



The State Bar of California

ATILS Agenda Item B.3.
[Advertising Rules]
02-04-20 Meeting

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Mark Tuft and Kevin Mohr
Date: January 31, 2020
Re: Lawyer Advertising, Solicitation and Matching Services

Introduction

At the last meeting it was moved and seconded that the Task Force recommend to the Board the consideration of adopting amendments to the CRPCs on advertising and solicitation as informed by the current ABA Model Rules and the proposed advertising and solicitation rules developed by APRL, in particular a reconsideration of the existing law designation of “real-time electronic communication” as a form of prohibited solicitation.

A vote on the motion was postponed to the February 4, 2020 meeting to develop recommended language to be voted on and to identify access to justice factors underlying the revised advertising and solicitation rules and explain how the recommendations advance access to justice.

Lawyer Advertising and Access to Justice

The regulation of lawyer advertising has traditionally placed restrictions on information regarding the availability of lawyers and legal services in an effort to protect consumers from lawyers actively soliciting business and promoting litigation. Based on an empirical study initiated by the Association of Professional Responsibility Lawyers (APRL) in 2014-2016 and a subsequent analysis of APRL’s reports and public hearings conducted by the ABA Standing Committee on Professional Responsibility (SCEPR), it was shown that the advertising rules were outdated and overly restrictive; that the lack of uniformity and inconsistent enforcement unreasonably restricted the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet and other forms of electronic media.

The recent amendments to the ABA Model Rules on lawyer advertising streamline and simplify the rules that enables lawyers to use new technologies that can inform consumers accurately and efficiently about the availability of legal services while maintaining the prohibition against engaging in false or misleading communications and adhering to constitutional limitations on restricting commercial speech.

The advent of the Internet and social media have revolutionized the practice of law, including attorney advertising and client solicitation. The current California rules on lawyer advertising and solicitation were adopted before the recent amendments to the ABA Model Rules. Since then several states have or are in the process of modernized their advertising rules based on APRL’s two reports and the ABA’s recent amendments. Attorneys are increasingly posting, blogging and Tweeting more efficiently at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs expands exponentially each year. Under these recent amendments, the legal profession is better able to reach out to a public that has become savvy in the use of social media and the Internet and is in greater need of more, and

not less, useful information regarding the availability of legal services. These trends suggest that traditional restrictions on the dissemination of accurate information about legal services hinder the public's access to useful information and may constitute an unconstitutional restraint trade.

The Task Force believes that amending the lawyer advertising rules to conform to the recent amendments to the ABA Model Rules will better serve the public by expanding opportunities for lawyers to use modern communications technology to increase the public's awareness and access to information about the availability of legal services, and protecting the public by focusing the bar's resources on content that is false or misleading.

Recommended Changes to the Current Rules on Lawyer Advertising and Solicitation

The Task Force recommends that the Board of Trustees appoint a committee to study the recent amendments to ABA Model Rules 7.1, 7.2 and 7.3, APRL's Report of the Regulation of Lawyer Advertising Committee (June 22, 2015) and APRL's Regulation of Lawyer Advertising Committee Supplemental Report (April 26, 2016), the changes to advertising rules currently under consideration by the State of Washington and other jurisdictions as well as the impact of the current advertising rules in Oregon, Virginia and the District of Columbia on access to justice and public protection.

The following issues are examples of what could be studied by the implementation committee:

- Whether provisions on false and misleading communications should be combined into rule 7.1 and its comments, including current provisions of rules 7.4 [Communications of Fields of Practice and Specialization] and 7.5 [Firm Names and Trade Names], which largely relate to misleading communications.
- Whether specific rules on lawyer advertising should be consolidated into rule 7.2.
- Whether a new subdivision to rule 7.2(b) should be added as an exception to the general provision against paying for referrals that would permit nominal "thank you" gifts only, and contains other restrictions. ABA Model Rule 7.2 currently states that such a nominal gift is permissible only where not expected as payment for a recommendation of the lawyer's services. Comment [4] of the Model Rule expands on what is considered nominal, including ordinary social hospitality. The comment clarifies that a gift may not be given based on an agreement to receive referrals or to make future referrals. The proposed additions acknowledge the reality that lawyers frequently give small tokens of appreciation after receiving a referral, and these tokens are neither intended to be a "payment" for the referral nor likely to induce future referrals.
- Whether in rule 7.2(c), "office address" should be changed to "contact information" to address technological advances that influence how lawyers may be contacted and how advertising is presented.
- Whether the ban on direct solicitation in rule 7.3 should apply solely to live person-to-person contact, including in person, face-to-face, telephone, and real-time electronic or other

communications such as Skype. It is recommended that the rule be changed to no longer prohibit solicitations such as chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

- Whether the exceptions in rule 7.3(a)(2) should be broadened to permit live person to person solicitation of “experienced users of the type of legal services involved for business matters.” The potential for overreaching, that justifies the prohibition against in person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter. Conversely, the prohibition is justified, and a lawyer should not engage in live in person solicitation, involving personal legal matters such as criminal defense, family law, or personal injury, even if the person has been represented multiple times.
- Whether the labeling requirement for targeted mailings should be eliminated, but continue to prohibit such mailings that are misleading, involve coercion, duress or harassment, or where the target of the solicitation has made known to the lawyer a desire not to be solicited. SCEPR concluded that the labeling requirement is no longer necessary because consumers have become accustomed to receiving advertising material by print and electronic delivery. According to SCRPR’s report, no evidence was produced showing that consumers are harmed by receiving unmarked written solicitations from lawyers, even if the solicitations are read by consumers. If the solicitation itself or its contents are misleading, the harm is believed to be adequately addressed by Rule 7.1 [Communications Concerning a Lawyer’s Services].
- Whether the definition of “solicitation” in rule 7.3 should be revised to conform to the definition in the Model Rule and the rule in Virginia’s; i.e., a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.
- Whether rule 7.3 should exempt communications about legal services authorized by law or by court order (such as class action notices).