



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

March 19, 2021

Via Zoom

	Page Nos.
<u>I. Welcome</u>	(Bagley) 1-2
<u>II. Approval of Minutes from 2/24/21 meeting</u>	(Bagley) 3-7
<u>III. Status of prior recommendations</u>	(NeSmith)
<u>IV. Action Items</u>	
A. Rule 4-207	(Mittelman) 8
i. Proposed draft to remove certified mail requirement	
<u>V. Discussion Items</u>	
A. Request from the Formal Advisory Opinion Board (Lefkowitz)	
i. David Lefkowitz's email to FAOB	9
ii. <u>Innovative Images LLC. v. James Darren Summerville, et al.</u>	10-36
iii. ABA Formal Ethics Opinion 02-245	37-43
B. Proposed Rule 1.8 (e)(3)	(Frederick)
i. Proposed draft to add ABA 1.8(e)(3)	44-50

C. Possible revision to Part 7 of the Rules—Update from the subcommittee

- | | | |
|------|--------------------|--------|
| i. | Proposed revisions | 51-61 |
| ii. | GRPC Part VII | 62-75 |
| iii. | ABA Report | 76-89 |
| iv. | ABA Rules 7.1--7.3 | 90-100 |

V. Adjourn



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

Committee Members

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

Disciplinary Rules and Procedure, s Committee
Meeting of February 24, 2021
Via Zoom

MINUTES

Chair Harold Michael Bagley called the meeting to order at 11:04 a.m.

Attendance:

Committee members: Harold Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang, Patrick H. Head, R. Javoyne Hicks, William D. James, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, Patrick E. Longan, Jabu Sengova, and William Thomas, Jr.

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

Guests: Supreme Court Justice Peterson, Supreme Court Deputy Clerk Tia Milton, Acting United States Attorneys, Peter Leary, Stacy Ludwig, and Kirk Erskine, United States Senior Litigation Counsel Charysse Alexander, District Attorney Sherry Boston and Robert W. Smith, Jr., General Counsel for Prosecuting Attorneys' Council of Georgia.

Approval of Minutes:

The Committee approved the Minutes from the January 8, 2021 meeting.

Action Item:

Rule 3.8

Sherry Boston presented the Georgia District Attorneys' version of Rule 3.8. Charysse Alexander presented the Georgia United States Attorneys' Office's version of Rule 3.8. The Committee thoroughly discussed the differences between the two versions. By unanimous vote, the Committee adopted the Georgia District Attorneys' version of Rule 3.8. Rule 3.8 as approved is attached.

The meeting adjourned at 12:10 p.m.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- a. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- b. refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;
- c. ~~Reserved~~ comply with Rule 4.2.
- d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;
- e. exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this rule;
- f. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 1. the information sought is not protected from disclosure by any applicable privilege;
 2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 3. there is no other feasible alternative to obtain the information;
- g. except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.
- h. promptly disclose new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted to an appropriate court or authority. If the conviction was obtained in the prosecutor's jurisdiction, the prosecutor shall promptly disclose that evidence to the defendant unless a court authorizes delay and undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- i. seek to remedy a conviction obtained in the prosecutor's jurisdiction when the prosecutor knows of clear and convincing evidence establishing that a defendant did not commit the offense.

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

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4: Misconduct.

[2] Reserved.

[3] Reserved.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6: Trial Publicity, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a

prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6 (b) or 3.6 (c): Trial Publicity.

[6] Reserved

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (h) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (h) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (i), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (h) and

(i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Rule 4.207. Letters of Formal Admonition and Confidential Reprimands; Notification and Right of Rejection

In any case where the State Disciplinary Board votes to impose discipline in the form of a Formal Letter of Admonition or a Confidential Reprimand, such vote shall constitute the State Disciplinary Board's finding of Probable Cause. The respondent shall have the right to reject, in writing, the imposition of such discipline.

a. Notification to respondent shall be as follows:

1. in the case of a Formal Letter of Admonition, the letter of admonition;
2. in the case of a Confidential Reprimand, the letter notifying the respondent to appear for the administration of the reprimand;
sent to the respondent at his or her address as reflected in the membership records of the State Bar of Georgia, ~~via certified mail, return receipt requested.~~

b. Rejection by respondent shall be as follows:

1. in writing, within 30 days of notification; and
2. sent to the State Disciplinary Board via any of the methods authorized under Rule 4-203.1 (c) and directed to the Clerk of the State Disciplinary Boards at the current headquarters address of the State Bar of Georgia.

c. If the respondent rejects the imposition of a Formal Letter of Admonition or Confidential Reprimand, the Office of the General Counsel may file a formal complaint with the Clerk of the Supreme Court of Georgia unless the State Disciplinary Board reconsiders its decision.

d. Confidential Reprimands shall be administered before the State Disciplinary Board by the Chair or his designee.

From: Betty Derrickson

Sent: Wednesday, March 10, 2021 3:23 PM

To: 'Alfreda Lynette Sheppard' <ASheppard@watsonspence.com>; 'Amanda Rourk Clark Palmer' <aclark@gsllaw.com>; Betty Derrickson <BettyD@gabar.org>; 'C. Andrew Childers' <achilders@cssfirm.com>; 'Chris Steinmetz III' <cjs@ggsattorneys.com>; 'David N. Lefkowitz' <dnl@lefkowitzfirm.com>; 'Edward B. Krugman' <Krugman@bmelaw.com>; 'Jacob Edward Daly' <jdaly@finglaw.com>; 'Jeffrey Alan Van Detta' <jvandetta@johnmarshall.edu>; 'Jeffrey Hobart Schneider' <jeffreyschneider@wncwlaw.com>; 'Jennifer M. Romig' <jennifer.romig@gmail.com>; John Shiptenko <JohnS@gabar.org>; 'Letitia A. McDonald' <tmcdonald@kslaw.com>; 'Lonnie T. Brown Jr.' <ltbrown@uga.edu>; 'Mary Prebula' <mprebula@prebulallc.com>; 'Megan Elizabeth Boyd' <mboyd7@gsu.edu>; 'Elissa Haynes' <HaynesE@deflaw.com>; 'Norbert D. Hummel IV' <bert.hummel@lewisbrisois.com>; 'Patrick E. Longan' (longan_p@law.mercer.edu) <longan_p@law.mercer.edu>; 'Sherry Boston' <sboston@dekalbcountyga.gov>

Cc: Bill NeSmith <BillN@gabar.org>; Paula Frederick <PaulaF@gabar.org>

Subject: Message for David Lefkowitz Regarding March 18, 2021 Formal Advisory Opinion Board Meeting

Good afternoon Board members:

The Formal Advisory Opinion Board meeting scheduled for March 18, 2021 is canceled. At this time, there are no action items requiring the work of the Board.

