



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

January 8, 2021

Via Zoom

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State Bar of Georgia

Disciplinary Rules and Procedures

Name	Position	Term Expires
Mr. Harold Michael Bagley	Chairperson	2022
Mr. R. Gary Spencer	Vice Chairperson	2022
Mr. Paul T. Carroll, III	Member	2021
Hon. J. Antonio DelCampo	Member	2021
Ms. Erin H. Gerstenzang	Member	2023
Mr. John G. Haubenreich	Member	2021
Mr. Patrick H. Head	Member	2021
Ms. R. Javoyne Hicks	Member	2021
Mr. William Dixon James	Member	2021
Mr. Seth David Kirschenbaum	Member	2022
Mr. Edward B. Krugman	Member	2021
Mr. David Neal Lefkowitz	Member	2021
Mr. David S. Lipscomb	Member	2021
Prof. Patrick E. Longan	Member	2021
Ms. Jabu Mariette Sengova	Member	2022
Mr. H. Craig Stafford	Member	2023
Mr. William Hickerson Thomas, Jr.	Member	2023

Mr. Patrick John Wheale	Member	2021
Ms. Paula J. Frederick	Staff Liaison	2021

Disciplinary Rules and Procedures Committee
Meeting of October 23, 2020
Via Zoom

MINUTES

Chair Harold Michael Bagley called the meeting to order at 2:00 p.m.

Attendance:

Committee members: Harold Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang, John G. Haubenreich, Patrick H. Head, R. Javoyne Hicks, Seth D. Kirschenbaum, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, Patrick E. Longan, Jabu M. Sengova, H. Craig Stafford, William Thomas, Jr. and Patrick J. Wheale.

Staff: Paula J. Frederick, Jenny K. Mittelman, William D. NeSmith, III, and Kathya S. Jackson.

Guests: District Attorney Sherry Boston, Robert W. Smith, Jr., General Counsel for Prosecuting Attorneys' Council of Georgia, and Judge Paige Reese Whitaker.

Approval of Minutes:

The Committee approved the Minutes from the January 10, 2020 meeting.

Action Items:

Possible revision to Part 7 of the GRPC

The Committee discussed whether they should make changes to all of the rules or focus on Rule 7.2. The Committee decided to create a subcommittee to work with Paula Frederick on possible revisions to Part 7. The subcommittee will present a draft to the Committee at its next meeting.

Rule 1.17 Comment 6

The Committee voted to add the language in ABA Rule 1.6(b)(7) to GRPC 1.6 as new subsection (b)(1)(v).

Proposed New Comment 7 to Rule 1.1

The Committee previously approved adding comment 7 to emphasize the importance of wellness as a component of competence. The Executive Committee had approved the amendment and it was on the agenda for approval at the January 2019 Board of Governors meeting when Bar Counsel received word that the Lawyer Assistance Program was opposed to the addition. Bar counsel agreed to pull the comment from the agenda and asked the leadership of the Attorney Wellness Committee and the Lawyers Assistance Program to make a recommendation about proceeding. R. Javoyne Hicks, member of the DRPC and Chair of the Wellness Committee, provided a report recommending that we not proceed with the comment at this time. Since the

Executive Committee has already voted to approve the amendment, Bar Counsel will provide a report to the Executive Committee.

Discussion Items:

ABA Rule 1.8(e)(3)

The Committee discussed the revision to ABA Rule 1.8. Paula Frederick will provide the revised rule to the pro bono community and bring all comments back to the Committee at its next meeting.

Rule 5.4

Several jurisdictions are exploring changes to Rule 5.4 to allow nonlawyer investment in law firms and some forms of nonlawyer practice. The loosened restrictions are in response to the access to justice problem. Bar counsel will keep the committee updated on the effect of these rule changes.

Rule 3.8

Sherry Boston and Robert Smith provided the Committee with a revised version of GRPC Rule 3.8 based off of the ABA Rule 3.8. R. Gary Spencer also presented the Committee with a revised version of Rule 3.8. The Committee discussed the differences between both drafts. The Committee decided that Sherry Boston, R. Gary Spencer, and any other members will collaborate and draft a version to present to the Committee at its next meeting.

Rule 8.4(g)

The Committee decided to wait for the Seeking Equal Justice and Addressing Racism & Racial Bias Committee to present them with a possible revision to Rule 8.4.

Revisions as approved:

RULE 1.6 CONFIDENTIALITY OF INFORMATION

- a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the court.
- b.
 1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

- i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 - ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;
 - iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - iv. to secure legal advice about the lawyer's compliance with these rules-;
 - v. to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- 2. In a situation described in paragraph (b) (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.
- 3. Before using or disclosing information pursuant to paragraph (b) (1) (i) or (ii), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.
- c. The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.
- d. The lawyer shall reveal information under paragraph (b) as the applicable law requires.
- e. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The maximum penalty for a violation of this rule is disbarment.

1 **RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

2
3 **A lawyer shall not make a false or misleading communication about the lawyer or the**
4 **lawyer's services. A communication is false or misleading if it contains a material**
5 **misrepresentation of fact or law, or omits a fact necessary to make the statement considered**
6 **as a whole not materially misleading.**

7
8 **Comment**

9
10 [1] This Rule governs all communications about a lawyer's services, including
11 advertising. Whatever means are used to make known a lawyer's services, statements about them
12 must be truthful.

13 [2] Misleading truthful statements are prohibited by this Rule. A truthful statement is
14 misleading if it omits a fact necessary to make the lawyer's communication considered as a whole
15 not materially misleading. A truthful statement is misleading if a substantial likelihood exists that
16 it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's
17 services for which there is no reasonable factual foundation. A truthful statement is also misleading
18 if presented in a way that creates a substantial likelihood that a reasonable person would believe
19 the lawyer's communication requires that person to take further action when, in fact, no action is
20 required.

21 [3] A communication that truthfully reports a lawyer's achievements on behalf of
22 clients or former clients may be misleading if presented so as to lead a reasonable person to form
23 an unjustified expectation that the same results could be obtained for other clients in similar matters
24 without reference to the specific factual and legal circumstances of each client's case. Similarly,
25 an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated
26 comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms,
27 may be misleading if presented with such specificity as would lead a reasonable person to conclude
28 that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or
29 qualifying language may preclude a finding that a statement is likely to create unjustified
30 expectations or otherwise mislead the public.

31 [4] It is professional misconduct for a lawyer to engage in conduct involving
32 dishonesty, fraud, deceit or misrepresentation. Rule ~~8.4(e)~~ (a)(4). See also Rule ~~8.4(e)~~ (a)(6) for
33 the prohibition against stating or implying an ability to improperly influence a government agency
34 or official or to achieve results by means that violate the Rules of Professional Conduct or other
35 law.

36 [5] Firm names, letterhead and professional designations are communications
37 concerning a lawyer's services. A firm may be designated by the names of all or some of its current
38 members, by the names of deceased members where there has been a succession in the firm's
39 identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be
40 designated by a distinctive website address, social media username or comparable professional
41 designation that is not misleading. A law firm name or designation is misleading if it implies a
42 connection with a government agency, with a deceased lawyer who was not a former member of
43 the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or
44 with a public or charitable legal services organization. If a firm uses a trade name that includes a
45 geographical name such as "Springfield Legal Clinic," an express statement explaining that it is
46 not a public legal aid organization may be required to avoid a misleading implication.

Commented [PF1]: The ABA rule does not include the disclaimers at GRPC 7.1(a)(5) and (6) re contingency fees and the meaning of "no fee unless you win or collect." The ABA thinks the language here would allow a regulator to require those disclaimers if leaving them out creates unjustified expectations. Same with the requirement that mailings be marked "Advertisement."

