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ABA Standing Committee on Ethics and Professional Responsibility
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The Legal Marketing Association (LMA) is pleased to have the opportunity to provide comments on the proposals brought forward by the Association of Professional Responsibility Lawyers (APRL) and the American Bar Association Standing Committee on Ethics and Professional Responsibility to amend the ABA Model Rules 7.1, 7.2, 7.3, 7.4 and 7.5. These rules serve as primary guidance for lawyers, law firms, legal marketing and communications professionals, and other client-services providers as to the manner and methods used to offer information about the scope of — and qualifications to provide — legal services to existing and potential clients.

The LMA (www.legalmarketing.org) is a not-for-profit organization with more than 4,000 members working across the legal industry. Approximately one-quarter of our members come from firms of fewer than 100 attorneys, 20% from firms of 100 to 500 attorneys, and 20% from firms with more than 500 attorneys. Our remaining members represent a broad range of service providers in a range of disciplines that support our mission. Because of the diversity of our membership, we have a strong sense of the shared and unique issues facing law firms across the United States and Canada. For more than 30 years, we have drawn on our members' insights and experience to serve the needs and maintain the standards and integrity of the legal profession.

We applaud the goals of APRL and the ABA in undertaking this important process:

- To ensure accuracy, truthfulness and transparency in legal advertising, and thus to create an environment in which consumers of legal services can make more informed choices regarding their legal-services providers.
- To modernize the rules in acknowledgement of the ever-changing role of technology and the challenges and expanded opportunities associated with new media and other communication channels in today's legal marketplace.
- To provide consistency across the requirements of state bar associations, professional marketing associations, and other government and governing bodies that disseminate, promote and enforce rules of legal professional conduct and advertising.
- To simplify and clarify standards of professional conduct, helping ensure greater compliance with established guidelines and quell anti-competitive behaviors.
- To help industry and state regulators refocus their enforcement efforts on parties that clearly and intentionally seek to circumvent these standards to the detriment of clients and consumers of legal services.
- To increase access to justice for all individuals and organizations.

With these goals in mind, we support the adoption of the streamlined Model Rules of Professional Conduct, which have been successfully adopted in several local jurisdictions. We would also like to offer the following, specific comments regarding these proposed rules:

Rule 7.1 – Misleading Communications/Consumer Protection

We believe that truthful, informative communication and consumer protection are the core objectives of the Model Rules; thus, Rule 7.1 is perhaps the most important declaration in the existing and proposed language. While speech is constitutionally protected, we also believe that legal professionals bear a higher level of responsibility to ensure accuracy and inspire consumer confidence in word and deed. Thus, we encourage the ABA to adopt language for this rule that is clear, succinct and unambiguous.

Rule 7.2 – Gifts, Referrals, Recommendations and Advertising

Given the many ways in which technology has enhanced and diversified communications channels, it is our position that language should be stricken from Rule 7.2 that specifically refers to “live, person-to-person” communications.

We also support the deletion of the “Attorney Advertising” requirement. In today’s environment, consumers at every level of sophistication and experience recognize an ad when they see it. Not only is language supposedly identifying “advertising material” redundant, it also places an onerous burden on lawyers and professionals, particularly given the increased use of electronic communications (including websites, blogs, social media, professional directories, client alerts, articles written for news outlets and industry organizations, etc.) which may be viewed from anywhere in the world.

Further, this “attorney advertising” requirement can have the unintended effect of preventing or stifling communications that might otherwise help provide greater access to legal services, if lawyers and firms choose to avoid sharing information for fear of non-compliance.

Rule 7.3 – Client Solicitation

We agree with language in the proposed rules that protects potential clients from solicitations that involve or include elements of harassment, undue influence, coercion, intimidation, unwarranted promises of benefits, and so forth.

However, we encourage the avoidance of language that attempts to list or categorize types of allowable or prohibited forms of solicitations, advertising or other client-contact methodologies, as such lists will not only create a separate, informal list of “loopholes,” but will also be outdated almost immediately upon their creation and publication. Technology moves too quickly, and the language of Rule 7.1 (disallowing false or misleading communications) provides a sufficient standard when determining whether or not a solicitation, advertisement or other contact fails to comply with the standards of professional responsibility.

Rule 7.4 – Fields of Practice, Certification, Concentration and Experience

Restrictions upon the use of certain terms (e.g., “expertise,” “specialize”) have had the unintended effect of diluting language used by compliant lawyers, law firms and marketing professionals to such a degree that they are unable to accurately demonstrate proficiency in

specific disciplines, legal issues and other areas of law. The result is that consumers of legal services are left to make decisions without complete information regarding the skills, backgrounds, experience and knowledge of a given lawyer or law firm — whether these capabilities have been gained via formal training or decades of practice in a particular area of law.

In effect, compliance with Rule 7.4, as it stands today, has meant that lawyers are contradicting the objectives laid out in Rule 7.1: to provide complete, accurate and truthful communications to existing and potential clients.

To create consistency across Rules 7.1 and 7.4, we recommend that specific, pre-approved or precluded words (or lists of words) be avoided in the proposed Rule 7.4, and that lawyers be allowed to use language that accurately describes their background and experience in order to provide clients with complete information regarding their capabilities (or lack thereof).