Formal Advisory Opinion Request No. 20-R2 was the only action item on the March 18, 2021 meeting agenda. You will recall that on September 8, 2020, the Supreme Court of Georgia issued an order in Innovative Images, LLC v. Summerville (see attached) in which the Court discussed whether Georgia lawyers have an obligation under Rule 1.4 (b) to “fully apprise their clients of the advantages and disadvantages of arbitration before including a provision in a retainer agreement mandating arbitration of legal malpractice claims.” The Court declined to decide this issue, stating, “we will leave it to the State Bar of Georgia to address in the first instance whether this is a subject worthy of a formal advisory opinion or amendment to the GRPC.” On October 27, 2020, the Formal Advisory Opinion Board accepted this request for the drafting of a formal advisory opinion, and a subcommittee was appointed to draft a proposed opinion for the Board’s consideration. While working on a proposed draft, the subcommittee discussed whether a formal advisory opinion is the best way to provide guidance to Georgia lawyers on this issue. The subcommittee decided that the issue raised in the request might be better addressed through amending the Georgia Rules of Professional Conduct rather than an opinion. This matter will be an action item on the next Disciplinary Rules and Procedures Committee meeting agenda. The Disciplinary Rules and Procedures Committee is scheduled to meet on Friday, March 19, 2020.

Once there are action items for the Board to address, John and Betty will communicate with the Board about scheduling the next meeting.

Thank you.

David Lefkowitz, Chair

In the Supreme Court of Georgia

Decided: September 8, 2020

S19G1026. INNOVATIVE IMAGES, LLC v. JAMES DARREN
SUMMERVILLE, et al.

NAHMIAS, Presiding Justice.

Innovative Images, LLC (“Innovative”) sued its former attorney James Darren Summerville, Summerville Moore, P.C., and The Summerville Firm, LLC (collectively, the “Summerville Defendants”) for legal malpractice. In response, the Summerville Defendants filed a motion to dismiss the suit and to compel arbitration in accordance with the parties’ engagement agreement, which included a clause mandating arbitration for any dispute arising under the agreement. The trial court denied the motion, ruling that the arbitration clause was “unconscionable” and thus unenforceable because it had been entered into in violation of Rule 1.4 (b) of the Georgia Rules of Professional Conduct (“GRPC”) for

attorneys found in Georgia Bar Rule 4-102 (d). In Division 1 of its opinion in *Summerville v. Innovative Images, LLC*, 349 Ga. App. 592 (826 SE2d 391) (2019), the Court of Appeals reversed that ruling, holding that the arbitration clause was not void as against public policy or unconscionable. See *id.* at 597-598. We granted Innovative's petition for certiorari to review the Court of Appeals's holding on this issue.

As explained below, we conclude that regardless of whether Summerville violated GRPC Rule 1.4 (b) by entering into the mandatory arbitration clause in the engagement agreement without first apprising Innovative of the advantages and disadvantages of arbitration – an issue which we need not address – the clause is not void as against public policy because Innovative does not argue and no court has held that such an arbitration clause may *never* lawfully be included in an attorney-client contract. For similar reasons, the arbitration clause is not substantively unconscionable, and on the limited record before us, Innovative has not shown that the clause was procedurally unconscionable. Accordingly, we affirm the

judgment of the Court of Appeals.¹

1. *Facts and procedural history.*

As summarized by the Court of Appeals, the record shows the following:

In July 2013, Innovative retained Mr. Summerville and his law firm to represent it in post-trial proceedings following an adverse civil judgment, and the parties executed an attorney-client engagement agreement that set out the terms of the representation (the “Engagement Agreement”). A section of the Engagement Agreement entitled “Other Important Terms” included a choice-of-law clause stating that the “agreement and its performance are governed by the laws of the State of Georgia.” That section of the Engagement Agreement also included an arbitration clause (the “Arbitration Clause” or the “Clause”) stating:

Any dispute arising under this agreement will
be submitted to arbitration in Atlanta, Georgia

¹ The trial court issued a separate order opening an automatic default against the Summerville Defendants under the “proper case” ground, see OCGA § 9-11-55 (b). Innovative cross-appealed that order, arguing that the Summerville Defendants had failed to provide a reasonable explanation for their failure to timely file an answer. See *Summerville*, 349 Ga. App. at 604. In Division 2 of its opinion, the Court of Appeals affirmed the trial court’s order, saying that “[f]or [the proper case] ground to apply, the defendant must provide a reasonable explanation for the failure to file a timely answer,” and holding that the Summerville Defendants had done so. *Id.* at 605-606. We recently disapproved *Summerville* to the extent that it holds that a reasonable excuse is required to open a default under the proper case ground. See *Bowen v. Savoy*, 308 Ga. 204, 209 n.7 (839 SE2d 546) (2020). Innovative’s petition for certiorari did not seek review of the Court of Appeals’s decision on the cross-appeal.

under the rules and procedures of the State Bar of Georgia Committee on the Arbitration of Attorney Fee Disputes, if concerning fees, or by an arbitrator to be agreed to by the parties, if concerning any other matter. Alternatively, you may choose to arbitrate any dispute arising under this agreement in Atlanta by a single arbitrator provided through the Atlanta office of Judicial Arbitration and Mediation Service (“JAMS”). The decision of any such arbitrator or arbitrators shall be binding, conclusive, and not appealable. In the event a dispute is not or cannot be arbitrated, the parties consent to the jurisdiction of and venue in the courts of Fulton County, Georgia.

In October 2017, Innovative filed the present legal malpractice action in the State Court of Fulton County against the Summerville Defendants for the allegedly negligent post-trial representation of Innovative in the underlying civil suit, asserting claims for . . . professional negligence, breach of contract, and breach of fiduciary duties. During the course of the litigation, the Summerville Defendants filed a motion to stay discovery, compel arbitration, and dismiss the legal malpractice action based on the Arbitration Clause (the “Motion to Compel Arbitration”). Innovative opposed the Motion to Compel Arbitration, contending, among other things, that the Arbitration Clause was unconscionable because the Summerville Defendants had not advised Innovative of the possible disadvantages associated with arbitration.

The trial court denied the Summerville Defendants’ Motion to Compel Arbitration, agreeing with Innovative that the Arbitration Clause was unconscionable. The trial

court reasoned that although the [Georgia Arbitration Code (“GAC”), OCGA § 9-9-1 et seq.,] does not prohibit the arbitration of legal malpractice claims, Rule 1.4 (b) of the [GRPC] . . . and American Bar Association (“ABA”) Formal Opinion 02-425 support imposing a legal requirement on attorneys to explain to their prospective clients the possible disadvantages of binding arbitration clauses contained in attorney-client engagement contracts, such as the waiver of the right to a jury trial, the potential waiver of broad discovery, and the waiver of the right to appeal. And, because there was no evidence in the record that the Summerville Defendants explained the Arbitration Clause to their prospective client, Innovative, before the Engagement Agreement was signed, the trial court found that the Arbitration Clause was unconscionable and thus unenforceable.