Commented [PF2]: THE SUBCOMMITTEE DOES NOT RECOMMEND INCLUDING THE DISCLAIMERS MENTIONED IN THE PREVIOUS COMMENT.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

What's left out:

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;~~

(2) A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:

- i. does not engage in conduct that would violate the Rules if engaged in by a lawyer;
- ii. provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and
- iii. discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

(3) A lawyer may pay the usual and reasonable fees or dues charged by a **bar-operated non-profit lawyer referral service**, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

- i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges,

Commented [PF3]: This is the content of GRPC 7.5, which the Supreme Court amended after we were sued over our longstanding rule banning use of trade names. The content used to be in ABA Rule 7.5, but this reorganization moves it to a comment with the rationale that it is just another example of potentially misleading communication. SO THE QUESTION IS WHETHER TO ADOPT THE ABA TREATMENT AND PLACE IT IN A COMMENT, OR WHETHER TO KEEP GRPC 7.5 AS RECENTLY AMENDED. THE SUBCOMMITTEE RECOMMENDS LEAVING THIS CONTENT AS A COMMENT, CONSISTENT WITH THE ABA VERSION.

Commented [PF4]: Do we want to add the information currently in GRPC 7.1 comments 3-5? If so, they should go as comments here. PJF does not think they are necessary. Also consider whether we want to keep the disclosures/disclaimers in Georgia rule 7.2(c)? If so, they should probably become comments to 7.1 too.

Commented [PF5]: THE SUBCOMMITTEE RECOMMENDS NOT ADDING THE INFORMATION MENTIONED IN THE PREVIOUS COMMENT.

Commented [PF6]: This is the current Georgia rule. It differs significantly from the ABA model. The ABA still refers to "qualified" services and still requires services to send certain information to the regulator's office on an annual basis. Georgia did away with that requirement many years ago.

Commented [PF7]: THE SUBCOMMITTEE RECOMMENDS OMITTING THESE TWO SUBPARAGRAPHS.

agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(4) ~~A lawyer may~~ pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(35) pay for a law practice in accordance with Rule 1.17;

(46) 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

(57) 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:~~

Commented [PF8]: The Georgia rule differs from the ABA model, but it is based on the ABA Model Rule for Lawyer Referral Services (which isn't part of their model rules of professional conduct).

Commented [PF9]: THE SUBCOMMITTEE RECOMMENDS LEAVING THIS AS PRESENTED.

Commented [PF10]: Both of these provisions would be new to Georgia. I think the current rules would allow reciprocal referral agreements, but we do not currently address them at all.

Commented [PF11]: Subpart 7 is a change in policy for the ABA. The previous rules prohibited any gifts. The change to allow nominal thank-you gifts reflects reality. The ABA report justified it, saying it is unlikely a nominal thank-you gift would really affect a lawyer's judgment on behalf of the client.

Commented [PF12]: THE SUBCOMMITTEE RECOMMENDS INCLUDING BOTH PROVISIONS

~~—— (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.~~

(c) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

(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.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(57), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(57) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise,

Commented [PF13]: THE SUBCOMMITTEE RECOMMENDS USING THIS LANGUAGE INSTEAD OF THE ABA LANGUAGE.

Commented [PF14]: This is the current Georgia rule 7.4. The struck-through language in (c) above is the ABA rule.

Commented [PF15]: The ABA does not have language requiring a lawyer to keep copies of advertising for any particular period, as we currently require in GRPC 7.2(b). If we want to keep that requirement, it could go here.

Commented [PF16]: THE SUBCOMMITTEE DOES NOT RECOMMEND KEEPING THE LANGUAGE REFERRED TO IN THE COMMENT ABOVE, REQUIRING LAWYERS TO KEEP COPIES OF ADS FOR A PARTICULAR TIME PERIOD.

183 agreement or understanding that such a gift would be forthcoming or that referrals would be
184 made or encouraged in the future.

185
186 [5] A lawyer may pay others for generating client leads, such as Internet-based client
187 leads, as long as the lead generator does not recommend the lawyer, any payment to the lead
188 generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of
189 the lawyer), and the lead generator's communications are consistent with Rule 7.1
190 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not
191 pay a lead generator that states, implies, or creates a reasonable impression that it is recommending
192 the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's
193 legal problems when determining which lawyer should receive the referral. See Comment [2]
194 (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect
195 to the conduct of nonlawyers); Rule 8.4(a)(1) (duty to avoid violating the Rules through the acts
196 of another).

197
198 [6] A lawyer may pay the usual charges of a legal service plan or a ~~not-for-profit or~~
199 ~~qualified~~ lawyer referral service. A legal service plan is a prepaid or group legal service plan or a
200 similar delivery system that assists people who seek to secure legal representation. A lawyer
201 referral service, on the other hand, is any organization that holds itself out to the public as a lawyer
202 referral service. ~~Qualified referral services are consumer-oriented organizations that provide~~
203 ~~unbiased referrals to lawyers with appropriate experience in the subject matter of the representation~~
204 ~~and afford other client protections, such as complaint procedures or malpractice insurance~~
205 ~~requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-~~
206 ~~profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved~~
207 ~~by an appropriate regulatory authority as affording adequate protections for the public. See, e.g.,~~
208 ~~the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services~~
209 ~~and Model Lawyer Referral and Information Service Quality Assurance Act.~~

210
211 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
212 from a lawyer referral service must act reasonably to assure that the activities of the plan or service
213 are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral
214 services may communicate with the public, but such communication must be in conformity with
215 these Rules. Thus, advertising must not be false or misleading, as would be the case if the
216 communications of a group advertising program or a group legal services plan would mislead the
217 public to think that it was a lawyer referral service sponsored by a state agency or bar association.

218
219 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
220 professional, in return for the undertaking of that person to refer clients or customers to the
221 lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional
222 judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and
223 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or
224 nonlawyer professional must not pay anything solely for the referral, but the lawyer does not
225 violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer
226 professional, so long as the reciprocal referral agreement is not exclusive and the client is informed
227 of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule
228 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed

Commented [PF17]: ABA rule 2.1 is different from the GRPC.

periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Commented [PF18]: This concept is not spelled out in the GRPC, but I think we would reach the same conclusion.

Commented [PF19]: THE SUBCOMMITTEE APPROVES THIS NEW LANGUAGE

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

~~[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Definitional Cross-References

“Law Firm” See Rule 1.0(c)

“Written” See Rule 1.0(n)

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

275 know needs legal services in a particular matter and that offers to provide, or reasonably can
276 be understood as offering to provide, legal services for that matter.

Commented [PF20]: The definition is new.

277
278 (b) A lawyer shall not solicit professional employment by live person-to-person
279 contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's
280 pecuniary gain, unless the contact is with a:

Commented [PF21]: THE SUBCOMMITTEE
APPROVED THIS LANGUAGE

281 (1) lawyer;

282
283 (2) person who has a family, close personal, or prior business or professional
284 relationship with the lawyer or law firm; or

Commented [PF22]: The exception for prior business
people is new.

285
286 (3) person who routinely uses for business purposes the type of legal services
287 offered by the lawyer.

288
289 (c) A lawyer shall not solicit professional employment even when not otherwise
290 prohibited by paragraph (b), if:

291 (1) the target of the solicitation has made known to the lawyer a desire not to
292 be solicited by the lawyer; or

293 (2) the solicitation involves coercion, duress, fraud, overreaching, harassment,
294 intimidation or undue influence; ~~or harassment;~~

295
296 (3) the written communication concerns an action for personal injury or
297 wrongful death or otherwise relates to an accident or disaster involving the
298 person to whom the communication is addressed or a relative of that person,
299 unless the accident or disaster occurred more than 30 days prior to the
300 mailing of the communication; or

301
302 (4) the lawyer knows or reasonably should know that the physical, emotional
303 or mental state of the person is such that the person could not exercise
304 reasonable judgment in employing a lawyer.

Commented [PF23]: This language is at GRPC 7.3(a) 3-4.
The ABA has removed these restrictions completely.

305
306 (d) This Rule does not prohibit communications authorized by law or ordered
307 by a court or other tribunal.

Commented [PF24]: THE SUBCOMMITTEE INVITES
COMMENT FROM OTHER COMMITTEE MEMBERS
ON THESE PROVISIONS. SHOULD THEY BE MOVED
TO THE COMMENTS? SEE PROPOSED ADDITIONAL
LANGUAGE (UNDERLINED) FOR SUBPART 2; IT
TRACKS CURRENT GEORGIA RULE 7.2(A)(2).

308
309 (e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a
310 prepaid or group legal service plan operated by an organization not owned or directed by
311 the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for
312 the plan from persons who are not known to need legal services in a particular matter
313 covered by the plan.

