

## Comments on: Proposed Amendments to Model Rules of Professional Conduct 7.1 to 7.5—Lawyer Advertising and Solicitation

Tom Gordon  
Executive Director,  
**Responsive Law**

Comments to the  
**American Bar  
Association Standing  
Committee on Ethics and  
Professionalism**

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Responsive Law thanks the ABA for the opportunity to present its testimony on the amendments to MRPC 7.1-7.5 proposed by the Association of Professional Responsibility Lawyers (APRL).

Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the public.

**We support (with one caveat) the proposed amendments, which would expand the amount of information about legal services available to the large number of Americans who not only don't know how to find a lawyer, but who may not even be aware that they have a legal problem.** The amendments would shift the focus of these rules from the perception of the profession to actual consumer protection, leaving lawyers with more ways to provide accurate, helpful information to bewildered consumers.

### **Consumers Need and Expect More Information About Legal Services**

In her groundbreaking 2014 report for the American Bar Foundation, Rebecca Sandefur found that consumers are woefully under-informed not only about where to get legal help, but even about whether their problems have a legal component to them. The study showed that only 22% of Americans facing legal problems sought help outside of their family and friends. In the cases where people didn't seek formal assistance, 46% thought there was no need to do so; 24% thought it would make no difference in the resolution of their matter; and 9% didn't know where to go to find help.<sup>1</sup>

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<sup>1</sup> Rebecca Sandefur, "Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study," pp. 11-13 (American Bar Foundation, 2014).

The typical American thus faces three obstacles in getting professional help for her legal problems: (1) recognizing that her problem has a legal component; (2) seeing the value of a lawyer in resolving that problem; and (3) knowing how to find a lawyer who can help her. Advertising can help consumers surmount all of these obstacles, as acknowledged by both the current and proposed comments to the Model Rules.<sup>2</sup> Permitting a wider range of advertising would raise awareness among consumers that their problems may have a legal component, and that they can find lawyers to help them with those problems.

In addition to expecting an abundance of information about potential service providers, consumers also benefit from having that information be reliable. By maintaining Rule 7.1's prohibition of false or misleading communications, while eliminating restrictions on useful information such as specializations, the proposed amendments would continue to ensure that consumers receive information about lawyers that is both broad and accurate.

**Many of the Current Rules Serve No Purpose Other Than to Maintain an Antiquated View of the Legal Profession.**

The U.S. Supreme Court's rulings in *Bates*, *Central Hudson*, and subsequent cases confirm that commercial speech, including that of lawyers, is protected by the First Amendment.<sup>3</sup> This not only benefits those who engage in commercial speech (such as lawyer advertising), but the recipients of such speech, who can become better informed consumers by receiving commercial information about potential service providers.

Yet, despite repeated court rulings that setting standards for taste and maintaining the image of the profession are not sufficient reasons to restrict commercial speech, the current Model Rules either ignore these constitutional parameters or attempt an end run around them.

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<sup>2</sup> ABA MRPC 7.2, Comment 1, retained in proposal as Rule 7.1, Comment 5.

<sup>3</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

The current Model Rules have their roots in the Victorian-era attitude that because law is a profession, it cannot also be a business. Advertising, as an especially commercial activity, is seen as particularly tasteless. A nineteenth century gentleman in an ascot and waistcoat may have been able to find a lawyer by discreetly asking another member of his country club for a recommendation. However, for everybody else with legal needs—then and now—this is not an option. One would hope that the legal profession has evolved enough over the past century-and-a-half to take the needs of the 99% into account in regulating its business practices.

Unfortunately, the Model Rules have remained preoccupied with governing taste and maintaining a status quo that reduces the pressure on lawyers to innovate their business practices, often at the expense of access to legal information for the public. A nationwide study by APRL found that complaints about lawyer advertising are predominantly made by lawyers, not by consumers, indicating whose ox is actually gored by violation of the current rules.

As APRL has noted in proposing the amendments:

“Lawyers should not be subject to discipline for ‘potentially misleading’ advertisements or advertisements that a regulator thinks are distasteful or unprofessional. Nor should they be subject to discipline for violations of technical requirements in the rules regarding font size, placement of disclaimer, or advertising record retention.”<sup>4</sup>

The proposed amendments act to properly refocus advertising restrictions on false and misleading advertising that harms consumers, rather than waste enforcement resources on lawyer-driven complaints about their peers’ failure to conform their conduct to standards of taste and conformity that are even less relevant to consumers today than they were in the 1800s.

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While Responsive Law generally supports the proposed amendments as a whole, there are three specific provisions to which we’d like to call attention, two of which we support and one which we think should be modified.

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<sup>4</sup> Association of Professional Responsibility Lawyers, 2015 Report of the Regulation of Lawyer Advertising Committee, p. 29 (June 22, 2015).

**The Proposal Properly Distinguishes Real-Time Electronic Communication from Telephone Communication**

The proposed amendments appropriately address consumer expectations regarding modern communication technology by treating real-time electronic communication as different from telephone conversations. Telephone solicitations by lawyers have traditionally had more restrictions on them due to their intrusiveness and the potential that they could make consumers feel duress in agreeing to representation. Real-time electronic communication, on the other hand, does not present these dangers.

For example, a consumer browsing a website or forum related to a particular legal issue is not likely to feel that a pop-up from a lawyer asking to chat is unnecessarily intrusive. In fact, the consumer may welcome this communication, which could provide valuable information. In addition, such a communication is written, not oral, and thus more easily recorded to protect against misunderstanding or misleading statements. And, of course, the typical web user will feel no reluctance to close such a pop-up window if they find it intrusive rather than welcome.

**The Proposed Rule 7.2(f), by Explicitly Permitting Paid Online Group Advertising, Will Expand Consumer Access to Legal Information Without Significant Consumer Harm**

Online group advertising is a common business practice in an internet economy. More important, it can create a useful resource for consumers by allowing them to compare and choose from multiple lawyers on a single website. Although there has been some ambiguity about whether such a business model amounts to “ambulance chasing” in which lawyers pay someone to chase potential clients, the risk of such undue pressure on a potential client is minimal when the attorney is paying for an online directory listing, rather than for face-to-face contact.

**The Requirement In Rule 7.2(c) to Mark Certain Ads As "Advertising Material" Is Impractical for Online Communication**

This requirement could unnecessarily hinder a lawyer's ability to communicate with a consumer who needs legal help. In the example above, where a consumer is browsing a legal forum online, a lawyer might respond to a legal question from the consumer by posting a message to the forum in response to her. This could lead to a dialogue between the lawyer and consumer that might end up as a free exchange of information or that might result in the consumer hiring the lawyer. At what point during this exchange is the lawyer supposed to insert the words "Advertising Material" to indicate the end of friendly discussion and the beginning of solicitation? Such a requirement is not consistent with the way that communication and commerce take place on the internet.

It is possible to interpret Comment 5 to Rule 7.2, exempting "communications sent in response to requests of potential clients" from the labeling requirement, as encompassing this type of communication. However, it is unclear that, for example, a request for information in an online forum would be considered a request of a potential client. The comment could provide greater clarity by adding the following sentence after the first sentence of Comment 5: "Requests for legal information or assistance made in any public forum should be considered a request of a potential client."

**Conclusion**

APRL's proposed rule amendments would go a long way toward achieving the much-needed goal of bringing lawyer advertising and solicitation rules into the 21st century. In doing so, they would allow consumers the access to information about legal services that they have come to expect from every other sector of the service economy. We urge the Committee to recommend adoption of the proposed amendments.