Summerville, 349 Ga. App. at 593-595 (footnotes omitted).

The trial court issued a certificate of immediate review, and the Court of Appeals granted the Summerville Defendants’ application for interlocutory appeal. In its subsequent opinion reversing the trial court’s order, the Court of Appeals’s analysis bounced between case law and concepts related to whether a contract is unconscionable and case law and concepts related to whether a contract is void as against public policy. See *id.* at 595-598. The court ultimately “decline[d] to adopt a blanket rule that an arbitration

clause in an attorney-client contract is unconscionable and against public policy if the attorney did not explain the potential disadvantages of the clause to his prospective client before execution of the contract.” Id. at 597. The Court of Appeals also noted that this Court “has not addressed whether ABA Formal Opinion 02-425 should be adopted as the proper interpretation of [GRPC] Rule 1.4 (b),” and “for these combined reasons,” concluded “that the trial court erred in finding the Arbitration Clause unconscionable and in denying the Summerville Defendants’ Motion to Compel Arbitration.” Id. at 598.

Innovative petitioned for a writ of certiorari, which this Court granted, directing the parties to address two questions:

1. Under the Georgia Rules of Professional Conduct, is an attorney required to fully apprise his or her client of the advantages and disadvantages of arbitration before including a clause mandating arbitration of legal malpractice claims in the parties’ engagement agreement?
2. If so, does failing to so apprise a client render such a clause unenforceable under Georgia law?

We have now determined that we need not answer the first question

to answer the second question and decide this case.

2. We can decide this case without answering the first question that we asked in granting certiorari.

We consider first the question of whether an attorney violates the GRPC by entering into an agreement with a client mandating arbitration of legal malpractice claims without first fully apprising the client of the advantages and disadvantages of arbitration. As it did in the courts below, Innovative argues that because GRPC Rule 1.4 (b) is identical to ABA Model Rule of Professional Conduct 1.4 (b), we should adopt the reasoning in ABA Formal Opinion 02-425 and conclude that Summerville violated the GRPC by entering into the Arbitration Clause without first apprising Innovative of the potential consequences of arbitration. Innovative also points to several other states that have relied on the reasoning in ABA Formal Opinion 02-425 to similarly interpret their respective rules of professional conduct.

Both GRPC Rule 1.4 (b) and ABA Model Rule 1.4 (b) say, “A lawyer shall explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation.” In 2002, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 02-425, which concluded, relying principally on ABA Model Rule 1.4 (b), that lawyers must fully apprise their clients of the advantages and disadvantages of arbitration before including a provision in a retainer agreement mandating arbitration of legal malpractice claims. The ABA Committee reasoned that “[b]ecause the attorney-client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships, the retainer contract may be subject to special oversight and review” (footnotes omitted), and that the requirement that a lawyer explain to the client the type of arbitration clause at issue in this case derives from those fiduciary duties.² Courts in

² In February 2002, a few weeks before the issuance of ABA Formal Opinion 02-425, ABA Model Rule of Professional Conduct 1.8, which deals with the client-lawyer relationship, was amended to add Comment 14 (now Comment 17). The comment says in pertinent part, “This paragraph does not . . . prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.” This comment has not been added in the GRPC.

several states have followed the reasoning of ABA Formal Opinion 02-425, interpreting their own rules of professional conduct regarding attorney-client relationships to require the same sort of advice about prospective arbitration clauses. See, e.g., *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A3d 729, 737 (Me. 2017); *Castillo v. Arrieta*, 368 P3d 1249, 1257 (N.M. Ct. App. 2016); *Hodges v. Reasonover*, 103 S3d 1069, 1077 (La. 2012).³

ABA formal opinions and the opinions of other state courts and bar associations interpreting professional conduct rules analogous to Georgia's may be persuasive to this Court's interpretation of the GRPC. See, e.g., *In the Matter of Woodham*, 296 Ga. 618, 621-623 (769 SE2d 353) (2015); *Frazier v. State*, 257 Ga. 690, 694 (362 SE2d 351) (1987). We have determined, however, that we can and should

³ In other jurisdictions, the bar association has adopted the same requirement by advisory opinion relying principally on conflict-of-interest rules. See, e.g., Vt. Advisory Ethics Op. 2003-07; Ariz. Ethics Op. 94-05. Innovative does not argue that an attorney's entering into a mandatory arbitration provision without the client's informed consent violates any of the GRPC's conflict-of-interest rules, and the courts below did not address that question. We too do not address those rules or any other rules not argued by Innovative.

decide this case without deciding whether GRPC Rule 1.4 (b) prohibits attorneys from entering into agreements requiring arbitration of legal malpractice claims without their prospective clients' informed consent. Even if we assume – as we will for the remainder of this opinion – that such conduct *does* violate Rule 1.4 (b) such that an attorney may be subject to professional discipline, the Arbitration Clause in dispute here is neither void as against public policy nor unconscionable.

Rather than unnecessarily addressing this attorney ethics issue by judicial opinion, we will leave it to the State Bar of Georgia to address in the first instance whether this is a subject worthy of a formal advisory opinion about or amendment to the GRPC. We have before us only one factual scenario and the arguments only of the parties and one amicus curiae (the Georgia Trial Lawyers Association). Under these circumstances, the Bar's processes provide better opportunities to obtain input from all types of lawyers as well as the public and to consider all of the potentially applicable rules without limitation to a particular litigant's arguments. See

Georgia Bar Rules 4-101 (“The State Bar of Georgia is hereby authorized to maintain and enforce, as set forth in rules hereinafter stated, Georgia Rules of Professional Conduct to be observed by the members of the State Bar of Georgia and those authorized to practice law in the state of Georgia and to institute disciplinary action in the event of the violation thereof.”); 4-402 and 4-403 (establishing the Formal Advisory Opinion Board and the process for promulgating formal advisory opinions concerning the GRPC); 5-101 to 5-103 (establishing the process for amending Georgia Bar rules). See also *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 SW3d 494, 506-508 (Tex. 2015) (Guzman, J., concurring) (explaining that defining the parameters of an ethics rule requiring attorneys to fully inform clients about the potential consequences of arbitration before entering into an agreement mandating arbitration of legal malpractice claims is “more aptly suited to [the bar] rulemaking process, which invites the input of the bench and bar,” and that “[g]uidance is essential, but rather than articulating best-practices standards by judicial fiat, the rulemaking process

provides a better forum for achieving clarity and precision”).⁴

3. The Arbitration Clause is not unenforceable because it is neither void as against public policy nor unconscionable.

The trial court concluded that because Summerville’s entering into the Arbitration Clause without Innovative’s informed consent violated GRPC Rule 1.4 (b), the agreement was “unconscionable.” The trial court’s order cited no Georgia cases addressing whether a contract was void as against public policy or voidable as unconscionable. The Court of Appeals reversed the trial court’s unconscionability ruling after a discussion that blended Georgia case law and concepts related to the somewhat distinct doctrines of