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319 Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "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 overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) 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.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

Definitional Cross-References

~~"Known" See Rule 1.0(f)~~

~~"Written" See Rule 1.0(n)~~

RULE 7.4 (Deleted)

RULE 7.5 (Deleted)

413 **RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT**
414 **LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES**

Commented [PF25]: THE COMMITTEE
RECOMMENDS ADOPTING RULE 7.6.

415 A lawyer or law firm shall not accept a government legal engagement or an
416 appointment by a judge if the lawyer or law firm makes a political contribution or solicits
417 political contributions for the purpose of obtaining or being considered for that type of legal
418 engagement or appointment.
419

420 **Comment**
421

422 [1] Lawyers have a right to participate fully in the political process, which includes
423 making and soliciting political contributions to candidates for judicial and other public office.
424 Nevertheless, when lawyers make or solicit political contributions in order to obtain an
425 engagement for legal work awarded by a government agency, or to obtain appointment by a judge,
426 the public may legitimately question whether the lawyers engaged to perform the work are selected
427 on the basis of competence and merit. In such a circumstance, the integrity of the profession is
428 undermined.
429

430 [2] The term "political contribution" denotes any gift, subscription, loan, advance or
431 deposit of anything of value made directly or indirectly to a candidate, incumbent, political party
432 or campaign committee to influence or provide financial support for election to or retention in
433 judicial or other government office. Political contributions in initiative and referendum elections
434 are not included. For purposes of this Rule, the term "political contribution" does not include
435 uncompensated services.

436 [3] Subject to the exceptions below, (i) the term "government legal engagement"
437 denotes any engagement to provide legal services that a public official has the direct or indirect
438 power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position
439 such as referee, commissioner, special master, receiver, guardian or other similar position that is
440 made by a judge. Those terms do not, however, include (a) substantially uncompensated services;
441 (b) engagements or appointments made on the basis of experience, expertise, professional
442 qualifications and cost following a request for proposal or other process that is free from influence
443 based upon political contributions; and (c) engagements or appointments made on a rotational
444 basis from a list compiled without regard to political contributions.

445 [4] The term "lawyer or law firm" includes a political action committee or other entity
446 owned or controlled by a lawyer or law firm.

447 [5] Political contributions are for the purpose of obtaining or being considered for a
448 government legal engagement or appointment by a judge if, but for the desire to be considered for
449 the legal engagement or appointment, the lawyer or law firm would not have made or solicited the
450 contributions. The purpose may be determined by an examination of the circumstances in which
451 the contributions occur. For example, one or more contributions that in the aggregate are
452 substantial in relation to other contributions by lawyers or law firms, made for the benefit of an
453 official in a position to influence award of a government legal engagement, and followed by an
454 award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would
455 support an inference that the purpose of the contributions was to obtain the engagement, absent
456 other factors that weigh against existence of the proscribed purpose. Those factors may include
457 among others that the contribution or solicitation was made to further a political, social, or

458 economic interest or because of an existing personal, family, or professional relationship with a
459 candidate.
460 [6] If a lawyer makes or solicits a political contribution under circumstances that
461 constitute bribery or another crime, Rule 8.4(b) is implicated.
462

463 **Definitional Cross-References**

464 “Law firm” *See* Rule 1.0(c)
465

Commented [PF26]: In the late ‘90’s the DRPC decided not to adopt Rule 7.6 and we have never had any version of this rule.

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PART SEVEN

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:

(1) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;

(4) fails to include the name of at least one lawyer responsible for its content;
or

(5) contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

"Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."

(6) contains the language "no fee unless you win or collect" or any similar phrase and fails to conspicuously present the following disclaimer:

33 “No fee unless you win or collect” [or insert the similar language used in the
34 communication] refers only to fees charged by the attorney. Court costs and other
35 additional expenses of legal action usually must be paid by the client. Contingent fees are
36 not permitted in all types of cases.

37
38 (b) A public communication for which a lawyer has given value must be identified as
39 such unless it is apparent from the context that it is such a communication.

40
41 (c) A lawyer retains ultimate responsibility to ensure that all communications
42 concerning the lawyer or the lawyer’s services comply with the Georgia Rules of Professional
43 Conduct.

44
45 The maximum penalty for a violation of this Rule is disbarment.

46
47 Comment

48
49 [1] This rule governs the content of all communications about a lawyer’s services,
50 including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means
51 are used to make known a lawyer’s services, statements about them should be truthful.

52
53 [2] The prohibition in sub-paragraph (a)(2) of this *Rule 7.1: Communications Concerning*
54 *a Lawyer’s Services* of statements that may create “unjustified expectations” would ordinarily
55 preclude advertisements about results obtained on behalf of a client, such as the amount of a
56 damage award or the lawyer’s record in obtaining favorable verdicts, and advertisements
57 containing client endorsements. Such information may create the unjustified expectation that
58 similar results can be obtained for others without reference to the specific factual and legal
59 circumstances.

60
61
62 *Affirmative Disclosure*
63

[3] In general, the intrusion on the First Amendment right of commercial speech resulting from rationally-based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(5) of *Rule 7.1: Communications Concerning a Lawyer's Services*. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win." Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client's liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as "fees" and "costs" in an advertisement.

[4] Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this *Rule 7.1: Communications Concerning a Lawyer's Services* would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.

Accountability

[5] Paragraph (c) makes explicit an advertising attorney's ultimate responsibility for all the lawyer's promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end product with these Rules. Although prior review by disciplinary authorities is not required by these Rules, lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a

promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.

RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

(1) public media, such as a telephone directory, legal directory, newspaper or other periodical;

(2) outdoor advertising;

(3) radio or television;

(4) written, electronic or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

(1) Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each

125 lawyer who is prominently identified pursuant to this paragraph. For the purposes of this
126 Rule, a bona fide office is defined as a physical location maintained by the lawyer or law
127 firm from which the lawyer or law firm furnishes legal services on a regular and
128 continuing basis. In the absence of a bona fide physical office, the lawyer shall
129 prominently disclose the full address listed with the State Bar of Georgia or other Bar to
130 which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the
131 service discloses the location of the lawyer's bona fide office, or the registered bar
132 address, when a referral is made.

133
134 (2) Disclosure of referral practice. If the lawyer or law firm will refer the
135 majority of callers to other attorneys, that fact must be disclosed and the lawyer or law
136 firm must comply with the provisions of Rule 7.3 (c) regarding referral services.

137
138 (3) Disclosure of spokespersons and portrayals. Any advertisement that
139 includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of
140 a client by a non-client, or any paid testimonial or endorsement, shall include prominent
141 disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-
142 lawyer, or of a client by a non-client.

143
144 (4) Disclosures regarding fees. A lawyer or law firm advertising any fixed fee
145 for specified legal services shall, at the time of fee publication, have available to the
146 public a written statement clearly describing the scope of each advertised service, which
147 statement shall be available to the client at the time of retainer for any such service.

148
149 (5) Appearance of legal notices or pleadings. Any advertisement that includes
150 any representation that resembles a legal pleading, notice, contract or other legal
151 document shall include prominent disclosure that the document is an advertisement rather
152 than a legal document.

153
154 The maximum penalty for a violation of this Rule is a public reprimand.

155 Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor *Rule 7.3: Direct Contact with Prospective Clients* prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;

(2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

(3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or

(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

(1) A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:

(i) does not engage in conduct that would violate these Rules if engaged in by a lawyer;

(ii) provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and

(iii) discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies that can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers

participating and the names and addresses of the lawyers participating in the service;

(ii) the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

(iii) the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

(iv) a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(3) A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(4) A lawyer may pay for a law practice in accordance with *Rule 1.17. Sale of Law Practice*.

(d) A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.

(e) A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engaged in by a lawyer.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal

services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

[8] A lawyer may not indirectly engage in promotional activities through a lay public relations or marketing firm if such activities would be prohibited by these Rules if engaged in directly by the lawyer.

340 **RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE**

341
342 A lawyer may communicate the fact that the lawyer does or does not practice in
343 particular fields of law. A lawyer who is a specialist in a particular field of law by experience,
344 specialized training or education, or is certified by a recognized and bona fide professional
345 entity, may communicate such specialty or certification so long as the statement is not false or
346 misleading.

