

Advertising Subcommittee

Draft Comments

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TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.01 (Communications Concerning a Lawyer's Services)

Comment to Model Rule 7.1:

The text of Model Rule 7.1 (2018) is much shorter than CDRR Proposed Rule 7.01. Much of what is stated in the Comment to Model Rule 7.1 is addressed in the text of CDRR Proposed Rule 7.01. The Comment to Model Rule 7.1 states:

Rule 7.1 Communications Concerning A Lawyer's Services - Comment

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

[2] Misleading truthful statements are 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 misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

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

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

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

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

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.01:

The following mark-up shows what would be removed from or added to the Comment to Model Rule 7.1 to make it into an appropriate Comment to CDRR Proposed Rule 7.01. Any footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.01 is set forth prior to the Comment for ease of reference.

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. Information about legal services must be truthful and non-deceptive. 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. This Rule governs all communications about a lawyer's services, including, but not limited to, advertisements and solicitation communications.

(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. 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 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) 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.

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

Comment

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

[12] Misleading truthful statements are 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.~~¹ ~~A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.~~² For example, a truthful statement is ~~also~~ misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

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

¹ Deleted because the matter is now addressed in the third sentence of CDRR Proposed Rule 7.01(a).

² Deleted because the matter is now addressed in the fourth sentence of CDRR Proposed Rule 7.01(a).

[34] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.04(a)(3)4(e). See also Rule 8.04(a)(5)4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[45] Firm names, letterhead and professional designations are communications concerning a lawyer's services. ~~A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading.~~³ A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. ~~A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization.~~⁴ If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Clean Copy of CDRR Proposed Rule 7.01 and Clean Copy of Proposed Comment:

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. Information about legal services must be truthful and non-deceptive. 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. This Rule governs all communications about a lawyer's services, including, but not limited to, advertisements and solicitation communications.

(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. 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 offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but

³ Deleted because the matter is now addressed in the first sentence of CDRR Proposed Rule 7.01(b).

⁴ Deleted because the matter is now addressed in the second sentence of CDRR Proposed Rule 7.01(b).

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) 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.

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

Comment

[1] Misleading truthful statements are prohibited by this Rule. For example, a truthful statement is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

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

[3] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.04(a)(3). See also Rule 8.04(a)(5) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[4] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A lawyer or law firm may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.02

Model Rule 7.2 and Comment:

The text of Model Rule 7.2 (2018) covers some of the topics that are dealt with in CDRR Proposed Rule 7.02. Model Rule 7.2 and its Comment provide:

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

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise 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;

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

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of

Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

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

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

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's 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.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications

are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are 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.

[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. 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.

[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.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

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

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.02:

The following mark-up shows what would be removed from or added to the Comment to Model Rule 7.2 to make it into an appropriate Comment to CDRR Proposed Rule 7.02. The footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.02, which was previously approved by the Committee, is set forth prior to the Comment for convenience of reference.

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.

(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.

(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.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's 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.

~~Paying Others to Recommend a Lawyer¹~~

~~[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."~~

~~[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory~~

¹ Proposed CDRR Rule 7.02 does not deal with "paying others to recommend a lawyer." Therefore, Model Rule 7.2 Comments 2 to 8 have been deleted and will be used elsewhere if appropriate.

~~listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.~~

~~[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.~~

~~[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).~~

~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are 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.~~

~~[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. 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.

~~[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.~~

Communications about Fields of Practice

~~[29]~~ Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.01 to communications concerning a lawyer's services.

~~[310]~~ The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

~~[411]~~ This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization that applies approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and

reliable, [and the organization is approved by the appropriate authority, if approval of certifying organizations is required by the state where the lawyer primarily practices law](#). To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

~~Required Contact Information~~

~~{12} This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.²~~

Clean Copy of CDRR Proposed Rule 7.02 and Clean Copy of Proposed Comment:

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.

(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.

(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.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's 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;

² [This provision has been omitted because it is inconsistent with CDRR Proposed Rule 7.02\(a\).](#)

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.

Communications about Fields of Practice

[2] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.01 to communications concerning a lawyer's services.

[3] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[4] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization that applies standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable, and the organization is approved by the appropriate authority, if approval of certifying organizations is required by the state where the lawyer primarily practices law. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.03

Model Rule 7.3 and Comment:

The text of Model Rule 7.3 (2018) covers some of the topics that are dealt with in CDRR Proposed Rule 7.03. Model Rule 7.3 and its Comment provide:

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.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

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

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment 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.