⁴ We note that the State Bar of Georgia has not issued a pertinent formal advisory opinion or amended GRPC Rule 1.8 in the 18 years since the ABA issued its Formal Opinion 02-425 and added the comment to Model Rule 1.8, and this appears to be the first published Georgia case (civil or disciplinary) in which an arbitration clause of this type has been an issue. We do not know (and unlike the State Bar, we have no good way to ascertain) if Summerville’s inclusion of such an arbitration clause in his firm’s engagement agreement with Innovative was an aberration or reflective of a widespread or developing practice of using such arbitration provisions by Georgia lawyers, which might warrant further ethical guidance.

It is also important to recognize that discipline of lawyers for violating the GRPC does not occur through civil actions such as this but rather through the disciplinary process administered by the State Bar. See generally Georgia Bar Rules, Part IV, Chapter 2 (Disciplinary Proceedings); GRPC, Scope [18] (“[These rules] are not designed to be a basis for civil liability.”). Thus, our decision in this case would not have a disciplinary effect on Summerville.

unconscionable contracts and contracts that are void as against public policy, ultimately “declin[ing] to adopt a blanket rule that an arbitration clause in an attorney-client contract is unconscionable *and* against public policy if the attorney did not explain the potential disadvantages of the clause to his prospective client before execution of the contract.” *Summerville*, 349 Ga. App. at 597 (emphasis added).

In this Court, Innovative argues that the Arbitration Clause is unenforceable because it violates public policy and also suggests that the clause is procedurally unconscionable because the Summerville Defendants did not prove that Innovative was a sophisticated client. As explained below, we conclude that – even assuming that Summerville violated GRPC Rule 1.4 (b) by entering into the Arbitration Clause without Innovative’s informed consent – the clause is neither void as against public policy nor unconscionable and therefore is not unenforceable on either of those grounds.

(a) *The Arbitration Clause is not void as against public policy.*

Innovative’s primary contention is that the Arbitration Clause is unenforceable because it is void as against public policy. We

disagree.

OCGA § 13-8-2 (a) says that “[a] contract that is against the policy of the law cannot be enforced,” and the statute then lists several types of contracts that are void as against public policy.⁵ The list in § 13-8-2 (a) is expressly non-exhaustive, and Georgia courts have on occasion voided contracts as contravening public policy based on policies found outside of that and other Georgia statutes. See *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393-394 (282 SE2d 903) (1981) (holding void as against public policy an exculpatory clause in an agreement between a patient and a dentist and dental school because it violates public policy to contract away the common law duty of reasonable care). See also *Edwards v. Grapefields, Inc.*,

⁵ OCGA § 13-8-2 (a) says in full:

A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

- (1) Contracts tending to corrupt legislation or the judiciary;
- (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;
- (3) Contracts to evade or oppose the revenue laws of another country;
- (4) Wagering contracts; or
- (5) Contracts of maintenance or champerty.

267 Ga. App. 399, 404 (599 SE2d 489) (2004).

However, recognizing that “all people who are capable of contracting shall be extended the full freedom of doing so if they do not in some manner violate the public policy of this state,” this Court has long emphasized that “courts must exercise extreme caution in declaring a contract void as against public policy” and may do so only “where the case is free from doubt and an injury to the public clearly appears.” *Porubiansky*, 248 Ga. at 393 (citations and punctuation omitted). Importantly, a contract is void as against public policy not because the *process* of entering the contract was improper and objectionable by one party or the other, but rather because the *resulting agreement* itself is illegal and normally unenforceable by either party. See *Dept. of Transp. v. Brooks*, 254 Ga. 303, 312 (328 SE2d 705) (1985) (“A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something

which is in violation of law.” (citation omitted)).

As both parties in this case recognize, binding arbitration agreements generally are not in contravention of the public policy of this State. To the contrary, “[i]n enacting the [Georgia Arbitration Code], the General Assembly established ‘a clear public policy in favor of arbitration.’” *Order Homes, LLC v. Iverson*, 300 Ga. App. 332, 334-335 (685 SE2d 304) (2009) (citation omitted). There is nothing about attorney-client contracts in general that takes them outside this policy and makes mandatory arbitration of disputes arising under them illegal. In fact, the State Bar, with the approval of this Court, long ago established a program for the arbitration of fee disputes between attorneys and clients. See Georgia Bar Rules, Part VI. See also GRPC Rule 1.5, Comment [9] (“If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the State Bar of Georgia, the lawyer should conscientiously consider submitting to it.”).

Nor are attorney-client agreements mandating arbitration of prospective legal malpractice claims categorically against public

policy in Georgia. The General Assembly effectively excluded *medical* malpractice claims from the GAC. See OCGA § 9-9-2 (c) (10) (excluding from the GAC “any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort”). But it did not similarly exclude *legal* malpractice claims. Moreover, the ABA’s Standing Committee on Ethics and Professional Responsibility and all of the states that have followed the reasoning of ABA Formal Opinion 02-425 agree that attorney-client agreements mandating arbitration of future legal malpractice claims without limiting the scope of the lawyer’s potential liability are not prohibited per se; instead, only the *process* of entering into such arbitration clauses is regulated by requiring the lawyer to obtain the client’s informed consent. See, e.g., ABA Formal Op. 02-425; *Snow*, 176 A3d at 736; *Castillo*, 368 P3d at 1257; *Hodges*, 103 S3d at 1077.⁶ Innovative and the amicus curiae take the same

⁶ As explained in ABA Formal Opinion 02-425:

The concern most frequently expressed about provisions mandating the use of arbitration to resolve fee disputes and malpractice claims stems from [ABA Model] Rule 1.8 (h) [which is

position.