347
348 The maximum penalty for a violation of this Rule is a public reprimand.

349
350 Comment

351
352 [1] This Rule permits a lawyer to indicate areas of practice in communications about the
353 lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in
354 such fields, the lawyer is permitted to so indicate.

355
356 [2] A lawyer may truthfully communicate the fact that the lawyer is a specialist or is
357 certified in a particular field of law by experience or as a result of having been certified as a
358 "specialist" by successfully completing a particular program of legal specialization. An example
359 of a proper use of the term would be "Certified as a Civil Trial Specialist by XYZ Institute"
360 provided such was in fact the case, such statement would not be false or misleading and provided
361 further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide
362 professional entity.

363
364 **RULE 7.5. FIRM NAMES AND LETTERHEADS**

365
366 (a) A lawyer shall not use a firm name, letterhead or other professional designation
367 that violates Rule 7.1.

368
369 (b) A law firm with offices in more than one jurisdiction may use the same name in
370 each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the

jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

(e) A trade name may be used by a lawyer in private practice if:

(1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and

(2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Firm names and letterheads are subject to the general requirement of all advertising that the communication must not be false, fraudulent, deceptive or misleading. Therefore, lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests partnership in the practice of law.

401 [2] Trade names may be used so long as the name includes the name of at least one or
402 more of the lawyers actively practicing with the firm. Firm names consisting entirely of the
403 names of deceased or retired partners have traditionally been permitted and have proven a useful
404 means of identification. Sub-paragraph (e) (1) permits their continued use as an exception to the
405 requirement that a firm name include the name of at least one active member.
406

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

101

REPORT

LAWYER ADVERTISING RULES FOR THE 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA's expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.¹ This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers' efforts to expand their practices and thwart clients' interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.² Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

¹ Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at*: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.

² See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 ("According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.").

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101

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.³

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.⁴

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA's lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

³ For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 2, at 7-18.

⁴ The recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were "active market participants" (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. See also, ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

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- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- 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.
- Eliminate the labeling requirement 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.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer’s Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. New Comment [3] provides that communications that contain information about a lawyer’s fee must also include information about the client’s responsibility for costs to avoid being labeled as a misleading communication.

In Comment [4], SCEPR recommends replacing “advertising” with “communication” to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an “unsubstantiated claim” may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments [6] through [9] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

B. Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules

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Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term “advertising” with “communication” and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words “compensate” and “promise” emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not “compensation.”

SCEPR’s amendments to Rule 7.2(b) allow lawyers to give something “of value” to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees, SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called “runners,” which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase “based on the lawyer’s experience, specialized training or education.”

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Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term “office address” is changed to “contact information” to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All “communications” about a lawyer’s services must include the firm name (or lawyer’s name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term “recommendations” does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate “station employees or spokespersons” as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. “employees, agents and vendors who are engaged to provide marketing or client development services.”

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] (“Legal services plans and lawyer referral services may communicate with the public, *but such communication must be in conformity with these Rules.*”) (Emphasis added.).

C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define “solicitation;” the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia’s definition. A solicitation is:

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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.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime or other face-to-face communications. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include “experienced users of the type of legal services involved for business matters.” Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which 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.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as “advertising material.” Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing

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Committee on Professional Discipline's suggestion to review both Oregon's rules and Washington State's proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm can and will be addressed by Rule 7.1's prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.

IV. SCEPR's Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.⁵ Throughout, SCEPR's process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR's work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.⁶

⁵ APRL's April 26, 2016 Supplemental Report can be accessed here:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.

⁶ Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here:

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A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. 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 ("NOBC") provided valuable advice and comments.

The APRL committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL's 2014 survey of U.S. lawyer regulatory authorities showed:

- 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).

APRL issued reports in June 2015 and April 2016⁷ proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

⁷ Links to both APRL reports are available at:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.

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On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.⁸

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR's then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility ("CPR") committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.⁹ The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives,

⁸ Written submissions to SCEPR are available at:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

⁹ Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

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NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.¹⁰

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee's revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.¹¹

V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA's adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public's perception of lawyers.¹² This ban on attorney advertising remained for approximately six decades, until the Supreme Court's decision in 1977 in *Bates v. Arizona*.¹³

B. Attorney Advertising in the 20th Century

¹⁰ All Comments can be found here:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html. The full transcript of the Public Forum can be accessed here:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf.

¹¹ An MP3 recording of the webinar can be accessed here:

https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3. A PowerPoint of the webinar is also available:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf.

¹² Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982). Mylene Brooks, *Lawyer Advertising: Is There Really A Problem*, 15 LOY. L.A. ENT. L. REV. 1, 6-9 (1994). See also APRL 2015 Report, *supra* note 2.

¹³ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

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Bates established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson*,¹⁴ the Supreme Court explained that regulations on commercial speech must “directly advance the [legitimate] state interest involved” and “[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive.”¹⁵

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.¹⁶ The Court reviewed issues such as the failure to adhere to a state “laundry list” of permitted content in direct mail advertisements,¹⁷ a newspaper advertisement’s use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,¹⁸ and an attorney’s letterhead that included his board certification in violation of prohibition against referencing expertise.¹⁹ The court’s decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state’s goal.²⁰

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass’n*, the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: “[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”²¹ The Court added: “It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”²² The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.²³

¹⁴ *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557 (1980).

¹⁵ 447 U.S. at 564.

¹⁶ See APRL 2015 Report, *supra* note 2, at 9-18, for a discussion of these cases.

¹⁷ *In re R.M.J.*, 455 U.S. 191, 197 (1982).

¹⁸ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

¹⁹ *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 93-94 (1990).

²⁰ *In re R.M.J.*, 455 U.S. 191, 197 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985); *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 93-94 (1990).

²¹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978).

²² *Id.* at 464-65.

²³ *Id.* at 465-467.

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Ohralik's blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapiro v. Kentucky Bar Ass'n*,²⁴ that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

D. Commercial Speech in the Digital Age

The *Bates*-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm's challenge to New York's 2006 revised advertising rules, which prohibited the use of "the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and... the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter."²⁵ The U.S. Court of Appeals for the Second Circuit found New York's regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading.²⁶ The court noted that prohibiting *potentially misleading* commercial

²⁴ 486 U.S. 466 (1988). *But see, Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. *But see, Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), in which Maryland's 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing *Went for It*, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

²⁵ *Alexander v. Cahill*, 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of 'common sense'—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve 'important communicative functions: [they] attract [] the attention of the audience to the advertiser's message, and [they] may also serve to impart information directly.'" (Citations omitted.).

²⁶ *Alexander v. Cahill*, 598 F.3d 79, at 96.

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speech might fail the *Central Hudson* test.²⁷ The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.²⁸

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana's 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.²⁹ The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.³⁰ Although paying homage to a state's substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.³¹

[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.³²

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida's rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar's prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.³³ The state's underlying regulatory premise was that these "specific media . . . present too high a risk of being misleading." This total ban on commercial speech again did not survive constitutional scrutiny.³⁴

²⁷ *Id.*

²⁸ *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

²⁹ *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.

³⁰ *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

³¹ *Id.* at 220.

³² *Id.* citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985).

³³ *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298 (S.D. Fla. 2014).

³⁴ *Id.* at 1312.

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Finally, in *Searcy v. Florida Bar*, a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.³⁵ The Searcy law firm challenged the regulation as a blanket prohibition on commercial speech, arguing board certification is not available in all areas of practice, including the firm's primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR's proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public's access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018

³⁵ *Searcy v. Fla. Bar*, 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015). Summary Judgment Order available at: [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/\\$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement).

ABA 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.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

ABA 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.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign

language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule

7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a

116 state bar association, that has been approved by the authority of the state, the District of
117 Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists.
118 Certification signifies that an objective entity has recognized an advanced degree of
119 knowledge and experience in the specialty area greater than is suggested by general
120 licensure to practice law. Certifying organizations may be expected to apply standards of
121 experience, knowledge and proficiency to ensure that a lawyer's recognition as a
122 specialist is meaningful and reliable. To ensure that consumers can obtain access to
123 useful information about an organization granting certification, the name of the certifying
124 organization must be included in any communication regarding the certification.