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

(e) Notwithstanding the prohibitions in this Rule, 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 live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family,

business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the

organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.03:

The following mark-up shows what would be removed from or added to the Comment to Model Rule 7.3 to make it into an appropriate Comment to CDRR Proposed Rule 7.03. The footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.03, which was previously approved by the Committee, is set forth prior to the Comment for convenience of reference.

Rule 7.03 Solicitation of Paid Professional Employment

(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.

(b) A lawyer shall not, for pecuniary gain, solicit through in-person contact, or through regulated telephone, social media, or electronic communication, professional employment from a non-client who has not sought the lawyer’s advice or employment, unless the target of the solicitation is:

(1) a 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, 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;

(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 ~~or clearly designated an “ADVERTISEMENT,” or otherwise clearly so designated~~ unless the target of the solicitation is:

(i) a 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 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, ~~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.

(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.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] ~~“Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other~~

¹[This exception is virtually identical to the language now found in Model Rule 7.2\(b\)\(5\) \(2018\).](#)

~~written communications that recipients may easily disregard.~~² A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

~~[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person to person contact of individuals who may be especially~~

² This definition has been deleted because CDRR proposed rule does not use the term "live person-to-person contact." However, the use of the term "live person to person contact" in Comments 3 and 4 is appropriate because they are not trying to define terminology used in the blackletter rule.

~~vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.³~~

~~[67] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.02.~~

~~[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.⁴~~

~~[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).~~

~~⁵~~

~~Paying Others to Recommend a Lawyer⁶~~

~~[2] Except as permitted under paragraphs (b)(1)–(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication~~

³ The first sentence of this comment is unnecessary because there is no reason to restate, in almost identical terms, what Rules 7.01 and 7.03 are ready state about false and misleading statements and coercion, duress, and harassment. In addition, the CDRR proposed advertising rules do not contain a rule similar to Model Rule 7.3(c)(1). Finally, the last sentence sweeps much too broadly and seems to suggest that lawyers should not come into "contact" with the elderly, the disabled, and persons whose first language is not English.

⁴ This point about class action notices is already stated in CDRR Proposed Rule 7.03(f).

⁵ Comment 9 has been deleted because CDRR Proposed Rule 7.03 does not contain a provision similar to Model Rule 7.3(e).

⁶ This heading and the remaining Comments are from Model Rule 7.2, not 7.3. They relate to the material found in CDRR Proposed Rule 7.03(d) and (e).

~~contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."~~⁷

~~[73]~~ This Rule Paragraph (b)(1) allows a lawyer to pay for advertising and communications ~~permitted by this Rule~~, including the usual costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

~~[84]~~ This Rule Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

~~[95]~~ 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 5.04(a)1-5(e) (division of fees) and 5.04(c) (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services). To comply with Rule 7.01, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. ~~See Comment [2] (definition of "recommendation").~~⁸ See also Rule 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

~~[106]~~ 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. Qualified referral services are

⁷ ~~The draft provided to the CDRR by the Advertising Committee did not track the language of Model Rule 7.2(b), which provides "(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services." Rather than focus of "recommending," the Advertising Committee's draft focused on "soliciting" or "referring" prospective clients. We deferred to that language. I do not think that we can easily adapt Model Rule 7.2 Comment 2 in a way that would usefully explain CDRR Proposed Rule 7.03(d). The language in the blackletter rule can stand on its own.~~

⁸ ~~Model Rule 7.2 Comment 2 (above) is being deleted.~~

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.~~⁹

[117] 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. 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.

[128] 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 2.01 and 5.04(c). Except as provided in Rule 1.045(fe), 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 1.067. 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.

Clean Copy of Proposed Rule 7.03 and Clean Copy of Proposed Comment

Rule 7.03 Solicitation of Paid Professional Employment

(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.

⁹ This language seems to be appropriate for the Model Rules, but not for the Texas Rules.

(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.

(b) A lawyer shall not, for pecuniary gain, solicit through in-person contact, or through regulated telephone, social media, or electronic communication, professional employment from a non-client who has not sought the lawyer’s advice or employment, unless the target of the solicitation is:

- (1) a 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 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;
- (2) the communication is designed to resemble legal pleadings or other legal documents; or
- (3) the communication is not plainly marked or clearly designated an “ADVERTISEMENT,” unless the target of the solicitation is:
 - (i) a 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 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, 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.¹⁰ 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) 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. (f) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

¹⁰ [This exception is virtually identical to the language now found in Model Rule 7.2\(b\)\(5\) \(2018\).](#)

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.02.

Paying Others to Recommend a Lawyer

[7] This Rule allows a lawyer to pay for advertising and communications, including the usual costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[8] This Rule permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[9] 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 5.04(a) (division of fees) and 5.04(c) (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services). To comply with Rule 7.01, 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 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

[10] 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. Qualified referral services are

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.

