Proposal to Amend Illinois Rules Relating to Marketing and Communications to Improve Access to Justice—Rule 5.4 and Rule 7 Series

(April, 2019)

I. Executive Summary

Many thousands of Illinoisans who need or would benefit from legal assistance and can afford to pay something for it are not getting help from lawyers. This is happening at the same time that we have more lawyers than ever before.

One of the most noticeable and problematic consequences of this dynamic is the rising tide of Illinoisans with matters before the courts who believe they have no option but to represent themselves, even though most would prefer to have a lawyer. This is negatively impacting the livelihoods of solo and small firm practitioners trying to serve this market too, as they are not connecting with scores of potential paying clients.

In short, we have a major market failure in the market for legal services, and it is a fundamental access to justice problem. In the rest of the business and professional world, an untapped market like this is met with sophisticated marketing and advertising campaigns to educate and attract consumers. Other professions like the medical, dental, accounting and financial services sectors offer guidance on what a better functioning market would look like while also protecting the public and ensuring professional independence.

Lawyers, however, face a far more difficult challenge in doing this under the current Rules of Professional Conduct, which are both constraining lawyers from getting clients and making it harder for clients to find lawyers. Rather than helping lawyers responsibly connect to people who may need legal help, these rules have created a confusing and distorted market that is not serving any of the key stakeholders well—lawyers, the public, or the justice system. And it is people in need of legal help who ultimately suffer most.

As the rules hold lawyers back from meeting these needs, other business entities are stepping into the void, taking advantage of exceptions in the rules (e.g., Legal Zoom) or going around lawyers all together (e.g., DoNotPay). These entities are bringing innovation and new service models into the system, but not always in a way that best serves the public when what people really need is a lawyer to help them.

The current rules contain a number of exceptions that open the door for lawyers to partner with other business entities for limited purposes (e.g., lead generation, legal insurance and litigation funding), or to avoid the restrictions otherwise in place if they partner with particular entities like bar associations. However, the resulting panoply of rules and exceptions distorts the legal market in a way that does not serve the public or the profession well. In addition, the optics appear anti-competitive even if the court may be technically exempt from antitrust liability.

Lawyers could and should be at the center of these innovations and solutions but need more flexibility to responsibly partner with other professionals to do so. There are a number of examples of firms and entities that are proving lawyers can successfully serve the consumer market through innovation and new practice models. These programs, however, are extremely challenging to reach the necessary scale under the current rules.

Rather than tinkering around the edges of our existing rules governing marketing and communications about legal services, we need to take a step back and fully reconsider these rules through the lens of who it is we are trying to protect and what we are actually trying to protect them from. We also need to reevaluate existing rules in the context of the prevalence of online and digital communication, which play such a pivotal role in our society.

Three overarching principles should guide the clarification of these rules: (1) Protecting the Public; (2) Protecting the Professional Independence of Judgment of Lawyers; and (3) Promoting Access to Justice. To that end, we are proposing amendments to the existing Rules that promote all three of the above goals while providing clarity and flexibility to lawyers to help them use new approaches to better connect to potential clients and meet the growing unmet legal needs of moderate-income Illinoisans throughout the state.

By streamlining confusing and antiquated rules for marketing legal services and providing a responsible way for innovative “legal matching” entities and professional networks to do business in Illinois, our profession will be much better positioned to meet the legal needs of this unserved population. At the same time, solo and small firms serving this market will be better positioned to get new clients and increase their incomes.

Our Illinois Supreme Court has been a nationwide leader in addressing access to justice issues. By adopting this forward-looking approach to tackle the present market failure, Illinois would once again lead the way by modernizing our regulatory structure to make our profession more innovative, responsive, and accessible to the people who need legal services.

The current Rules of Professional Conduct are holding lawyers back in two broad ways: (1) prohibiting the sharing of fees with other entities (Rule 5.4), and (2) artificially restricting the ways lawyers can communicate about their services (Rule 7 series). This proposal begins with proposed changes to Rule 5.4 of the Rules. A parallel proposal then suggests complementary changes to Rule 7 series of the Rules.