125 Required Contact Information

126 [12] This Rule requires that any communication about a lawyer or law firm's services
127 include the name of, and contact information for, the lawyer or law firm. Contact
128 information includes a website address, a telephone number, an email address or a
129 physical office location.

1 **Rule 7.3 Solicitation of Clients**

2 *Information About Legal Services*

3 (a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a
4 lawyer or law firm that is directed to a specific person the lawyer knows or reasonably
5 should know needs legal services in a particular matter and that offers to provide, or
6 reasonably can be understood as offering to provide, legal services for that matter.

7 (b) A lawyer shall not solicit professional employment by live person-to-person contact
8 when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s
9 pecuniary gain, unless the contact is with a:

10 (1) lawyer;

11 (2) person who has a family, close personal, or prior business or professional relationship
12 with the lawyer or law firm; or

13 (3) person who routinely uses for business purposes the type of legal services offered by
14 the lawyer.

15 (c) A lawyer shall not solicit professional employment even when not otherwise
16 prohibited by paragraph (b), if:

17 (1) the target of the solicitation has made known to the lawyer a desire not to be solicited
18 by the lawyer; or

19 (2) the solicitation involves coercion, duress or harassment.

20 (d) This Rule does not prohibit communications authorized by law or ordered by a court
21 or other tribunal.

22 (e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid
23 or group legal service plan operated by an organization not owned or directed by the
24 lawyer that uses live person-to-person contact to enroll members or sell subscriptions for
25 the plan from persons who are not known to need legal services in particular matter
26 covered by the plan.

27
28 Comment

29 *Information About Legal Services*

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "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 overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and

occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) 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.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves.

Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

ABA Rule 1.8: Current Clients: Specific Rules

...

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

22 ...

23 Comments

24 ...

25 Financial Assistance

26 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on
27 behalf of their clients, including making or guaranteeing loans to their clients for
28 living expenses, because to do so would encourage clients to pursue lawsuits that
29 might not otherwise be brought and because such assistance gives lawyers too
30 great a financial stake in the litigation. These dangers do not warrant a prohibition
31 on a lawyer lending a client court costs and litigation expenses, including the
32 expenses of medical examination and the costs of obtaining and presenting
33 evidence, because these advances are virtually indistinguishable from contingent
34 fees and help ensure access to the courts. Similarly, an exception allowing lawyers
35 representing indigent clients to pay court costs and litigation expenses regardless of
36 whether these funds will be repaid is warranted.

37 [11] Paragraph (e)(3) provides another exception. A lawyer representing an
38 indigent client without fee, a lawyer representing an indigent client pro bono
39 through a nonprofit legal services or public interest organization and a lawyer
40 representing an indigent client pro bono through a law school clinical or pro bono
41 program may give the client modest gifts. Gifts permitted under paragraph (e)(3)
42 include modest contributions for food, rent, transportation, medicine and similar
43 basic necessities of life. If the gift may have consequences for the client, including,
44 e.g., for receipt of government benefits, social services, or tax liability, the lawyer
45 should consult with the client about these. See Rule 1.4.

46 [12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific
47 circumstances where it is unlikely to create conflicts of interest or invite abuse.

48 Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the
49 availability of financial assistance prior to retention or as an inducement to
50 continue the client-lawyer relationship after retention; (ii) seeking or accepting
51 reimbursement from the client, a relative of the client or anyone affiliated with the
52 client; and (iii) publicizing or advertising a willingness to provide gifts to
53 prospective to clients beyond court costs and expenses of litigation in connection
54 with contemplated or pending litigation or administrative proceedings.

55 [13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may
56 be provided even if the representation is eligible for fees under a fee-shifting
57 statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in
58 other contemplated or pending litigation in which the lawyer may eventually
59 recover a fee, such as contingent-fee personal injury cases or cases in which fees
60 may be available under a contractual fee-shifting provision, even if the lawyer does
61 not eventually receive a fee.

62 ...

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Model Rule 1.8: Current Clients: Specific Rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~and~~

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client ~~pro bono~~ through a nonprofit legal services or public interest organization and a lawyer representing an indigent client ~~pro bono~~ through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses ~~if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.~~ The ~~legal services must be delivered at no fee to the indigent client and the~~ lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such ~~financial assistance to gifts to prospective~~ clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses,

because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts ~~if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle.~~ Gifts permitted under paragraph (e)(3) include modest contributions ~~as are reasonably necessary~~ for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. ~~Modest gifts are~~ A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, ~~including modest gifts may be provided~~ pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

Deletions struck through; additions underline

REPORT

I. Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) propose adding a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as “a humanitarian exception” to Rule 1.8(e).¹

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: “There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes.”² Another wrote: “I

¹ See, e.g., Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (discussing the desirability of a humanitarian exception to Model Rule 1.8(e)); Model Rule 1.8(e) “is at odds with the legal profession’s goal of facilitating access to justice. [It] bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result.” The rule should be changed “[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effect on indigent clients”); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014). See also Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (giving an indigent client a used coat and \$200 is an “act of humanitarianism”).

² Statement of Legal Services Corporation (“LSC”) Program Executive Director in connection with a broad but anecdotal survey conducted by the National Legal Aid and Defender Association (NLADA) for the

hate that helping a client . . . is against the rules.”³ And another: “Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule.”⁴

Model Rule 1.8 cmt. [10] gives two reasons for the prohibition against lawyers financially assisting litigation clients. First, it prevents lawyers from having “too great a financial stake in the litigation.” Second, allowing assistance would “encourage clients to pursue lawsuits that would not otherwise be brought.”

Regarding the first reason, because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer’s advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client’s recovery and therefore could affect the lawyer’s judgment.

Regarding the second reason—that financial assistance will “encourage... lawsuits that might not otherwise be brought”—in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA Policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule’s restrictions, the amendment ensures equal justice under law, a core ABA mission.⁵

Additional support for this conclusion is found in legislation—for example, in civil rights and anti-discrimination statutes that empower courts to award counsel fees to the prevailing plaintiff. The policy behind this legislation is to facilitate access to courts, not discourage it.⁶ Lawyers in turn advance the legislative purpose if they can financially help their indigent clients with living expenses while a case is pending.

Support is also found in two Supreme Court opinions recognizing the social value of court access. In another context, Justice Hugo Black wrote “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁷ Nor can there be equal justice when the ability to bring and prosecute a case—to get a trial at all—is lost because of extreme poverty.

ABA Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), on file with SCLAID (hereinafter, “SCLAID Survey”). See also Schrag, *supra* note 1 at 40.

³ SCLAID Survey, *supra* note 2, at 3.

⁴ *Id.* at 1.

⁵ See ABA MISSION STATEMENT, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited May 4, 2020). Many ABA policies support equal justice. See, e.g., ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).

⁶ See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (“The purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” H.R. REP. NO. 94-1558, p. 1 (1976)).

⁷ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

Nearly thirty years later, Justice Byron White rejected the argument that restrictions on lawyer advertising were justified by the goal of not “stirring up litigation.” Justice White wrote:

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: ‘we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action’. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.⁸

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

II. Support for the Proposed Rule in the Nonprofit Community

SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, including the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide.⁹ Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel (“APBCo”), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country’s largest law firms wrote:

APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way

⁸ *Zauderer v. Disciplinary Counsel*, 471 U.S. 626, 643 (1985) (*citing* *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977)).

⁹ See (i) SALT email of April 24, 2020, (ii) NLADA Memo of April 23, 2020, and (iii) emails dated April 10 and April 11, 2020 from Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte, Roth, & Zabel and former member of SCLAID, and Barbara S. Gillers, SCEPR Chair, to public interest lawyers and law school clinicians, and responses, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.

that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy behind the Rule.¹⁰

III. Background

Model Rule of Professional Conduct 1.8(e) was adopted in 1983.¹¹ Its prohibition against financial assistance in connection with litigation is derived from the common law prohibitions against champerty and maintenance.¹² As originally defined, maintenance is “improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.”¹³ Champerty is “a specialized form of maintenance in which the person assisting another’s litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery.”¹⁴

Payments or loans for litigation costs and expenses are allowed under the rule “because [they] are virtually indistinguishable from contingent fees and help ensure access to the courts.”¹⁵ Comment [10], which was added in 2001 on the recommendation of the Ethics 2000 Commission,¹⁶ makes clear that “court costs and litigation expenses [include] the expenses of medical examination and the costs of obtaining and presenting evidence”.¹⁷ Litigation expenses also typically include payments for experts, translators, court reporters, medical examinations connected to the merits or remedies, mailing, and photocopying.¹⁸ However, living expenses in connection with pending or contemplated litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule

¹⁰ See Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.

