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— ABA Loosens Some Advertising Rules

BY MARCY TENCH STOVALL AND DAVID P. ATKINS

When the U.S. Supreme Court declared, 42 years ago, that lawyer advertising was protected commercial speech, it emphasized that notions of good taste or perceptions of the "dignity of the profession" were not enough to justify traditional restrictions on lawyer self-promotion. Since then, the authors of the American Bar Association's (ABA's) Model Rules of Professional Conduct have periodically tinkered with the Rules on lawyer advertising (Model Rules 7.1 through 7.5), with each state then adopting its own version of those rules.

The trend, in general, has been to reduce the number of restrictions on, and requirements for, lawyer self-promotion as to both substance and format. And a few jurisdictions, notably the District of Columbia, have sensibly pared down the entire regulatory framework into a few straightforward restrictions, summed up as follows: Thou shalt not communicate about lawyer services in a way that is false or misleading, and thou shalt not solicit a potential client by means of coercion, duress, overreaching or harassment.

The Model Rules do not yet reflect this uncomplicated approach, but they are moving in that direction. In August 2018, the ABA approved a collection of amendments to the advertising rules. Currently, however, the attorney advertising rules vary widely from state to state, and only one state (Connecticut) has revised its advertising rules in accordance with the ABA's amendments. This lack of uniformity creates risk for lawyers who advertise in multiple jurisdictions. The revision of the Model Rules offers an opportunity for the rule makers in the individual states to reconsider their advertising rules and, ideally, simplify them so they are uniform across the country.

Amendments for the 21st Century

The ABA styled its changes to the advertising rules as creating "Lawyer Advertising Rules for the 21st Century." The amendments, while not eliminating the regulatory scheme that remains enforceable by attorney disciplinary tribunals, were intended to simplify complex and sometimes contradictory rules that may interfere with both lawyers' efforts to publicize their practices and the clients' interest in obtaining information about legal services.

The amended rules facilitate the use of technology to connect lawyers and clients. Rule 7.2(a) now provides this broad permission: "A lawyer may communicate information regarding the lawyer's services through any media." Throughout amended Rules 7.1 through 7.3, the term "communication" replaces the terms "advertising" and "advertisement." This may be an example of the rules finally catching up to what actually occurs in modern practice. And it has the virtue of eliminating any ambiguity about the wide range of technologies through which lawyers may communicate about their services.

Changes to the Solicitation Rule

The most significant revisions are in Rule 7.3, the rule concerning solicitation of clients. New Subsection (a) provides a definition of "solicitation" (formerly found in the Commentary) as a specific type of lawyer communication that, depending on the circumstances, may or may not be permitted:

"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.

In an effort to give better guidance on how not to cross the boundaries of permitted client solicitation, the Commentary attempts to identify when there is a risk of "over-reaching".

"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 over-reaching.

The Commentary also includes this additional gloss on impermissible solicitation:

A solicitation that contains false or misleading information…that involves coercion, duress or harassment…or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer…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.

Amended Rule 7.3(b) retains the general prohibition on person-to-person contact for a solicitation, but includes exceptions to the prohibition for solicitation contacts with "a lawyer or a person who has a family, close personal or prior business or professional relationship with the lawyer" or with "a person who routinely uses for business purposes the type of legal services offered by the lawyer."

Amended Rule 7.3 now expressly provides that the anti-solicitation provision "does not prohibit communications authorized by law or ordered by a court or other tribunal." And as the Commentary explains, such communications "include a notice to potential members of a class in class action litigation."

The ABA also has done away with the requirement that communications be labeled "Advertising Material" if the target of the solicitation is someone "known to be in need of legal services in a particular matter."

Changes to the General Rule on Advertising Content

Rule 7.1's cardinal tenet about lawyer advertising remains the same:

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.

The Commentary, however, has been revised in an attempt to make concrete what often seems elusive: what exactly makes an attorney or law firm's promotional effort "misleading?" The newly adopted Commentary explains that truthful information may be misleading if, for example, it is "presented in a way that leads a reasonable person to believe the lawyer's communication requires

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THE FUTURE OF ETHICS IS COMING — BUT STAY IN THE PRESENT

By Paul Bonner

The recent amendments to the ABA Model Rules that this article adeptly summarizes can truly be viewed as a preview of the future. But remember, only Connecticut has updated its rules to be in line with them, and rules vary widely from state to state. Make sure your firm abides by the current rules of each and every state in which it operates. For firms with offices in multiple states, most firms follow the rules of the most stringent jurisdiction. **When in doubt, reach out to your firm counsel.**

that person to take further action when, in fact, no action is required."

In addition, the specific guidance concerning firm names, letterhead, and professional designations that lawyers could previously find in Rule 7.5 has been moved to the Rule 7.1 Commentary, and Rule 7.5 has been deleted.

Gifts and Contact Information

Amended Model Rule 7.2(b) retains the prohibition on giving or promising "anything of value to a person for recommending a lawyer's services." But the amended rule contains an additional exception to the prohibition, permitting a lawyer to give nominal gifts for a referral "as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services."

Prior to 2018, the Model Rules required that all communications about a law firm or lawyer's services include the name and "office address" of at least one lawyer or law firm responsible for its content. That provision has been revised to require that that the lawyer or law firm "include the name and *contact information* of at least one lawyer or law firm responsible for its content." (Emphasis added.) An addition to the Commentary provides that contact information "includes a website address, a telephone number, an email address or a physical office location."

What's Next

Now that the ABA has moved toward modernizing the advertising rules, the various states have the opportunity to re-examine their own rules, and bring them more into line with modern practice. Ideally, the states' amendments of their advertising rules will lead to a more uniform approach to those rules across the country. To keep up with state implementation of the changes to the advertising rules, visit the ABA's website (americanbar.org) for the Center for Professional Responsibility. ■

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