Nevertheless, citing one case from this Court and a few from the Court of Appeals in which contracts that implicate the attorney-client relationship were held void as against public policy, Innovative argues that when an attorney violates the GRPC with regard to an engagement agreement, the resulting agreement contravenes public policy and is therefore void. See *AFLAC, Inc. v. Williams*, 264 Ga. 351, 353-354 (444 SE2d 314) (1994); *Eichholz Law Firm, P.C. v. Tate Law Group, LLC*, 310 Ga. App. 848, 850-851 (714 SE2d 413) (2011); *Nelson & Hill, P.A. v. Wood*, 245 Ga. App. 60, 65-

substantially identical to GRPC Rule 1.8 (h)], which prohibits the lawyer from prospectively agreeing to limit the lawyer's malpractice liability unless such an agreement is permitted by law and the client is represented by independent counsel. Commentators and most state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead only prescribe a procedure for resolving such claims. The Committee agrees that mandatory arbitration provisions are proper unless the retainer agreement insulates the lawyer from liability or limits the liability to which she otherwise would be exposed under common or statutory law.

(Footnote omitted.)

66 (537 SE2d 670) (2000); *Brandon v. Newman*, 243 Ga. App. 183, 187 (532 SE2d 743) (2000). We do not read these cases in the way Innovative does.⁷

In *Williams*, without any mention or analysis of the then-applicable rules of professional conduct, we held that a provision in an attorney’s retainer agreement that required the client to pay liquidated damages in the event the client terminated the attorney was unenforceable because it prevented the client from exercising the client’s “absolute right to discharge the attorney and terminate the relation at any time, even without cause.” *Williams*, 264 Ga. at 353 (citation omitted). No amount of advice from the attorney to the client could have rendered the damages provision lawful, because as a matter of public policy, “a client must be free to end the relationship whenever ‘he ceases to have absolute confidence in . . . the attorney,’” and “requiring a client to pay damages for terminating its attorney’s employment contract eviscerates the

⁷ Our reading of these cases makes it unnecessary to decide whether they were all correctly decided.

client's absolute right to terminate." *Id.* at 353 (citations and punctuation omitted). Similarly, in the three Court of Appeals cases cited by Innovative, that court held void as against public policy what the court deemed to be flatly illegal agreements affecting the attorney-client relationship. See *Eichholz*, 310 Ga. App. at 850-853 (voiding a fee-splitting agreement in which an attorney was to receive a portion of a contingency fee that was earned after he had been discharged, citing case law and GRPC Rule 1.5 (e) (2)); *Nelson & Hill*, 245 Ga. App. at 65-66 (in an alternative holding, noting that evidence of an oral contingency fee agreement would be inadmissible to support a quantum meruit claim because such an unwritten agreement violated public policy, citing *Williams*, a then-applicable standard of conduct, and an advisory opinion interpreting that standard); *Brandon*, 243 Ga. App. at 186 (voiding an attorney referral reward based on an illegal fee-splitting agreement between an attorney and a non-lawyer, citing a then-applicable disciplinary standard).

As these cases and the list enumerated in OCGA § 13-8-2 (a)

illustrate, a contract is void as against public policy when the agreement itself effectuates illegality; no change in the *process* of entering into such an agreement will render it legal and fully enforceable. Because the Arbitration Clause in dispute here would be lawful if (as Innovative argues and we are assuming) Summerville had obtained Innovative's informed consent in compliance with GRPC Rule 1.4 (b), the clause is not void as against public policy. See *Watts v. Polaczyk*, 619 NW2d 714, 717-718 (Mich. Ct. App. 2000) (concluding that even though the State Bar of Michigan had issued informal advisory opinions saying that a lawyer should allow a client to seek independent counsel before entering into a retainer agreement mandating arbitration of legal malpractice claims, the arbitration clause at issue had been entered in violation of those opinions, and the attorney might face a disciplinary proceeding, the arbitration clause was not void as against public policy because such binding arbitration agreements are permissible under Michigan law).

(b) *The Arbitration Clause is not substantively or procedurally*

unconscionable.

Although Innovative does not specifically argue in this Court that the Arbitration Clause in dispute is unconscionable, it does suggest that the Clause was procedurally unconscionable, arguing that the Summerville Defendants did not prove that Innovative was a sophisticated client. Moreover, as noted previously, the Court of Appeals conflated the analyses for whether a contract is void as against public policy with whether it is unconscionable. We therefore turn to the question of whether the Arbitration Clause is unenforceable because it is unconscionable.

This Court has defined an unconscionable contract as one that “no sane man not acting under a delusion would make and that no honest man would take advantage of,” one that is “abhorrent to good morals and conscience,” and “one where one of the parties takes a fraudulent advantage of another.” *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 391 n.2 (478 SE2d 769) (1996) (citations

omitted).⁸ We examine unconscionability from the perspective of *substantive* unconscionability, which “looks to the contractual terms themselves,” and *procedural* unconscionability, which considers the “process of making the contract.” Id at 392.

Innovative makes no argument that the Arbitration Clause in dispute is substantively unconscionable. If an arbitration clause of this type were substantively unconscionable, no amount of advice from an attorney would render it fully enforceable; it would be voidable or operable at the election of the injured client. See *Brooks*, 254 Ga. at 313. But as discussed above, Innovative concedes that the Arbitration Clause would be mutually enforceable if the engagement agreement had been entered into after Summerville fully apprised

⁸ *NEC Technologies* involved a contract that was subject to the Georgia Uniform Commercial Code, so we interpreted the doctrine of unconscionability in that case consistent with authority on unconscionability under the UCC. See 267 Ga. at 391; OCGA § 11-2-302. But the basic standards that we set forth in *NEC Technologies* were drawn from common-law unconscionability cases, and we have since applied them in a non-UCC case. See *Dept. of Transp. v. American Ins. Co.*, 268 Ga. 505, 509 n.19 (491 SE2d 328) (1997) (noting that “principles of unconscionability [are] not limited to commercial settings”). See also John K. Larkins, Jr., GA. CONTRACTS LAW AND LITIGATION § 3:18 (2019) (explaining that “there has been a virtual merger of the common law and UCC doctrine of unconscionability in Georgia.”).

Innovative of the potential consequences of arbitration. Moreover, the General Assembly has expressed a policy permitting arbitration agreements in the GAC, and arbitration can be beneficial to either attorneys or clients, so we cannot say that no sane client would enter a contract that mandated arbitration of future legal malpractice claims and no honest lawyer would take advantage of such a provision. See Louis A. Russo, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 334-337 (2006) (explaining a number of potential benefits to clients of arbitrating legal malpractice claims, including speed, efficiency, and confidentiality).

As for procedural unconscionability, Innovative suggests that the Arbitration Clause is unconscionable because the Summerville Defendants did not prove that Innovative was a sophisticated client. But Innovative improperly shifts the burden of proof: where, like other contracts, a binding arbitration agreement is bargained for and signed by the parties, it is the complaining party that bears the burden of proving that it was essentially defrauded in entering the

agreement. See, e.g., *R.L. Kimsey Cotton Co., Inc. v. Ferguson*, 233 Ga. 962, 966-967 (214 SE2d 360) (1975) (holding that the trial court erred in denying the plaintiff's motion for summary judgment seeking enforcement of contracts that the defendants argued were unconscionable because the defendants did not sufficiently prove unconscionability). See also *Saturna v. Bickley Constr. Co.*, 252 Ga. App. 140, 142 (555 SE2d 825) (2001) (explaining that “the mere existence of an arbitration clause does not amount to unconscionability” (citation omitted)).