¹¹ ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 193 (2013).

¹² See MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) “has its basis in common law champerty and maintenance”); Cristina D. Lockwood, *supra* note 1 at 466 (“the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance”); Utah State Bar, Advisory Op. 11-02 (2011) (Rule 1.8(e) is “derived from the common law prohibition of champerty and maintenance”) (cite omitted); Mich. State Bar Advisory Opinion RI-14 (1989) (Rule 1.8(e) “is the result of the common law rules against champerty and maintenance”). See also John Sahl, *Helping Clients With Living Expenses; “No Good Deed Goes Unpunished”*, 13 No. 2 PROF. LAW. 1 (Winter 2002) (common law doctrines of champerty and maintenance influenced the ABA Rules against financial assistance to clients).

¹³ STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 30 (11th ed. 2018) (*quoting In re Trepca Mines, Ltd.*, [1963] 3 All E.R. 351 (C.A.)).

¹⁴ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 at 940 (1986) (cites omitted); GILLERS, *supra* note 13 at 630 (“[c]hamperty [is] the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation” (*quoting Saladin v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)); *In re Primus*, 436 U.S. 412, 424 n. 15 (1978) (champerty is “maintaining a suit in return for a financial interest in the outcome”; maintenance is “helping another prosecute a lawsuit”).

¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

¹⁶ See GARWIN, *supra* note 11 at 207.

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

¹⁸ N.Y. City Bar, Formal Op. 2019-6 at 3 (2019).

because of concerns rooted in traditional common law prohibitions on champerty and maintenance.

Modern American applications of the doctrines of champerty and maintenance are varied and in some jurisdictions are quite limited.¹⁹ Moreover, courts and commentators have recognized that these doctrines “can be used abusively—to deny unpopular litigants access to the courts to vindicate constitutional rights. They can also make it harder for persons with even mundane claims to go to court”²⁰ Some bar committees have rejected the essential justification for the doctrines.²¹ The SCLAID Survey demonstrated that the prohibition on living expenses is especially harsh on indigent clients for whom even small financial burdens can pose significant barriers to initiating, participating in, and completing litigation.²² For all of these reasons, and those explained below, the prohibition on financial assistance should no longer apply in the limited circumstances and the types of representations covered by the proposed rule.

IV. Analysis

A. The Current Rule

Model Rule of Professional Conduct 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”²³

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, *because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.*”²⁴ The Comment continues: “[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence” is permitted “because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

¹⁹ REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 5-8 (Feb. 28, 2020) (“[t]he extent to which the United States has adopted and has continued to enforce prohibitions [based on champerty and maintenance] varies by jurisdiction”) (cites omitted).

²⁰ GILLERS, *supra* note 13 at 631 (cites omitted).

²¹ See, e.g., Utah State Bar, Advisory Op. 11-02, *supra* note 12 at 4 (permitting “small charitable gifts” under Utah RPC 1.8(e), which is “more permissive” than M.R. 1.8(e); observing that “[t]he original goal of not stirring up litigation is no longer a justification for [the rule]”) (cites omitted)).

²² See Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR [hereinafter, “SCLAID Memo”].

²³ MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2019).

²⁴ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.”²⁵

B. The Proposed Rule

The proposed rule adds a new exception, 1.8(e)(3). The new exception permits lawyers representing poor people pro bono or through certain organizations or programs to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be gifts not loans for basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the litigation or administrative proceedings or from withstanding the delays that put substantial pressure on the client to settle. The assistance is permitted even if the representation is eligible for an award of attorney’s fees under a fee-shifting statute, for example, the Civil Rights Attorney’s Fees Award Act.²⁶ The lawyer may not promise the assistance in advance, seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client, or advertise its availability. The new provision reads:

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. The legal services must be delivered at no fee to the indigent client and the lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide financial assistance to clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

²⁵ *Id.*

²⁶ 42 U.S.C.A. § 1988 (“[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs [with exceptions]”).

SCEPR and SCLAID propose new Comments [11], [12], and [13] to explain key elements of the new exception.

Comment [11]

New Comment [11] offers guidance on covered expenses and permitted amounts. Below, this Report first sets out the text of new Comment [11] and then discusses its key elements. The text reads:

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4

Living Expenses

Comment [11] gives examples of permitted assistance: “Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life.” This would include reasonable contributions for meals, clothing, transportation, housing and similar basic necessities. Examples from SCLAID include small amounts for moving to avoid eviction, bus fare, meals, clothes to go to court, and groceries, including cleaning supplies and toilet paper.²⁷

Amounts

The Rule and the Comments permit contributions of modest and reasonable amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.²⁸ The flexibility gives lawyers room to decide amounts based on

²⁷ See SCLAID Survey, *supra* note 2.

²⁸ See D.C. Rule of Prof'l Conduct 1.8(d) (a lawyer may “pay or otherwise provide . . . financial assistance which is *reasonably necessary* to permit the client to institute or maintain the litigation or administrative proceedings”) (emphasis added); Minn. Rule of Prof'l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship”; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the

the cost of living in their jurisdictions and other factors. Rent assistance and food costs in New York City, for example, would differ from that in a rural area. Lawyers routinely make judgments about reasonableness. See, e.g., Model Rule 1.4(a)(2) (lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); Model Rule 1.4(a)(3) (lawyers must “keep the client reasonably informed about the status of the matter”); Model Rule 1.4(a)(4) (lawyers must “promptly comply with reasonable requests for information”); Model Rule 1.5 (lawyers must “not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses”); and Model Rule 1.6 (limiting the disclosure of confidential information “to the extent the lawyer reasonably believes necessary”); see also, Model Rule 1.0(h), (i) and (j) (defining “reasonable,” “reasonably,” “reasonable belief” and “reasonably should know”).

No Definition of “Indigent”

The new Rule and Comments do not add a definition of “indigent.” None is needed. The word “indigent” has been in Rule 1.8(e) since 1983. It was also in the predecessor rule, DR 5-103(B). SCEPR is aware of no problems in applying this term. Further, the Model Rules already address obligations toward the indigent, the poor, and “persons of limited means.”²⁹ Additionally, SCEPR opinions address lawyers’ obligations toward the “indigent.”³⁰ Webster’s Dictionary defines (1) “indigent” as “suffering from indigence” and “impoverished” and (2) “indigence” as (3) “a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking” and (4) “impoverished.”

outcome of the litigation) (emphasis added); Miss. Rule of Prof’l Conduct 1.8(2)(2) (permits a lawyer to advance (i) “*reasonable* and necessary” (a) “medical expenses associated with treatment for the injury giving rise to the litigation” and (b) “living expenses incurred”; client must be in “dire and necessitous circumstances”; other limitations and conditions apply) (emphasis added). Mont. Rule 1.8(e)(3) (a lawyer may guarantee a loan from certain financial institutions “for the sole purpose of providing basic living expenses;” the loan must be “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; prohibits promises or advertisements before retention) (emphasis added); N.D. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; no promise of assistance before retention) (emphasis added); Tex. Rule of Prof’l Conduct 1.08(d)(1) (a lawyer may “advance or guarantee . . . *reasonably necessary* medical and living expenses, the repayment of which may be contingent on the outcome of the matter”) (emphasis added); Utah Rule of Prof’l Conduct 1.8(e)(2) (a lawyer representing an indigent client may “pay . . . minor expenses *reasonably connected* to the litigation”) (emphasis added). Only *one* of the eleven jurisdictions incorporates a dollar amount: Mississippi. See Miss. Rule of Prof’l Conduct 1.8(e)(2) (Permitted expenses “shall be limited to \$1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless [the Standing Committee on Ethics of the Mississippi Bar approves a greater amount.]”).