II. The Fundamental Access to Justice Problem

Growing numbers of Illinoisans who need or would benefit from legal assistance and can afford to pay something for it are not getting help from lawyers. Many people don't even recognize their problem as a legal one, and when they do, they too often don't know where to go to find quality legal help or whether it would be an affordable and cost-effective solution for them. There increasingly is a perception that lawyers only represent wealthy individuals or corporations.

At the same time, we have more lawyers than ever before, most of whom have capacity and interest in helping more paying clients but increasingly are focusing on the already crowded market for corporate work. Solo and small firm lawyers willing and able to serve the market for individuals increasingly report economic challenges in their practices.

To put it bluntly, our market for legal services is broken. And it is people in need of legal help who ultimately suffer most.

Modernizing the Rules of Professional Conduct is not a substitute for properly funding and promoting pro bono and legal aid services for low-income Illinoisans who are in need of free legal help, or for the Court's ongoing leadership in making the legal system more user-friendly and accessible for people without lawyers. For the many thousands of Illinoisans who can afford to pay something for legal services, however, this is an essential part of the fix for the current broken market.

III. The Urgent Imperative for a New Look at the Rules Governing Marketing and Communications

The case for a new approach to these rules is driven by a series of related problems that are stifling innovation and access to justice.

A. People with legal needs increasingly are not using lawyers

Studies consistently show that the great majority of people with legal problems are not using lawyers, for two overarching reasons.

First, people don't seek legal advice because they fail to recognize their problem as a legal one. This most commonly occurs when people experience consumer, housing and employment problems. A recent American Bar Foundation study by the now nationally acclaimed Rebecca Sandefur highlighted the depth of this issue: http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf. Other legal needs studies in Illinois and elsewhere report similar findings.

Second, for people who do recognize they need legal help and can afford to pay something for it, the market failure referenced above is even more striking. This segment of the population has trouble finding affordable and cost-effective options for legal assistance in the current market. That trend is apparent in the American Bar Foundation study and is plainly illustrated by the statistics showing exploding numbers of pro se litigants in the courts.

The National Center on State Courts recently found that for civil cases, at least one party was unrepresented in an astounding 74% of cases: https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx. While the Administrative Office of the Illinois Courts only recently has begun collecting formal statistics on pro se litigants in Illinois, early returns suggest similarly huge percentages of people are unrepresented in the courts here.

There is no doubt that low-income or poor Illinoisans (who represent roughly 25% of the state's population) make up a significant share of the pro se population due to the shortage of pro bono and legal aid services. However, the statistics showing that people are going unrepresented in three out of four civil cases make it clear that a large share of this group have higher incomes. And studies suggest most of them would much prefer to have a lawyer, but they struggle to connect with affordable and accessible options in the current market. (See, e.g., http://iaals.du.edu/honoring-families/publications/cases-without-counsel-research-experiences-self-representation-us and https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf).

B. Lawyers increasingly are struggling and/or moving away from the market for individual legal services

Despite this huge untapped market for individual legal services, solo and small firm lawyers increasingly are gearing their practices towards the already crowded market for corporate services. A big driver of this trend is the increasing economic challenges lawyers who otherwise would be willing and able to serve the consumer market have found in those practices.

A recent article on trends in the legal profession by Bill Henderson highlights this growing divide: https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/.

C. Other legal providers are recognizing this market gap and moving in

At the same time that lawyers increasingly are failing to effectively meet the legal needs of individuals and small businesses, a growing number of other well capitalized, for-profit companies like Legal Zoom, TIKD, and, until recently, Avvo are sensing a major market opportunity and offering new kinds of online service options. These companies are proving that they have the expertise, financial resources, and scale to better connect people who need legal help with lawyers and other forms of legal assistance.