[11] 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. 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.

[12] 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 2.01 and 5.04(c). Except as provided in Rule 1.04(f), 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 1.06. 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.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.04

Model Rule 7.4

Model Rule 7.4 has been deleted.

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.04:

The following mark-up shows what would be removed from or added to the Comment to the present version of Texas Rule 7.07 to make it into an appropriate Comment to CDRR Proposed Rule 7.04. Any footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.04, which was previously approved by the Committee, is set forth prior to the Comment.

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 of 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.

Comment

~~1. Rule 7.07 covers the filing requirements for public media advertisements (see Rule 7.04) and written, recorded, or other electronic solicitations (see Rule 7.05). Rule 7.07(a) deals with solicitation communication sent by a lawyer to one or more specified prospective clients. Rule 7.07(b) deals with advertisements in the public media. Rule 7.07(c) deals with websites. Although websites are a form of advertisement in the public media, they require different treatment in some respects and so are dealt with separately. Each provision allows the Bar to~~

~~charge a fee for reviewing submitted materials, but requires that fee be set solely to defray the expenses of enforcing those provisions.~~

~~12. Copies of non-exempt solicitations communication or advertisements in public media (including websites) must be provided to the Advertising Review Committee of the State Bar of Texas either in advance or concurrently with dissemination, together with the fee required by the State Bar of Texas Board of Directors. Presumably, ~~t~~The Advertising Review Committee ~~shall~~ will report to the appropriate grievance committee any lawyer whom, based on filings with the Committee, it reasonably believes finds from the reviewed products has disseminated an advertisement in the public media or a solicitation communication that violates Rules 7.01, 7.02, or 7.03, ~~7.04, or 7.05,~~ or otherwise engaged in conduct that, ~~at a minimum, any lawyer whose violation~~ raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).~~

~~23. Paragraph (a) does not require that a lawyer submit a copy of each and every written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.~~

~~4. A lawyer wishing to do so may secure an advisory opinion from the Advertising Review Committee concerning any proposed advertisement in the public media (including a website) or any solicitation communication in advance of its first use or dissemination by complying with Rule 7.07(d). This procedure is intended as a service to those lawyers who want to resolve any possible doubts about their proposed advertisements' or solicitations' compliance with these Rules before utilizing them. Its use is purely optional. No lawyer is required to obtain advance clearance of any advertisement in the public media (including a website) or any solicitation communication from the State Bar. Although a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding, a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for review, as long as the lawyer's presentation to the Advertising Review Committee in connection with that advisory opinion is true and not misleading.¹~~

~~5. Under its Internal Rules and Operating Procedures, the Advertising Review Committee is to complete its evaluations no later than 25 days after the date of receipt of a filing. The only way that the Committee can extend that review period is to: (1) determine that there is reasonable doubt whether the advertisement or solicitation communication complies with these Rules; (2) conclude that further examination is warranted but cannot be completed within the 25-day period; and (3) advise the lawyer of those determinations in writing within that 25-day period. The Committee's Internal Rules and Operating Procedures also provide that a failure to send such a communication to the lawyer within the 25-day period constitutes approval of the advertisement or solicitation communication. Consequently, if an attorney submits an advertisement in the public media (including a website) or a solicitation communication to the Committee for advance approval not less than 30 days prior to the date~~

¹ I think that the Advertising Review Committee is no longer going to issue advisory opinions. If I am wrong we need to reconsider this.

~~of first dissemination as required by these Rules, the attorney will receive an assessment of that advertisement or communication before the date of its first intended use.²~~

~~6. Consistent with the effort to protect the first amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (e) exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of paragraphs (a), (b), and (c). Those types of communications need not be filed at all if they were not prepared to secure paid professional employment.³~~

~~7. For the most part, the types of exempted advertising listed in sub-paragraphs (e)(1) to (e)(5) are objective and less likely to result in false, misleading or fraudulent content. Similarly the types of exempted solicitation communications listed in sub-paragraphs (e)(6) to (e)(8) are those found least likely to result in harm to the public. See Rule 7.05(f), and comment 7 to Rule 7.05. The fact that a particular advertisement or solicitation made by a lawyer is exempted from the filing requirements of this Rule does not exempt a lawyer from the other applicable obligations of these Rules. See generally Rules 7.01 through 7.06.⁴~~

~~38. Paragraph (f) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or solicitation~~written~~ communications that do not seek to obtain paid professional employment for that lawyer.~~

Clean Copy of CDRR Proposed Rule 7.04 and Clean Copy of Proposed Comment

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.**

² Same.