²⁹ MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. [3] provides: “Persons eligible for legal service [that meet Rule 6.1] are those who qualify for participation in programs funded by the [LSC] and those whose incomes and financial resources are slightly above guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women’s centers and food pantries that serve those of limited means.”)

³⁰ See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligations of lawyers “who represent *indigent* persons”) (emphasis added).

Synonyms include “needy, necessitous, and impoverished.”³¹ Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.³²

Comment [12]

Comment [12] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance. It provides:

[12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

New Comment [13]

New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters. It reads:

[13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

³¹ See ROGET’S INTERNATIONAL THESAURUS § 836.8 (3rd ed.). See also THE COMPACT OXFORD ENGLISH DICTIONARY, NEW EDITION, SECOND EDITION (1994) (“indigent” means “destitute,” “lacking in the necessities of life,” “in needy circumstances,” “characterized by poverty,” “poor,” “needy”).

³² See, e.g., Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* n.4 (Sept. 2009), <https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf> (“LSC establishes maximum income levels for persons eligible for civil legal assistance . . . the maximum level is equivalent to 125 percent of the federal poverty guidelines”). For poverty guidelines, see U.S. Department of Health & Human Services, *Poverty Guidelines 2020* (2020), <https://aspe.hhs.gov/poverty-guidelines>. See also ABA FINDLEGALHELP.ORG FREQUENTLY ASKED QUESTIONS, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (last visited May 4, 2020) (clients of public defenders are “indigent”).

C. Proposed 1.8(e)(3) Does Not Present the Ethical Risks that 1.8(e)(1) and (2) Address

Policy Against “Encouraging Litigation”

As noted earlier, Model Rule 1.8(e) prohibits living expenses “*because [permitting them] would encourage clients to pursue lawsuits that might not otherwise be brought. . .*”³³

The proposed amendment could result in a poor client being able to bring and maintain a lawsuit that would not otherwise be brought or that would be settled quickly if brought because of the client’s adverse financial circumstances. SCEPR and SCLAID deem this a worthy objective. It reflects the view that legal ethics rules should not impede a poor client’s access to the courts, as the current rule does, where the conditions described in the proposed rule are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposed rule will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no benefit if the amendment allowed financial assistance to indigent clients only if a lawyer were willing to forego a court-ordered fee under a fee-shifting statute.

Comment [10] is *not* addressed to the problem of frivolous litigation, as some analysts seem to suggest.³⁴ Other rules do that. Model Rule 3.1 makes clear that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so *that is not frivolous*. . . .”³⁵ Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify, *inter alia*, that court filings are not “presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . [and that] claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law.”³⁶ Many jurisdictions have similar court rules and other mechanisms to prevent frivolous litigation.³⁷

Whatever the relationship between financial assistance and frivolous litigation in other contexts, however, it is not credible that a lawyer working *without fee* would assist

³³ MODEL RULES OF PROF’L CONDUCT R.1.8(e) cmt. [10] (2019).

³⁴ See Lockwood, *supra* note 1 at 472-474 (“the assertion [in Cmt. [10] is that] unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation”); N.Y. CITY BAR REPORT BY THE PROF’L RESPONSIBILITY COMM. PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL CONDUCT 8 (Mar. 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct> [hereinafter “CITY BAR RPT.”] (NYRPC 1.8 cmt. [10], which is identical to Model Rule 1.8 cmt. [10], is aimed, in part, to curb frivolous litigation). Lawyers will “support” plaintiffs, it is suggested, in order to get retained to bring cases that turn out to be frivolous. As shown in the text by reference to Model Rule 1.8 cmt. [10] this is *not* the purpose of the prohibition in 1.8(e). It is not in the text. It is not in the Comment. Other Rules perform that function.

³⁵ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2019) (emphasis added).

³⁶ FED. R. CIV. P. 11(b)(1) and (b)(2) (emphasis added).

³⁷ See, e.g., N.Y. Rules of the Chief Administrator of the Courts Part 130, *Awards of Costs and Imposition of Financial Sanctions For Frivolous Conduct In Civil Litigation*, 22 NYCRR 130-1.1.

a poor client with living expenses, which could not be recouped, so that the lawyer could file a frivolous lawsuit.

No Compromise of the Lawyer's Independent Judgment

Rule 1.8(e) forbids financial assistance for living expenses also to avoid conflicts between the interests of the lawyer and the interests of the client and to protect the lawyer's independence. Living expenses are not allowed "*because such assistance gives lawyers too great a financial stake in the litigation.*"³⁸

Rule 1.8(e)(1), however, allows the lawyer to advance the costs of litigation with repayment contingent on the outcome of the matter. There is no cap on the amount of these expenses, which can amount to tens of thousands of dollars. Lawyers also may invest thousands of hours on a contingency matter which will be compensated only if there is a recovery. The profession tolerates these outlays of time and money, trusting that lawyers will honor their obligations to exercise independent professional judgment in the advice they give clients and not be influenced by their own financial concerns.

The proposed rule presents no such risks simply because loans to assist indigent clients are prohibited. Unlike in the exception for advancing the costs of litigation, lawyers have no interest in repayment of the financial help.

No Competition for Clients

Some opponents of expanding a lawyer's discretion to provide financial assistance under Rule 1.8(e) expressed concern that lawyers will use this discretion to improperly compete for clients.³⁹ The proposed rule avoids this problem because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers don't compete for business. As stated by SCLAID: "Poverty lawyers and lawyers who provide *pro bono* service to clients in poverty are simply not competing for the business of their clients."⁴⁰

Other Impediments to Financial Assistance

There may be other laws or rules in American jurisdictions that will operate if financial assistance is allowed and provided. Some commenters seemed to suggest that the proposed rule might affect a client's tax status or the ability to qualify for public assistance or social services or, potentially, a financial disclosure requirement. SCEPR and SCLAID have seen no evidence that the type of modest assistance to indigent clients

³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

³⁹ See, e.g., Sahl, *supra* note 12 at 5 ("[s]ome practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance") (cite omitted); Schrag, *supra* note 1 at 54 (a "thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients").

⁴⁰ SCLAID Memo, *supra* note 22.

for basic necessities of life permitted by the proposed rule will have such consequences.⁴¹ However, Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and a reference is made to that obligation in the proposed new Comments.

Financial assistance to transactional clients, social hospitality toward all clients as part of business development, and payment of litigation expenses that may or may not be recovered may all have collateral consequences under tax or other law. But in allowing each, the only question is whether the activity creates the kind of dangers that should concern the Model Rules of Professional Conduct. The limited exception in the proposed amendment does not create those dangers.

V. The Need for ABA Leadership

In all but eleven U.S. jurisdictions Rule 1.8(e) is identical or substantially similar to Model Rule 1.8(e).⁴² Ethics Committees generally interpret the prohibition strictly.⁴³ Courts generally discipline lawyers for providing clients with non-litigation expenses.⁴⁴ Only a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbid it.⁴⁵

⁴¹ SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposed rule. He told the Committee that the proposed rule appears to be a gift with true donative intent; that the gift should be neither income to the donee nor deductible by the donor for federal income tax purposes; and that there is an exclusion from gift taxes of up to \$15,000 per donee for 2020. Tom Callahan also indicated that the tax impact, if any, of state and local taxes has not been considered. Email exchange between Tom Callahan and SCEPR Chair Barbara S. Gillers, on file with SCEPR.

⁴² See ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 173 (9th ed. 2019) (“[m]ost jurisdictions do not allow an exception for assisting indigent clients”).

⁴³ See N.Y. City Bar, Formal Op. 2019-6, *supra* note 18 at 2 (“routine medical care and living expenses do *not* qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement”) (emphasis in original) (cites omitted); Conn. Bar Ass’n, Informal Op. 2011-10 (2011) (water bills; \$300 in advance rent to avoid eviction); Pa. Bar Ass’n, Informal Op. 94-12 (1994) (bond for preliminary injunction); Ariz. State Bar, Formal Op. 95-01 (1995) (transportation costs); Ill. State Bar Ass’n, Advisory Op. on Prof’l Conduct 95-6 (1995) (medical care); S.C. Bar Ethics Advisory Comm., Advisory Op. 89-12 (1989) (medical treatment). *But see* N.C. State Bar, Formal Op. 7 (occasional cab or bus fare or other transportation cost may be permitted as a litigation cost “when reasonable in light of the distance to be traveled”).