Innovative has not met its burden. This case was adjudicated on a motion to dismiss and to compel arbitration, and there is no evidence in the limited existing record that the Summerville Defendants took fraudulent advantage of Innovative by including the Arbitration Clause in the Engagement Agreement. Innovative argued in the trial court that the Arbitration Clause was “unconscionable” only because it violated the GRPC, not because it was the result of fraud. Innovative now argues that there is no evidence in the record to support a finding that it *was* a

sophisticated client, such that a finding of unconscionability is not foreclosed. But the record indicates that Innovative is a business that had been involved in litigation before entering the Arbitration Clause, and in any event, “lack of sophistication or economic disadvantage of one attacking arbitration will not amount to unconscionability” without more. *Saturna*, 252 Ga. App. at 142 (citation omitted). Accordingly, Innovative has not proven that the Arbitration Clause is unconscionable. See *NEC Technologies*, 267 Ga. at 394.

(c) In summary, whether or not a lawyer may be subject to professional discipline under GRPC Rule 1.4 (b) for entering into an engagement agreement with a client requiring the arbitration of future legal malpractice claims without first fully apprising the client of the advantages and disadvantages of arbitration, such an arbitration clause is neither void as against public policy nor substantively unconscionable, and Innovative has not proven that the Arbitration Clause at issue here is procedurally unconscionable either. Because Innovative has not established that the Arbitration

Clause is unenforceable on these grounds, we affirm the judgment of the Court of Appeals.

Judgment affirmed. All the Justices concur.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 02-425

February 20, 2002

Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims

It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.

Overview

The use of binding arbitration provisions in retainer agreements has increased significantly in recent years.¹ Provisions requiring the arbitration of fee disputes have gained more willing acceptance than those involving malpractice claims.² The Model Rules of Professional Conduct, in a comment to Rule 1.5, provide that when a “procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the

1. See Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, ARB. J. 8 (June 1993) (“Twenty years ago, alternative dispute resolution (ADR) was primarily the concern of a few ‘ivory tower’ academics; 10 years ago, it was a part of the practice of a few idealistic practitioners; today, it is an integral part of the practice of law.”); David Hechler, *ADR Finds True Believers*, NAT’L L.J., July 2, 2001, at A-1 (reporting increased use of ADR, including report that that in 1996, 76,200 ADR cases were filed with the American Arbitration Association and that in 2000, 198,491 cases were filed). In D.C. Eth. Op. 218 (June 18, 1991), the Bar Association of the District of Columbia stated that Rule 1.6(d)(5) encourages lawyers to minimize the disclosure of client confidences in fee collection actions. Because of its private nature, arbitration arguably furthers the goal of Rule 1.6(b)(2) because it enables the lawyer to avoid, and thereby limit, the public disclosure of otherwise confidential information in seeking to recover a fee or defend against a malpractice claim. *Id.*

Moreover, mandatory arbitration has its detractors. *San Francisco Chronicle* staff writer Reynolds Holding wrote a series of articles available at <http://www.sfgate.com>

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Marvin L. Karp, Cleveland, OH □ Loretta C. Argrett, Washington, DC □ Michael E. Bragg, Bloomington, IL □ Thomas M. Fitzpatrick, Seattle, WA □ Mark I. Harrison, Phoenix, AZ □ Daniel W. Hildebrand, Madison, WI □ Donald B. Hilliker, Chicago, IL □ William H. Jeffress, Jr., Washington, DC □ Bruce Alan Mann, San Francisco, CA □ M. Peter Moser, Baltimore, MD □ CEN-TER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

lawyer should conscientiously consider submitting to it.”³ The greater acceptance of such provisions by lawyers also is attributable to the fact that there are ABA Model Rules for Fee Arbitration and that most bar associations have implemented fee arbitration programs that have been upheld by the courts.⁴ The Model Rules do not specifically address provisions for arbitration of disputes with clients over matters other than fees.

Because the attorney-client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships,⁵ the retainer contract may be subject to special oversight and review.⁶ The authority for this oversight comes from the Model Rules, which impose rigorous disclosure obligations on the lawyer and expressly limit and condition the lawyer’s freedom to enter into contractual arrangements with clients.⁷ We now turn to an examination of the rules implicated by the inclusion of mandatory arbitration provisions in retainer agreements.

sharply critical of mandatory arbitration provisions in a variety of commercial contexts, reporting that millions of consumers are losing their legal rights in the process. *See Private Justice - Millions are losing their legal rights - Supreme Court forces disputes from court to arbitration - a system with no laws*, S.F. CHRON., October 7, 2001; *Can public count on fair arbitration? - Financial ties to corporations are conflict of interest, critics say*, S.F. CHRON., October 8, 2001; *Judges’ action casts shadow on court’s integrity - Lure of high-paying jobs as arbitrators may compromise impartiality*, S.F. CHRON., October 9, 2001; *Arbitration attacked in front of high court - Justices disagree on expanding its reach*, S.F. CHRON., October 11, 2001. *See also* *Circuit City Stores v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002) (mandatory arbitration agreement was both procedurally and substantively unconscionable under California law); *Paone v. Dean Witter Reynolds*, 789 A.2d 221, 227 (Pa. Super. 2001) (court must determine whether the proponent of the arbitration provision has met its burden of showing that the provision is fair under all the circumstances, that it was entered into with knowledge of its nature and consequences, and that the provision was not itself a result of a violation of the trust reposed in the confidential relationship. If this burden is not met, then the arbitration provision is unenforceable.).

2. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 990-991 (1995); HALT, *ARBITRATING LAWYER-CLIENT FEE DISPUTES: A NATIONAL SURVEY* (1988) (nationwide survey of states and District of Columbia bar-run programs for arbitrating fee disputes between lawyers and their clients conducted in 1987 by HALT - An Organization of Americans for Legal Reform).

3. Model Rules of Professional Conduct Rule 1.5, cmt. 9 (2002).

4. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 628-29 (1997).

5. Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients To Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 845 (1999); Powers, *supra* note 4, at 645-46.

