



The State Bar of California

ATILS Agenda Item B.7.
[Advertising Rules]
02-24-20 Meeting

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Mark Tuft and Kevin Mohr
Date: February 20, 2020
Re: B.7. Lawyer Advertising, Solicitation and Matching Services

Discussion

Short Statement of the Recommendation

ATILS recommends that the Board of Trustees consider adoption of amendments to the Rules of Professional Conduct on advertising and solicitation informed by the current American Bar Association Model Rules and the proposed advertising and solicitation rules developed by the Association of Professional Responsibility Lawyers, in particular a reconsideration of the existing designation of “real-time electronic contact” as prohibited solicitation. Information and data generated by a regulatory sandbox, pilot program, or other similar time-limited program can help inform this rule study.

Introduction

At the January 10, 2020 meeting it was moved and seconded that the Task Force recommend to the Board the consideration of adopting amendments to the California Rules of Professional Conduct on advertising and solicitation as informed by the current ABA Model Rules and the proposed advertising and solicitation rules developed by the Association of Professional Responsibility Lawyers (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 in order 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. At the February 4, 2020 meeting, the Task Force voted to approve this recommendation (14-0-0).

The Recommendation

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the ABA Standing Committee on Ethics Professional Responsibility (SCEPR), it was shown that the advertising rules were outdated and overly restrictive;¹ that the lack of uniformity and inconsistent enforcement unreasonably restricted the

¹ Association of Professional Responsibility Lawyers [2015 Report of the Regulation of Lawyer Advertising Committee](#), at pp. 20–25.

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.²

The recent amendments to the ABA Model Rules on lawyer advertising streamline and simplify³ the rules that enable 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 has 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 modernizing 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.⁴ 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.

Specific 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 specific 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.

² [Id. at p. 27.](#)

³ The ABA Standing Committee on Ethics and Professional Responsibility [Memorandum in Support of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising](#), December 21, 2017, at p. 15.

⁴ [Id. at p. 8.](#)

- 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 SCEPR’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; 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).

ATILS Charter and Request for Public Comment

In part, ATILS' charter instructs the task force to:

Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need.

This recommendation responds to the charter by proposing rule changes that could facilitate enhanced access to legal services by facilitating the use of modern communication, including online marketing and social media, to provide truthful and non-deceptive information to consumers regarding the availability of lawyers and law firms to provide legal services. This is especially pertinent to potential innovative online delivery systems that might exclusively use electronic communication for interacting with potential clients.

This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the RPCs. It was issued as recommendation 3.4 as set forth below.

Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

What would this recommendation do? If rule changes are ultimately adopted, this recommendation could improve public awareness and understanding of the legal dimensions of various issues, such as common landlord-tenant problems, because the advertising and solicitation rules would be revised in ways that foster innovative online delivery of legal services and the online marketing of such services.

Recommendation 3.4 received a total of approximately 79 written comments, 62 in opposition, 11 in support, and 6 with no stated position. Staff has completed processing of all written comments received and the public hearing testimony. Some of the general themes derived from the written public comments, the public hearing testimony, various articles, podcasts, social media posts and the oral input conveyed at the bar association Town Hall Outreach meetings are listed below together with the task forces' response.

- The advertising and solicitation CRPCs were revised recently (operative November 1, 2018) and it seems premature to proceed with the implementation of further changes to these rules.

Task Force Response: The changes made by the ABA to the Model Rules that were initiated by the study and report of APRL occurred after the Rules Revision Commission's work on its new and amended advertising rules was completed. Other jurisdictions have or are presently considering these ABA's changes. Particularly in the area of online lawyer advertising and

solicitation, uniformity among legal ethics standards in all United States jurisdictions is a meaningful goal that promotes lawyer compliance and public protection.

- Allowing a lawyer's real-time electronic communication with a prospective client should be permitted, especially in the context of online delivery system.

Task Force Response: The Task Force agrees that the issue of real-time electronic contact with a potential client should be reconsidered. The existing rule's treatment of this conduct as a form of banned solicitation may be overbroad and an obstacle to the legal profession's interest in exploring innovative online delivery systems.

Conclusion and Possible Next Steps

ATILS believes that updates to the lawyer advertising and solicitation rules described above strike the right balance of public protection and the free flow of information about the availability of legal services. This, in turn, can improve consumer access to legal services as well as understanding about problems such as civil justice legal issues. Should the Board of Trustees consider adoption of these rule amendments, it is anticipated that the next step of further study and drafting of the actual revisions would be informed by data generated by a regulatory sandbox, pilot program, or other similar time-limited program in which the program participants can experiment with robust online and social media communication with potential clients.