule, but may be subject to constitutional challenge.