

Home / Expert Testimony / Quandaries and Quagmires: ABA adopts new advertising ethics rules

## Quandaries and Quagmires: ABA adopts new advertising ethics rules

by Charles Lundberg, August 27, 2018



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At the ABA Annual Meeting earlier this month, the House of Delegates approved sweeping amendments to the Model Rules of Professional Conduct governing lawyer advertising. To ethics nerds, this is a momentous and unprecedented development in lawyer discipline. Normal practicing Minnesota lawyers, however, need not rush to change their advertising processes – ABA Model Rules are not binding and do not become law unless and until the Minnesota Supreme Court adopts them. It will be a while before that happens.

*Some history:* The four-year story of the development of these changes to the advertising rules sheds some light on the nature of what has changed, and why. The proposal originated as a committee report from the Association of Professional Responsibility Lawyers (full disclosure: I have long been an active member). In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. APRL's committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel provided valuable advice and comments.

With NOBC's assistance, the APRL committee gathered substantial empirical data through a survey of bar regulators across the country regarding the enforcement of current advertising rules. That committee

received survey responses from 34 of 51 U.S. jurisdictions. That 2014 survey resulted in some interesting and perhaps surprising conclusions:

- There are a dizzying number of state variations in the rules governing lawyer advertising and vast departures from the Model Rules between jurisdictions, a huge problem for lawyers who practice (and advertise) in more than one state.
- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c) (prohibiting dishonesty or misrepresentation).

APRL issued reports in June 2015 and April 2016 proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while tightening the enforceable standard prohibiting false and misleading communications. The proposal was then sent to the ABA Standing Committee on Ethics and Professional Responsibility which spent the better part of two years studying and refining the changes and getting input and buy-in from a vast number of bar groups and constituencies.

*The principal amendments:* Resolution 101 at the 2018 Annual Meeting presented a history of the four-year drafting project, and a [summary of the changes](#):

- Combine provisions on false and misleading communications into Rule 7.1 and its Comments and clarify key terms such as “misleading” and “truthful.”
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term “certified specialist.”
- Permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as “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.”
- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions. (The most significant new exception, of interest to business lawyers, incorporates a “sophisticated client” test: solicitation would be allowed of any person “who routinely uses for business purposes the type of legal services offered by the lawyer.”)
- Eliminate the labeling requirement (“Advertising Material”) for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

The rule changes passed overwhelmingly on a voice vote before the House of Delegates, *with no announced opposition*. That in itself is highly unusual — perhaps unprecedented for a proposal that will have as great a practical effect on the practice of law as these changes will. The last time the rules were changed, in 2016 (adopting Rule 8.4 (g), prohibiting sexual harassment and discrimination in the practice of law) there was vociferous, loud and organized opposition, and over the years a fight over any new ABA ethics provision has been more the rule than the exception.

*Issues and debate going forward – what to expect:* The Model Rules now go to the states for consideration and adoption. One state — Virginia — adopted the changes even before the ABA did; other

states including Washington and Oregon are already moving forward with even more progressive updates to their advertising rules. In Minnesota, the MSBA Rules of Professional Conduct Committee will begin considering the new rules on Aug. 28. The plan is to present a report to MSBA as early as December; if approved there, MSBA would petition the Supreme Court for adoption. Meanwhile, the Rules Committee of the Lawyers Board will likely also be studying the rule changes; it is customary that the bar and the board jointly petition the court for adoption of ethics rule changes wherever possible.

In Minnesota, however, there is one particular procedural conundrum: Some of the important rule changes were placed in the Comments (e.g., the substance of old Rule 7.5 (governing firm names and letterhead) is now a series of Comments under Rule 7.1). Why is that a problem? Because the Minnesota Supreme Court has resolutely and repeatedly declined to adopt any of the Comments, notwithstanding the unanimous urging of the state bar and disciplinary authorities. See Wernz, *Minnesota Legal Ethics* at 58-59 (8<sup>th</sup> ed. 2018) (detailing how MSBA, LPRB, and OLPR have all strongly urged the court to adopt the comments as guides, but the court has refused to do so). It remains to be seen how this problem might be addressed.

*CHUCK LUNDBERG is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics ([www.lundberglegalethics.com](http://www.lundberglegalethics.com)).*

### **Sidebar: The New ABA Model Advertising Rules**

(Note: These are the black-letter rules; some of the new changes have been moved to the Comments section)

#### **Rule 7.1 Communications Concerning A Lawyer's Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

#### **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.

### **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.

### **Rule 7.4 (Deleted)**

### **Rule 7.5 (Deleted)**