Rule 7.5 – Lawyer and Firm Names and Letterheads

As with Rule 7.2, the requirement to use law firm and lawyer names and letterheads on any content deemed to be “advertising” places an onerous burden on the legal profession, particularly given the technologies referred to above. It is simply unfeasible to create and maintain such placements on all media fairly used by lawyers today to communicate information about individual professionals, law firms, and current issues and events. Once again, we defer to Rule 7.1, which places the highest requirement on legal professionals, regardless of communication channel used: accuracy, truthfulness and transparency.

To demonstrate the real-world, practical reasons behind our suggestions, we have compiled examples of compliance issues submitted by our members and have included these stories on the following page.

Again, we thank the ABA for requesting input from the LMA and other organizations into the revised and streamlined Model Rules under consideration. We welcome the opportunity to participate in ongoing dialogue regarding these important standards that will help protect consumers, support higher-quality service and increase access to justice.

Sincerely,



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LMA 2018 President



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LMA Executive Director

Challenges Navigating Current ABA Model Rules and State Attorney Advertising and Ethics Rule: Practical Examples Reported by LMA Members

Rule 7.2

- Frequently, client alerts or bulletins must be drafted and distributed in a timely manner because they provide information on fast-moving developments that may have an impact on clients' businesses or industries. In some cases, our communications may also include invitations to seminars, webinars and other programs that discuss these issues in depth. When such communications are marked as "Attorney Advertising," they are often ignored by clients, preventing them from responding to potential challenges and opportunities alike.
- While seemingly intended to provide greater transparency into the identity of a lawyer who is advertising, the name and contact information requirement in rule 7.2(c) — even with slight revision — still fails to recognize and allow for the advance of technology in the delivery of advertising material on a variety of digital media. For example, many types of digital advertising, such as Google AdWords on search results or sponsored posts on social media platforms such as Facebook, LinkedIn and Twitter, do not envision the ability to include displayed specific lawyer name contact information. If they do, such inclusion would obviate the efficacy of the advertisement. Depending on the nature of the sponsored post (e.g., on Instagram or Snapchat or similar social media networks), even the inclusion of a link wouldn't necessarily include a lawyer name and contact information once clicked. While such media are perhaps not widely used now for lawyer advertising, that could change, and perhaps quite soon. The name and contact information part of Rule 7.2(c) could have the effect of limiting or quelling a valid way to advertise to consumers (especially younger consumers) with limited access or ability to access information about legal services.

Rule 7.3

- At a recent industry event for which an attendee list was publically available and at which networking dinners were encouraged, our firm's lawyers were not allowed to invite certain attendees to dinner. The reason? A strict interpretation of Rule 7.3: Solicitation of Clients. These individuals were not lawyers and did not have a prior professional relationship with our lawyers — however, it is quite likely that some of these event attendees would have been interested in speaking to and found value in networking with the firm's other clients and our attorneys.
- At our firm, we struggle constantly with what seem like confusing rules that sometimes contradict themselves. We spend a great deal of time trying to navigate a fine but fuzzy line between avoiding communications and contact methodologies that might cause us to inadvertently cross a line and get into trouble, and failing to reach out at all to clients who might be in need of our services.
- Removal of the previous requirement (Rule 7.3(c)) for inclusion of "advertising material" on envelopes and/or electronic communication is an excellent revision. It recognizes the

state of technology today and the fact that inclusion of “advertising material” or similar notices on electronic communication such as websites, emails, etc., is often cumbersome to issues of design and placement. It has often resulted in absurdities such as the notice being placed in a very small size and/or as footers at the bottom of electronic communications and websites, with the effect that the notice often went unseen and was ineffectual, not to mention meaningless and superfluous. It makes sense that the Rules follow the rescission of similar types of notices that were once required but now are deemed unnecessary, such as the IRS Circular 230 notice. Further, in today’s 24/7, minute-to-minute news cycle, such tools and methodologies are particularly useful in providing critical, time-sensitive information to clients who might be put off by a label indicating that they are receiving an advertisement.

Rule 7.4

- On many occasions, content that is to be delivered to our existing or potential clients is significantly watered down in order to ensure the correct use of certain terms and to otherwise comply with Rule 7.4. Such content — often lacking useful detail — fails to fully communicate the full scope of our lawyers’ skills and experience, to the detriment of clients who might benefit from our knowledge.
- We have found the interpretation and application of Rule 7.4 to be confusing. We have generally not used “specialist/specializes in” or “expert/expertise” because we thought that was not allowed. However, in reading the current comment it appears it is acceptable to use such terms, so long as we are not implying a lawyer is “certified” as a specialist. The rule and the comment seem to contradict each other — or at the very least, do not provide clear direction.
- In attempting to comply with Rule 7.4, we have tried to use informative, accepted language that describes our work and skills accurately. But the Rule goes on to say that using any of such language — even common workaround language such as “concentrates in” or “focuses on” — could still be a violation. The description of the Rule is confusing, saying that it is generally okay to use alternative terminology, but that such language is also subject to false and misleading claims standards.
- Rule 7.4 poses a particular challenge to us when working with lawyers who are not familiar with its requirements. After reviewing content and communications, they often come back and ask why we changed “expert” to “deep experience in,” or “specialist” to “practice concentrates in.” It would be very helpful to be able to point them to guidance that is clear and clean. The rule currently reads as if the use any of the replacement words could create a violation.