⁴⁴ See Schrag, *supra* note 1 at 59-61 (discussing “unforgiving” application of Rule 1.8(e)); Lawyer Disciplinary Bd. v. Nessel, 769 S.E.2d 484, 493 (W. Va. 2015) (prohibition on living expenses is absolute; no exception for “altruistic intent”); Matter of Cellino, 798 N.Y.S.2d 600 (4th Dept. 2005) (suspension for, among other violations, loaning a client money for the client’s son’s nursing and care and rehabilitation); State ex rel. Oklahoma Bar Ass’n v. Smolen, 17 P.3d 456 (2000) (suspending a lawyer for, among other violations, loaning a client \$1200 for living expenses); Maryland Attorney Grievance Comm’n v. Kandel, 563 A.2d 387 (Md. App. 1989) (discipline for advancing the cost of medical treatment and transportation to obtain the treatment).

⁴⁵ See, e.g., Florida Bar v. Taylor, 648 So.2d 1190, 1192 (Fla. 1994) (used clothing for child and \$200 for necessities approved as “act of humanitarianism”); Okla. Bar Ass’n, Op. 326 (2009) (“[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses”); Va. State Bar Legal Ethics Op. 1830 (2006) (“nominal amounts” to an incarcerated client to buy personal items or food at the jail

Of the jurisdictions that have adopted an exception to Rule 1.8(e)'s prohibition on providing assistance for living expenses, some go beyond the modest amendment SCEPR and SCLAID propose.⁴⁶ They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, the proposed rule permits gifts only. No loans. No advances. No reimbursements. New Jersey has a specific provision for pro bono legal services.⁴⁷

The proposed rule draws on the rules of the eleven jurisdictions, expert commentary, and comments provided in response to earlier drafts. In addition, SCEPR and SCLAID notes that recently, the New York State Bar Association (NYSBA) House of Delegates unanimously approved a recommendation by the NYSBA Committee on Standards of Attorney Conduct (COSAC) and the City Bar Professional Responsibility Committee to adopt a humanitarian exception to NYRPC 1.8(e) that is similar in some respects to the one SCEPR and SCLAID propose for the Model Rules.⁴⁸

The ABA has been a leader in access to justice for decades. It should lead here, too, by changing an out-of-date rule that interferes with access to justice by the most vulnerable population and encouraging all American jurisdictions to adopt the new rule.

VI. Support Based on Bar Counsel Experience

SCEPR asked bar counsel for the eleven jurisdictions with some form of humanitarian exception about their experience implementing the provision. Two jurisdictions, D.C. and Louisiana, responded. Both jurisdictions permit loans for living expenses and apply in contingency matters. Chief Disciplinary Counsel in Louisiana wrote that Louisiana's version of Rule 1.8(e), which has been in effect since 1976,

commissary); Md. State Bar Ass'n Comm. on Ethics, Op. 2000-42 (2000) (a "de minimus gift" does not violate 1.8(e)); Ariz. State Bar, Formal Op. 91-14 (1991) (loan for client's daughter's medical care prohibited but a gift for that purpose is permitted if the lawyer has a "charitable motivation").

⁴⁶ In addition to the rules cited in footnote 28, see Ala. Rule of Prof'l Conduct 1.8(e) (lawyer may advance or guarantee emergency assistance; prohibits (i) making repayment contingent on the outcome and (ii) promises or assurance of assistance before retention); Cal. Rule of Prof'l Conduct 1.8.5 (permits a lawyer to pay a client's personal or business expenses to third person, "from funds collected or to be collected for the client as a result of the representation" with the consent of the client; and "to pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interest of an indigent person in a matter in which the lawyer represents the client"); La. Rule of Prof'l Conduct 1.8(e) (permits financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances"; conditions and limitations apply).

⁴⁷ N.J. Rule of Prof'l Conduct 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . (e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to an indigent client whom the organization, program or attorney is representing without fee." N.J. Rules of Court, R. 1:21-11(a) defines "qualifying pro bono service" to include legal assistance through a legal services or public interest organization and legal assistance through a law school clinical or pro bono program.

⁴⁸ NYSBA COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT MEMORANDUM 3-6 (Jan. 15, 2020), <https://nysba.org/app/uploads/2020/03/12-14-cosac-AGENDA-ITEM-8.pdf>. CITY BAR RPT., *supra* note 34.

permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state's disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.⁴⁹

Disciplinary Counsel for D.C. wrote:

We have had few if any complaints about lawyers violating Rule 1.8(d) [the D.C. analogue to M.R. 1.8(e)]. I can't represent that no one has ever complained because I don't have a way of checking every one of the approximately 1000 complaints we receive each year. Certainly, we have never brought a case based on a violation of that rule, and it has been mentioned in only three reported opinions, two of which are reciprocal matters from other states whose parallel rule is not as liberal as our Rule 1.8(d).⁵⁰

VII. Support from the Pro Bono Community

Commenters have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR's work in connection with the proposed rule shows that there is broad support for this in the pro bono and law school clinician

⁴⁹ Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).

⁵⁰ E-mail from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason (Apr. 8, 2020) (on file with SCEPR) (citing the following reciprocal cases: *In re Schurtz*, 25 A.3d 905, 906-907 (D.C. 2011); *In re Edelstein*, 892 A.2d 1153, 1159 n.3 (D.C. 2006); *In re Wallace*, Board Docket No. 17-BD-001 at 10 n.6 (BPR HCR, Mar. 16, 2018)). See also Sahl, *supra* note 12 at 8 (DC's "permissive approach concerning lawyer advances for living expenses has existed for a 'long time and has not produced any official complaints.' Nor has the approach caused the bar any 'reason to be concerned.'" (citing the author's conversations with D.C. Bar Counsel); CITY BAR RPT., *supra* note 34 at 10 ("the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a 'humanitarian exception,' in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases.")).

communities.⁵¹ SCLAID is a cosponsor. ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities—the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.⁵² Just recently—on Easter weekend and in response to SCEPR’s Survey—one lawyer wrote:

Ethics rule 1.8, and its correlating rule under New York rules, has substantially hindered our ability to support clients: rather than supporting those in the most desperate of circumstances, we can only help clients with no pending or contemplated litigation. We urge the rule be amended to allow our ability to respond to our client’s financial needs during this crisis.⁵³

Some lawyers outside the pro bono community have suggested that giving pro bono lawyers discretion to help their needy clients would create stress that might impair the client-lawyer relationship. SCEPR has seen no evidence from the pro bono community that this is true, and there are several approaches short of denying the discretion to the many pro bono lawyers who seek it. Lawyers and legal services organizations can adopt a policy against providing assistance with living expenses to any client. Alternatively, decisions can be made not by individual attorneys but by a central-decision maker according to rules and standards adopted by the organization.

VIII. Conclusion

For the foregoing reasons, the ABA should adopt the proposed amendments to Rule 1.8(e).

Respectfully submitted,

Barbara S. Gillers
Chair, Standing Committee on Ethics
and Professional Responsibility
August 2020

⁵¹ See Section II of this Report.

⁵² *Id.*

⁵³ E-mail from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers (Apr. 10, 2020) (on file with SCEPR).



State Bar of Georgia

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

- (a) A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or
 - (2) a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- (i) A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
- (2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

The maximum penalty for a violation of Rule 1.8 (b) is disbarment. The maximum penalty for a violation of Rule 1.8 (a) and 1.8 (c)-(j) is a public reprimand.

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Use of Information to the Disadvantage of the Client

[1B] It is a general rule that an attorney will not be permitted to make use of knowledge, or information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this general rule and provides that the client may waive this prohibition. However, if the waiver is conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the objective advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j) of this rule.

Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial

assistance provided by the lawyer. It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.

Payment for a Lawyer's Services from One Other Than The Client

[5] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

[6] Paragraph (g) requires informed consent. This requirement is not met by a blanket consent prior to settlement that the majority decision will rule.

Agreements to Limit Liability

[7] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

[9] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[10] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of litigation set forth in paragraph (e).