6. Powers, *id.* at 646.

7. Rule 1.4 (duty to explain to clients the risks and benefits of alternative courses of

Prospective Agreements to Limit the Lawyer's Liability

The concern most frequently expressed about provisions mandating the use of arbitration to resolve fee disputes and malpractice claims stems from Rule 1.8(h), which prohibits the lawyer from prospectively agreeing to limit the lawyer's malpractice liability unless such an agreement is permitted by law and the client is represented by independent counsel. Commentators and most state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead only prescribe a procedure for resolving such claims.⁸ The Committee agrees that mandatory arbitration provisions are proper unless the retainer agreement insulates the lawyer

action); Rule 1.8(a) (guidelines governing business transactions with clients); Rule 1.8(h) (requirement of independent representation when prospectively limiting liability to clients); Rule 1.8(d) (prohibition against entering into agreements for literary/media rights); 1.5 (requirements governing fee agreements with clients); and Rules 1.7, 1.8, 1.9 (conflicts between lawyer and client that require disclosure and informed consent).

8. *E.g.*, 2 G.C. HAZARD AND W.W. HODES, *THE LAW OF LAWYERING* (3d ed. 2001) §12.18 at 12-50 (“[Agreements requiring mandatory arbitration of malpractice claims] would not violate Rule 1.8(h), for they merely provide a procedure for resolving disputes, and do not attempt to ‘limit’ the lawyer’s liability in advance.”); Me. Eth. Op. 170 (December 23, 1999) (“An agreement to limit liability is, in substance, an agreement that says that even though the lawyer errs in fulfilling certain duties to the client, the lawyer will not be liable to the extent that common and statutory law would otherwise make the lawyer liable.”). *See also* Comments [14] and [5] to Rule 1.8(h):

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

from liability or limits the liability to which she otherwise would be exposed under common or statutory law. For example, if the law of the jurisdiction precludes an award of punitive damages in arbitration but permits punitive damages in malpractice lawsuits, the provision would violate Rule 1.8(h) unless the client is independently represented in making the agreement.⁹ The mere fact that a client is required to submit disputes to arbitration rather than litigation does not violate Rule 1.8(h), even though the procedures implicated by various mandatory arbitration provisions can markedly differ from typical litigation procedures. The Committee believes, however, that clients must receive sufficient information about these differences and their effect on the clients' rights to permit affected clients to make an informed decision about whether to accept an agreement that includes such a provision.

The Duty to Fully Disclose the Risks and Benefits of Mandatory Binding Arbitration

The lawyer's duty to explain matters to a client expressed in Rule 1.4(b)¹⁰ derives in large measure from the lawyer's fiduciary duty to clients¹¹ and includes the duty to advise clients of the possible adverse consequences as well as the ben-

Model Rules of Professional Conduct Rule 1.8, cmts. 14 and 15 (2002). *Contra* Md. Eth. Op. 90-12 (October 19, 1990) (the differences between arbitration and court proceedings so significant as to constitute an attempt to limit liability prospectively).

9. See e.g., N.Y. County Lawyers' Ass'n Eth. Op. 723 (July 17, 1997) ("Outside the context of domestic relations matters, as to which special rules apply, and provided that New York law authorizes an arbitrator to award punitive damages in a malpractice claim submitted to arbitration under an agreement, a lawyer may ethically include a condition in a retainer agreement requiring that all disputes arising under the agreement shall be subject to arbitration in an appropriate forum authorized to award all relief available in a court of law, provided that the lawyer fully discloses the consequences of that condition to the client and allows the client the opportunity, should the client so choose, to seek independent counsel regarding the provision."). Other, unusual requirements in mandatory arbitration provisions also might be deemed to have the effect of limiting a lawyer's liability when they are one-sided. The validity of such requirements, for example, requiring that arbitration be conducted in a specific location distant from the client's abode, permitting the lawyer to choose the arbitrator, or unequally allocating the cost of the arbitration, thus might be called into question under Rule 1.8(h).

10. Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"; cf. MODEL RULES OF PROFESSIONAL CONDUCT Preamble cmt. [17] (2002) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties . . . that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.").

11. See, e.g., *Sage Realty v. Proskauer, Rose & Goetz*, 91 N.Y.2d 30, 37, 689 N.E.2d 879, 882, 666 N.Y.S.2d 985, 988 (N.Y.App.Div. 1997) ("Among the duties of an attorney as fiduciary and agent of the client are those of openness and conscientious disclosure.").

efits that may arise from the execution of an agreement.¹² The Committee is of the opinion that Rule 1.4(b) applies when lawyers ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims.¹³

Rule 1.4(b) requires the lawyer to “explain” the implications of the proposed binding arbitration provision “to the extent reasonably necessary to permit the client to make (an) informed decision” about whether to agree to the inclusion of the binding arbitration provision in the agreement.¹⁴ Depending on the sophistication of the client and to the extent necessary to enable the client to make an “informed decision,” the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement. For example, the lawyer should make clear that arbitration typically results in the client’s waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal.¹⁵ The

12. See, e.g., *Matter of Morse*, 266 Ga. 652, 653, 470 S.E.2d 232, 234 (Ga. 1996) (lawyer asked client to sign agreement settling workers’ compensation claim without explaining legal effect of agreement); *Matter of Ragland*, 697 N.E.2d 44, 47 (Ind.1998) (lawyer failed to explain impact of executing settlement and indemnity agreements); *Viccinelli v. Causey*, 401 S.2d 1243 (La. Ct. App.), *writ denied*, 409 So.2d 615 (La. 1981) (lawyer failed to explain to divorce client significance of judgment against property she received in property settlement guilty of malpractice); *Matter of Disciplinary Proceedings Against Winkel*, 217 Wis.2d 339, 344, 577 N.W.2d 9, 11 (Wis.1998) (lawyer’s failure to inform clients about risk of criminal prosecution if clients surrendered business assets to bank and law firm without arranging to pay subcontractor bills amounted to failure to explain matter to extent reasonably necessary to enable clients to make informed decision). See also *Smith v. St. Paul Fire & Marine Ins. Co.*, 366 F.Supp. 1283, 1290 (M.D.La. 1973), *aff’d* 500 F.2d 1131 (5th Cir. 1974) (lawyer need not advise client about every possible alternative, only those where reason to believe adverse consequences may result), *Ariz. Eth. Op. 97-6* (Sept. 8, 1997) (criminal defense lawyer whose client enters cooperation agreement with law enforcement agencies must fully advise client of real-world consequences of such cooperation).

13. The majority of the Committee’s prior opinions construing Rule 1.4(b) have focused on communications bearing primarily on the *subject-matter of the representation* rather than on the *client-lawyer relationship* itself. However, because the factors that affect and define the client-lawyer relationship often impact the representation, the Committee concludes that, in appropriate circumstances, such as the present situation, the duty of communication imposed by Rule 1.4(b) may extend to *both* the client-lawyer relationship and the subject-matter of the representation.