³ This comment should be considered in connection with the comments to CDRR Proposed Rule 7.05, which deals with exemptions.

⁴ These cross-references are no longer valid. The comment does not say anything useful.

(b) If requested by the staff of 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.

Comment

1. The Advertising Review Committee shall report to the appropriate grievance committee any lawyer whom, based on filings with the Committee, it reasonably believes disseminated an advertisement in the public media or a solicitation communication that violates Rules 7.01, 7.02, or 7.03, or otherwise engaged in conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

2. Paragraph (a) does not require that a lawyer submit a copy of each written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

3. Paragraph (f) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or solicitation communications that do not seek to obtain paid professional employment for that lawyer.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.05

Model Rule 7.5

Model Rule 7.5 has been deleted.

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.05:

The following mark-up shows what would be removed from or added to the Comment 6 to the present version of Texas Rule 7.07 to make it into an appropriate Comment to CDRR Proposed Rule 7.05. Any footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.05, which was previously approved by the Committee, is set forth prior to the Comment.

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.

Comment

[16] ~~Consistent with the effort to protect the first amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (c) This Rule~~ exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of ~~paragraphs (a), (b), and (c) Rule 7.04~~. Those types of communications need not be filed at all if they were not prepared to secure paid professional employment.

Clean Copy of CDRR Proposed Rule 7.05 and Clean Copy of Proposed Comment

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.

Comment

[1] This Rule exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of Rule 7.04. Those types of communications need not be filed at all if they were not prepared to secure paid professional employment.

TO: Committee on Disciplinary Rules and Referenda
FROM: CDRR Subcommittee on Lawyer Advertising
Vincent R. Johnson, Chair
Claude Ducloux and Amy Bresnen, Members
Date: November 5, 2018
RE: Proposed Comment to CDRR Rule 7.06

Model Rule 7.6

Model Rule 7.6 is not relevant to CDRR Proposed Rule 7.06.

Redlined Copy of Proposed Comment to CDRR Proposed Rule 7.06:

The CDRR voted to retain the present version of Texas Rule 7.06 as CDRR Proposed Rule 7.06. The following mark-up shows what would be removed from or added to the Comment to the present version of Texas Rule 7.06 to make it into an appropriate Comment to CDRR Proposed Rule 7.06. The footnotes contain explanations. The blackletter text of CDRR Proposed Rule 7.06, which was previously approved by the Committee, is set forth prior to the proposed Comment for convenience of reference

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.

Comment¹

[1] This Rule deals with three different situations. First, paragraph (a) addresses situations where the lawyer in question has violated the specified 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. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

[2] Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other specified provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have known that the employment was procured by conduct prohibited by the stated rules. This effectively means that, in such cases, the disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

[3] Third, paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation only if the lawyer does not pay anything of value, such as ,but may not pay a referral fee, to the person making the referring lawyer.

~~Selection of a lawyer by a client often is a result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, and other lawyers. Although that method of referral is perfectly legitimate, the client is best served if the recommendation is disinterested and informed. All lawyers must guard against creating situations where referral from others is the consequence of some form of prohibited compensation or from some form of false or misleading communication, or by virtue of some other violation of any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9). Paragraph (a) forbids a lawyer who violated these rules in procuring employment in a matter from accepting or continuing employment in that matter. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate these rules. Paragraph (b) also forbids a lawyer from accepting or continuing employment in a matter if the lawyer knows or reasonably should know that a member or employee of his or her firm or any other person has procured employment in a matter as a result of conduct that violates these rules. Paragraph (c) addresses the situation where the lawyer becomes aware that the matter was procured in violation of these rules by an attorney or individual, but had no culpability. In such circumstances, the lawyer may continue employment and collect a fee in the matter as long as nothing of value is given to the attorney or individual involved in the violation of the rule(s). See also Rule 7.03(d), forbidding a lawyer to charge or collect a fee where the misconduct involves violations of Rule 7.03(a), (b), or (c).~~

¹ I have deleted the entire text of the Comment to current Texas Rule 7.06 and written three new paragraphs.

Clean Copy of CDRR Proposed Rule 7.06 and Clean Copy of Proposed Comment

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.

Comment

[1] This Rule deals with three different situations. First, paragraph (a) addresses situations where the lawyer in question has violated the specified advertising rules or other provisions dealing with serious crimes and barratry. The Rule makes clear that the offending lawyer cannot accept or continue to provide representation. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

[2] Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have known that the employment was procured by conduct prohibited by the stated rules. This effectively means that, in such cases, the disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

[3] Third, paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation

only if the lawyer does not pay anything of value, such as a referral fee, to the person making the referral.