ILLINOIS STATE
BAR ASSOCIATION

February 28, 2018

**Comments of the Illinois State Bar Association
to the Proposed Amendments to the
American Bar Association Model Rules of Professional Conduct
on Lawyer Advertising**

To: American Bar Association
Standing Committee on Ethics and Professional Responsibility
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Introduction

On behalf of its more than 28,000 lawyer members, the Illinois State Bar Association is pleased to submit its comments on the Standing Committee on Ethics and Professional Responsibility's "Working Draft of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising," dated December 21, 2017.

The Illinois State Bar Association ("ISBA") supports the goals stated in the Standing Committee's memorandum of "encouraging more national uniformity" and "simplifying the rules that are actually enforced by state regulators." Many of the amendments proposed by the Standing Committee appear to advance those goals. Unfortunately, however, as discussed below, the ISBA is concerned that several of the proposed amendments would actually lead to less uniformity and more complexity in the enforcement of the lawyer advertising rules. More important, the ISBA is also concerned that adoption of some of the Standing Committee's proposals would most likely result in less protection of the public from inappropriate or improper adverting and solicitation by lawyers.

Specific Concerns

1. Proposed new Model Rule 1.0(l) to define "solicitation."

The Standing Committee proposes to create a new black letter definition of "solicitation" by inserting a new paragraph (l) into existing Rule 1.0. This proposal raises at least four concerns.

First, the Standing Committee's Memorandum states (at p. 16): "The Rules currently do not define solicitation …." This is accurate only with regard to the black letter of the Model

Rules. Comment [1] to current Rule 7.3 provides: "[1] A solicitation is a targeted communication initiated by a lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services." The current Rules do define "solicitation."

Second, the Association of Professional Responsibilities Lawyer's ("APRL") Report of April 26, 2016 recommends: (1) retaining the current Model Rules definition of "solicitation" in substantially the same form; and (2) making that definition part of the black letter as new Rule 7.2(a). The Standing Committee memorandum does not explain either why it considers the current definition of "solicitation" in Comment [1] to Rule 7.3 inadequate or why it rejected the APRL recommendation in favor of a definition "borrowed" from Virginia.

Third, creating a new black letter paragraph in Rule 1.0 to define a term relevant to only one rule appears to be inconsistent with established Model Rules practice. The definitions in Rule 1.0 relate to terms that are used in multiple rules. In situations where a term is relevant to a single rule, as is the situation with "solicitation," that term is typically defined in the black letter or commentary of that rule. For example, Appendix A lists 19 current Model Rules definitions not included in Rule 1.0 (five in black letter; 14 in comments).

Fourth, and perhaps most significant, changing an established Model Rule that affects other rules is not a trivial matter. The "transaction costs" (renumbering the three following paragraphs of current Rule 1.0 and then locating and revising the countless references and cross references to those paragraphs) of this unnecessary change will likely cause many, perhaps most, jurisdictions to follow the APRL recommendation or simply retain current Comment [1] to their Rule 7.3. As a result, if the Standing Committee proposal eventually becomes part of the Model Rules, this change will most likely cause less, rather than more, uniformity among the jurisdictions.

2. Proposed relegation of current Rule 7.5(c) to commentary (as Comment [8] to revised Rule 7.1).

The Standing Committee proposes to move the substance of current Rule 7.5(c), which prohibits the use of the name of a lawyer holding public office in a law firm name, to a new Comment [8] to revised Rule 7.1. The Standing Committee did not give any reason for this change.

Current Rule 7.5(c) is an important stand-alone black letter rule that impacts broader interests than lawyers in private practice. It also has important implications for governmental and judicial ethics. It is an important and necessary rule to help assure the public that a judge or government official is not biased or subject to improper influence from prior law firm relationships. Relegating this current rule to merely a "guide to interpretation" as opposed to an authoritative rule is inadequate. See ABA Model Rules, Preamble: A Lawyer's Responsibilities, Comment [12].

The ISBA believes that the current Model Rule 7.5(c) should be retained as a black letter standard in any revision of the advertising rules.

