

TO: CDRR

FROM: Subcommittee (Vincent R. Johnson, chair; Claude DuCloux; Amy Bresnen)

Date: Updated May 6, 2019

RE: Revised Proposed Comments to Texas Rules 7.01 to 7.07

Changes to the previous draft of Proposed Comments to Proposed Texas Rules 7.01 to 7.06 are shown with track changes. There is no comment to Proposed Texas Rule 7.07.

Proposed Comment to Proposed Texas Rule 7.01

[1] This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications which appear in any media, including social media. Firm names, letterhead, and professional designations are communications concerning a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful and not misleading.

Misleading Truthful Statements

[2] 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.

Use of Actors

[34] The use of an actor to portray a lawyer in a commercial is misleading if there is a substantial likelihood that a reasonable person will conclude that the actor is the lawyer who is offering to provide legal services. Whether a disclaimer—such as a statement that the depiction is a “dramatization” or shows an “actor portraying a lawyer”—is sufficient to make the use of an actor not misleading depends on a careful assessment of the relevant facts and circumstances, including whether the disclaimer is conspicuous and clear. Similar issues arise with respect to actors portraying clients in commercials. Such a communication is misleading if there is a substantial likelihood that a reasonable person will reach erroneous conclusions based on the dramatization.

Intent to Refer Prospective Clients to Another Firm

[45] A communication offering legal services is misleading if, at the time a lawyer makes the communication, the lawyer knows or reasonably should know, but fails to disclose, that a prospective client responding to the communication is likely to be referred to a lawyer in another firm.

Unjustified Expectations

[5~~6~~] A communication is misleading if there is a substantial likelihood that it will create unjustified expectations on the part of prospective clients. 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. 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.

Required Statements and Disclaimers

[6] A statement or disclaimer required by these Rules must be presented clearly and conspicuously such that it is likely to be noticed and reasonably understood by an ordinary person. In radio, television, and Internet advertisements, verbal statements must be spoken in a manner that their content is easily intelligible, and written statements must appear in a size and font, and for a sufficient length of time, that a viewer can easily see and read the statements.

Unsubstantiated Claims and Comparisons

[7] 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 to lead a reasonable person to conclude that the comparison or claim can be substantiated.

Public Education Activities

[8] As used in these Rules, the terms "advertisement" and "solicitation communication" do not include activities undertaken by a lawyer that are not substantially motivated by pecuniary gain, such as activities that inform members of the public about their legal rights and about legal services that are available from public or charitable legal-service organizations, or from similar non-profit entities. Permissible forms of communication include, but are not limited to, community legal education sessions, know-your-rights brochures, public service announcements on television and radio, billboards, information posted on organizational social media sites, and outreach to low-income groups in the community, such as in migrant labor housing camps, domestic violence shelters, disaster resource centers, and dilapidated apartment complexes.

Web Presence

[9] A lawyer or law firm may be designated by a distinctive website address, e-mail address, social media username or comparable professional designation that is not misleading and does not otherwise violate these Rules.

Past Success and Results

[10~~3~~] A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that a large verdict was reduced or reversed, or that the case was settled for a lesser amount, must disclose those facts with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may

claim credit for a prior judgement or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer's experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Related Rules

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

Proposed Comment to Proposed Texas Rule 7.02

[1] These Rules permit the public dissemination of information that is not false or misleading about a lawyer's or law firm's name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language abilities; names of references and, with their consent, names of clients regularly represented; and other similar 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 by 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.

Certified Specialist

[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 the Texas Board of Legal Specialization or 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, if the organization is accredited by the Texas Board of Legal Specialization. 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.

Proposed Comment to Proposed Texas Rule 7.03

Solicitation by Public and Charitable Legal Services Organizations

[1] Rule 7.01 provides that a “solicitation communication” is a communication substantially motivated by pecuniary gain.” Therefore, the ban on solicitation imposed by paragraph (b) of this Rule does not apply to the activities of lawyers working for public or charitable legal services organizations.