14. Significantly, “informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.0(e) (2002).

15. At least one major malpractice insurance carrier has advised its lawyer-insureds that arbitration of malpractice claims is not always advisable and has suggested that litigation may provide benefits to the lawyer-insured unavailable through arbitration. This carrier requires its insureds to provide notice to the carrier of the insureds’ intent

lawyer also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.

The duties of communication and disclosure imposed on lawyers by Rule 1.4 find substantial support in other Model Rules, most notably 1.7(b).¹⁶ Rule 1.7 gen-

to refer a claim to arbitration. See Mark D. Nozette and Brian J. Redding, *Arbitration of Malpractice Claims—Is It A Good Idea?*, ALAS LOSS PREVENTION JOURNAL 2 (Fall 2001).

16. See also cases and opinions interpreting Rule 1.5(b) that focus upon the lawyer's fiduciary obligation to ensure that the client is fully informed about the terms of the fee agreement. *E.g.*, *Wong v. Michael Kennedy*, 853 F.Supp. 73, 80 (E.D.N.Y. 1994) (lawyer who drafts fee agreement stands in fiduciary relationship to client and has burden of showing that agreement is fair, reasonable and fully known and understood by client); ABA Formal Op. 93-379 (1993) (Billing for Professional Fees; Disbursements and Other Expenses) in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 218-20 (ABA 2000) (disclosure of basis of fees and charges should be made at outset of representation pursuant to Rules 1.4, 1.5(b), and 7.1). Although many of the ethics opinions that have addressed the question now before the Committee have relied heavily on Rule 1.8(a), we do not believe that that rule applies. In the Committee's opinion, the establishment of a lawyer-client relationship is not a "business transaction" within the meaning of Rule 1.8(a). See Me. Eth. Op. 170 ("a retention . . . agreement does not constitute a covered 'business transaction' between a lawyer and client"). However, we do find it significant that the Comment to Rule 1.8(a) states that "[a]s a general principle, *all transactions* between client and lawyer should be fair and reasonable to the client." (Emphasis added). A Comment to Rule 1.8(a) states that Rule 1.8 (a)(1) "requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a), cmt. (2) (2002).

We also note that although Rule 1.8(a) does not apply to the transaction establishing the lawyer-client relationship, some or all of the protections provided to clients by the rule nonetheless have been imposed by various state ethics opinions discussing the propriety of a provision in an attorney-client retainer agreement requiring the arbitration of fee disputes and malpractice claims. See, *e.g.*, Va. Legal Eth. Op. 1586 (April 11, 1994) ("[A] provision requiring mandatory arbitration of fee disputes and designating the situs of the arbitration is not per se violative of the Code of Professional Responsibility, provided that there is . . . full and adequate disclosure as to all possible consequences of such a transaction and the transaction must not be unconscionable, unfair or inequitable when made."); Md. Eth. Op. 94-40 (July 12, 1994) (a retainer agreement may provide for binding arbitration of fee disputes provided that it includes language advising the client that the agreement "may affect the client's legal rights, including a relinquishment of a right to a jury trial. The client should also be advised of a right to confer with other counsel with respect to any adverse consequences which might result from agreeing to mandatory arbitration, including the possible effects of

erally governs and limits the ability of lawyers to represent clients in conflict of interest situations and provides for the resolution of such conflicts only with the client's informed consent. Pertinent to the present opinion, Rule 1.7, Comment [6], states: "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Fee disputes with lawyers and claims against lawyers for malpractice obviously implicate such concerns. Therefore, a provision in a retainer agreement that *requires* the submission of such disputes and claims to binding arbitration may present the kind of potential conflict that can be neutralized only by the lawyer providing full disclosure and an explanation sufficient "to permit the client to make an informed decision" about whether to agree to a binding arbitration provision.

Conclusion

It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law.

res judicata or collateral estoppel."); Md. Eth. Op. 90-12 ("before a lawyer can enter into a written agreement with a client providing for the submission to arbitration of all disputes arising out of the attorney-client relationship, the client must be represented by independent counsel in connection with that written agreement. If the client refuses to seek independent counsel, then the lawyer is prohibited from entering into such a written agreement."); D.C. Eth. Op. 211 (May 15, 1990) (mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under Rule 1.8(a) unless client "has actual counsel from another lawyer, who has no conflict of interest, upon whom the client can rely to assess the complexities posed by arbitration."); Mich. Eth. Op. RI-196 (March 7, 1994) (lawyer must advise client that independent representation appropriate in order to validate mandatory ADR provision). See also Comments [14] and [5] to revised Rule 1.8(h), *supra* note 8.

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.

- 31 3. a lawyer representing an indigent client pro bono, a lawyer representing an
32 indigent client pro bono through a nonprofit legal services or public interest
33 organization and a lawyer representing an indigent client pro bono through a law
34 school clinical or pro bono program may provide modest gifts to the client for
35 food, rent, transportation, medicine and other basic living expenses. The lawyer:
36 1. may not promise, assure or imply the availability of such gifts prior to
37 retention or as an inducement to continue the client-lawyer relationship
38 after retention;
39 2. may not seek or accept reimbursement from the client, a relative of the
40 client or anyone affiliated with the client; and
41 3. may not publicize or advertise a willingness to provide such gifts to
42 prospective clients.

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

45 f. A lawyer shall not accept compensation for representing a client from one other than the
46 client unless:

- 47 1. the client gives informed consent;
48 2. there is no interference with the lawyer's independence of professional judgment
49 or with the client-lawyer relationship; and
50 3. information relating to representation of a client is protected as required by Rule
51 1.6.

52 g. A lawyer who represents two or more clients shall not participate in making an aggregate
53 settlement of the claims for or against the clients, nor in a criminal case an aggregated
54 agreement as to guilty or nolo contendere pleas, unless each client gives informed
55 consent, in a writing signed by the client. The lawyers disclosure shall include the
56 existence and nature of all claims or pleas involved and of the participation of each
57 person in the settlement.

58 h. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a
59 client for malpractice unless permitted by law and the client is independently represented
60 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).

[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. Gifts permitted under paragraph (e)(3) include modest contributions 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 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 clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts 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.

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
282 (1) lawyer;

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

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

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

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

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

295
296 (2) the solicitation involves coercion, duress fraud, overreaching, harassment,
297 intimidation or undue influence; or harassment;

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

304
305 (4) the lawyer knows or reasonably should know that the physical, emotional
306 or mental state of the person is such that the person could not exercise
307 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.

308
309
310 (d) This Rule does not prohibit communications authorized by law or ordered
311 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).

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

318
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)

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

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

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

Comment

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

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

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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.").

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

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.

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

- 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

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

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.”

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

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:

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

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

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

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:

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

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.

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

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.

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

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).

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

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.

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

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.

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

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.

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

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).