3. Proposed new Comment [2] to Rule 7.2 on "implying value" of lawyer services.

In proposed new Comment [2] to Rule 7.2, the Standing Committee revises the current definition of a communication that constitutes a "recommendation" (currently found in Comment [5] to Rule 7.2) by deleting the phrase "endorses or vouches" and substituting the new language "expresses, implies or suggests value as to the lawyer's services …." The Standing Committee memorandum gives no reason for why it found the current language inadequate. The ISBA believes the proposed new definition sweeps too broadly. There are myriad communications, including ABA, ISBA, and other bar association publications and consumer outreach that routinely suggest the value of lawyers' services. Of particular concern are bar operated public member directories that provide substantial consumer oriented information. The Committee proposed language excluding "directory listings and group advertisements that lists lawyers by practice area, *without more*, …" is an insufficient safe harbor for bar association directories. Many of these not for profit bar association directories contain much more detailed information than simple practice area. To the extent that the Committee's proposal would impede the ability of bar associations to utilize modern technologies to provide relevant information about their members to the public as part of paid member benefits and services, it is objectionable.

The ISBA believes that the current definition of "recommendation" is both adequate and appropriate, and it should be retained in any revision of the lawyer advertising rules. It further believes the added language concerning directory listings and group advertisements needs to be substantially rewritten to ensure the ability of bar associations to provide the public with information about their members and the value of retaining lawyers without restriction.

4. Proposed deletion of standards for lawyer referral services from commentary to Rule 7.2.

In its proposed revised version of Rule 7.2, the Standing Committee deletes the standards for lawyer referral services that are currently included in Comments [6] and [7] to Rule 7.2. The Committee memorandum (at p. 15) dismisses these provisions as "superfluous," but no explanation of why the current provisions are redundant is offered. The ISBA is concerned that the deletion of these provisions, especially current Comment [7], which requires that participating lawyers ensure their participation in a referral service is compatible with the lawyer's professional obligations, effectively removes any standards on referral services. This is particularly important with respect to participation in for-profit referral services. In the absence of state regulation of these for profit businesses, it may be that current Comment [7] is the only meaningful check on such entities.

5. Proposed expansion of exceptions to the prohibition on in-person solicitation of Rule 7.3.

The Standing Committee proposes two new and significant expansions of the exceptions to the prohibition on in-person solicitation of Rule 7.3. One proposed expansion (the "experienced user" expansion) is mentioned and briefly explained in the Committee memorandum; the other (the "with" expansion) is neither mentioned nor explained by the Standing Committee in its memorandum.

a. The "experienced user" expansion.

The Standing Committee memorandum states (at p. 16) that the current exceptions to prohibited in-person solicitation are "slightly broadened" to include "experienced users of the type of legal services involved for business matters." However, proposed new Comment [5] to Rule 7.3 suggests a much broader reach of the new exception. For example, there is no practical guidance on when someone might become an "experienced user" of legal services. And although the expanded unprotected group appears to exclude persons who have previously retained lawyers only for personal representations, as a practical matter, virtually any person who has ever retained any lawyer for any business matter would become fair game for any other lawyer for in-person solicitation. The Standing Committee's apparent notion that the actual in-person solicitation of an "experienced user" might somehow be limited to a particular "type of legal services" is simply not realistic. Once a person is deemed an "experienced user" subject to direct in-person contact, and a direct in-person contact is made by a lawyer, there is no reasonable way to limit the subjects that may be discussed during the ensuing conversation.

The ISBA notes that APRL proposed a "sophisticated user" exception to the prohibition on in-person solicitation. The ISBA believes that the prohibition on in-person solicitation is an important client-protection measure, and the ISBA is concerned that neither APRL nor the Standing Committee have adequately considered or justified the implications of their respective proposals. For that reason, the ISBA opposes any expansion of the exceptions to the prohibition on in-person solicitation for either "sophisticated" or "experienced" users of legal services at this time.

b. The unexplained "with" expansion.

Without explanation, the Standing Committee inserted the preposition "with" before each of the categories of persons listed as exceptions to the prohibition on in-person solicitation in the proposed draft of new Rule 7.3(a). Thus, for example, under proposed new Rule 7.3(a) any person who may be "with" a lawyer or an "experienced user" is subject to in-person solicitation. Neither the Committee memorandum nor the proposed new comments to new Rule 7.3 explain or reveal the reason for this broad expansion of the exceptions to the prohibition on in-person solicitation.