Communications Directed to the Public or Requested

[2] 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 made in response to a request for information, including an electronic search for information. The terms “advertisement” and “solicitation communication” are defined in Rule 7.01(b).

The Risk of Overreaching

[3] A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services via in-person or regulated telephone, social media, or other electronic contact. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult 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.

[4] The potential for overreaching that is inherent in in-person or regulated telephone, social media, or other electronic contact justifies their prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be sent by regular mail or e-mail, or by other means that do not involve communication in a live or electronically interactive manner. 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, with minimal risk of overwhelming a person’s judgment.

[5] 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.

Targeted Mail Solicitation

[6] Regular mail or e-mail targeted to a person that offers to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter is a solicitation communication within the meaning of Rule 7.01(b)(2), but is not prohibited by subsection (b) of this

Rule. Unlike in-person and electronically interactive communication by “regulated telephone, social media, or other electronic contact,” regular mail and e-mail can easily be ignored, set aside, or reconsidered. There is a diminished likelihood of overreaching because no lawyer is physically present and there is evidence in tangible or electronic form of what was communicated. *See Shapero v. Kentucky B. Ass'n*, 486 U.S. 466 (1988).

Personal, Family, Business, and Professional Relationships, and Constitutionally Protected Activities

[7] There is a substantially reduced likelihood that a lawyer would engage in overreaching against a former client, 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 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.

Constitutionally Protected Activities

[8] 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.

Group and Prepaid Legal Services Plans

[9] 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.

Designation as an Advertisement

[10] For purposes of paragraph (c)(3) of this Rule, a communication is rebuttably presumed to be “plainly marked or clearly designated an ‘ADVERTISEMENT’” if: (a) in the case of a letter transmitted in an envelope, both the outside of the envelope and the first page of the letter state the word “advertisement” in bold face all-capital letters that are 3/8” high on a uncluttered background; (b) in the case of an e-mail message, the first word in the subject line is “advertisement” in all capital letters; and (c) in the case of a text message or message on social media, the first word in the message is “advertisement” in all capital letters.

Paying Others to Recommend a Lawyer

[11] 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.

[12] 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.

[13] 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 with nonlawyers) and 5.04(c) (nonlawyer interference with the 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).

Charges of and Referrals by a Legal Services Plan or Lawyer Referral Service

[14] 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.

[15] 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.

Reciprocal Referral Arrangements

[16] A lawyer does not violate paragraph (d) of this Rule by agreeing to refer clients to another lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive, the client

is informed of the referral agreement, and the lawyer exercises independent professional judgment in making the referral. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. A lawyer should not enter into a reciprocal referral agreement with another lawyer that includes a division of fees without determining that the agreement complies with Rule 1.04(f).

Meals or Entertainment for Prospective Clients

[17] This Rule does not prohibit a lawyer from paying for a meal or entertainment for a prospective client that has a nominal value or amounts to ordinary social hospitality.

Proposed Comment to Proposed Texas Rule 7.04

[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 a 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).

Multiple Solicitation Communications

[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.

Requests for Additional Information

[3] Paragraph (b~~f~~) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in communications about legal services that were not substantially motivated by pecuniary gain.

Proposed Comment to Proposed Texas Rule 7.05

[1] This Rule exempts certain types of advertisements and solicitation communications substantially motivated by pecuniary gain from the filing requirements of Rule 7.04. Advertisements and solicitation communications not substantially motivated by pecuniary gain do not need to be filed.

Website-related Filings

[2] While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the

homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer's website.

Proposed Comment to Proposed Texas Rule 7.06

[1] This Rule deals with three different situations: personal disqualification, imputed disqualification, and referral-related payments.

Personal Disqualification

[2] 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.

Imputed Disqualification

[3] 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.

Restriction on Referral-Related Payments

[4] 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, even 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.