The Standing Committee offers no definition of "with" in the context of the proposed amended rule. The New Oxford American Dictionary (3d ed. 2010), at p. 1985, lists ten definitions of "with," including: "accompanied by" and "employed by." Applying the standard dictionary definitions to the proposed rule suggests, for example, that any lay person who may be in the same room as a lawyer, or any lay person employed by an "experienced user," could be subject to in-person solicitation. If "with" is interpreted to include any degree of affiliation, which would be a defensible interpretation, then any lay person who has any affiliation with, including an employment relationship, or proximity to, anyone who is: (1) a lawyer; (2) a friend, former legal client, or former business client or customer or vendor; or (3) an "experienced user" of legal services, would become subject to in-person solicitation. The "with" expansion would make any meaningful enforcement of the few remaining situations covered by the revised rule so

difficult and expensive that the prohibition on in-person solicitation would effectively be repealed.

As noted above, the ISBA believes that the prohibition on in-person solicitation is an important client-protection measure, and the Standing Committee has offered no reason for proposing the "with" expansion to the exceptions to the prohibition on in-person solicitation. The ISBA strongly opposes the proposed "with" expansion.

6. Proposed elimination of the "Advertising Material" legend from targeted written solicitations.

The Standing Committee proposes to eliminate the requirement, expressed in current Rule 7.3(c), that targeted written communications soliciting professional employment be marked "Advertising Material." In its memorandum, the Committee states (at p. 17) that "… most consumers will not feel any compulsion to view the materials solely because they were sent by a lawyer or law firm." In other words, the Committee is asserting that it will always be safe for consumers to assume that any unmarked letters or emails from lawyers are junk mail. (The ISBA finds this an unusual assertion for a professional association of lawyers.) If risk-averse consumers nevertheless believe that unmarked letters or emails from a lawyer or law firm might affect their rights or interests, they will need to open and review all the letters or emails to determine whether the communications are in fact junk. Although the careful consumers may decide quickly that the communications are junk, opening and reviewing these communications takes time. The cumulative annoyance and wasted time will be substantial.

Another concern with unmarked targeted communications is the potential for confusing recipients of the communications. Even moderately clever lawyers will be able to craft communications that may not be objectively misleading, but may cause unsophisticated consumers to believe that they need to contact that lawyer. The Standing Committee memorandum dismisses this concern (at p. 17) by stating that if a solicitation is misleading, the harm is adequately addressed by Rule 7.1. But this assertion overlooks two important client-protection factors. First, communications that disciplinary authorities might not find sufficiently false or misleading to justify a charge may nevertheless confuse many unsophisticated consumers. Second, the requirement of appropriate labeling would obviate the need for costly after-the-fact adjudications in the first instance.

Also, no particular compliance burden on lawyers' meeting this current requirement has been identified. Given what appears to be only de minimis cost, if any, in adding the disclaimer language to applicable lawyer communications, objection to retaining this requirement seems misplaced.

Finally, should the proposed elimination of the "Advertising Material" legend from targeted written solicitations become part of the Model Rules, it is highly unlikely to be adopted in Illinois or in many other jurisdictions. Again, the result will be less, rather than more, uniformity in the lawyer advertising rules among the jurisdictions.

The ISBA strongly opposes the proposed elimination of "Advertising Material" legend from targeted written solicitations. The ISBA believes that requiring a legend for targeted written solicitations is an important client-protection measure. The reasons given by the Standing Committee for proposing to eliminate the requirement are not persuasive. Like APRL, the ISBA recommends retaining the substance of current Rule 7.3(c) in any revision of the advertising rules.

7. Revisions to Rule 7.4 Communications of Fields of Practice and Specialization.

Given its commentary on many of the specific Standing Committee proposals, the ISBA merely notes that it is taking no position on the proposed amendments to Model Rule 7.4. Illinois' version of this Rule is significantly different than the Model Rule and therefore it believes any comments it would make on the Committee amendments would not be helpful.

Conclusion

For the reasons stated, the ISBA urges the Standing Committee to withdraw its current proposed amendments to the lawyer advertising rules and reconsider appropriate revisions in consideration of the comments of the ISBA and other interested persons and groups. The ISBA also requests that if and when the Committee proposes other or additional amendments to the lawyer advertising rules, that the Committee afford the ISBA and other interested persons and groups sufficient time (at least 120 days) to review and formulate comments on the proposed amendments.