These entities see both the huge latent market of people who do not recognize their problems as legal in nature as well as the substantial market for people who recognize they need legal help, but don't know where to find it. And these companies are finding new ways to market to these people and connect them with legal services.

Under the current rules, what these entities cannot do is actually offer legal services or directly partner with lawyers as part of their networks. These companies currently are using exceptions to the rules that permit "lead generation" or legal insurance to connect their customers to lawyers, or they are offering technology "solutions" that go around lawyers all together.

The problem is for the many cases when what someone really needs is a lawyer to represent them, these services may not be an effective alternative.. Yet lawyers have an extremely difficult time competing with these entities today because they have little hope under the current rules of matching their business expertise and scale.

D. The existing rules are holding lawyers back from innovating and competing

A number of lawyers and firms are proving they can build successful practices that provide affordable and accessible services for this market by using innovative new practice models.

The dozens of lawyers launching successful firms through the CBF Justice Entrepreneurs Project (JEP) are a notable example. Expanding and replicating local networks like the JEP are an essential part of the solution to meeting the needs of the consumer and small business market. However, as is true for existing bar association lawyer referral programs (which collectively serve several thousand people a month), there is no way under the current rules these local networks can come close to reaching the scale necessary to meet the scope of the challenge for a market that numbers in the millions in Illinois alone.

Legal Zoom is proving that this can be done on a large scale, albeit with a model that artificially limits the role of lawyers to remain compliant with the current rules. Legal Zoom offers flat fees and 100% customer service guarantees, and has invested millions in marketing and advertising to raise public awareness and build its brand. Legal Zoom has served more than 4 million people since its inception, regularly gets high customer service ratings, and recently received a second stage investment of $500 million that values the company at more than $2 billion.

While entities the scale of Legal Zoom are only one part of the solution, allowing lawyers to responsibly partner with these types of entities at the local, regional and national levels not only would be put lawyers on a level playing field for competition, but would open up new markets for lawyers to get new clients and better serve the public.

For the huge latent market of people who don't recognize they have a legal problem and could benefit from a lawyer's services, more sophisticated and well-funded advertising campaigns like those of Legal Zoom can help educate and attract potential clients. The same is true for the market of people who recognize a legal problem but don't know where to turn to find affordable and accessible options that offer commensurate value.

Entities like Avvo and Legal Zoom have the financing, expertise, and technological capability to attack this problem at the necessary scale that solo and small firm lawyers and bar associations cannot match. There is great potential for lawyers to partner with these types of entities to close the gap between people who need and have the ability to pay a reasonable amount for legal services, if they are able to communicate more freely about their services and share fees so long as appropriate protections for the public are in place.

Other professionals like doctors, dentists, accountants and financial advisors can form or join professional networks, where the network provides the marketing and business expertise and scale that helps them better connect with more clients while allowing the professionals to focus on serving those clients well. These professional networks utilize a variety of business models. Some may charge the professional a set fee for participation, which can vary depending on the extent of the services the professionals want to receive. Others charge a set fee for the clients to utilize the network, a percentage of the fees from clients, or a share of the overall profits in the network. And some networks use a combination of these approaches.

A recent article in Crain's Chicago Business, "The latest thing in dentistry: Retail chains," (Crain's, July 27. 2018) offers a good example. A relatively small but growing percentage of dentists are joining networks backed by private equity that give the dentists the means to more affordably and effectively reach consumers and give solo/small practice dentists the opportunity to benefit from the resources, scale and

brand these broader networks make possible. This is similar to what is happening in other professions like medicine and accounting, but not in the legal profession because we are artificially limiting the types of business approaches lawyers can use.

Notably, we already allow a similar fee sharing approach when it is for bar association sponsored lawyer referral programs. Yet we then turn around under the rules and say for-profit companies cannot do the exact same thing. Apart from raising at least the appearance of antitrust concerns, this regulatory approach is very shortsighted and counterproductive for lawyers, clients, and access to justice more broadly.

E. The Current Rules Are a Confusing, Logically Inconsistent Patchwork and Raise Antitrust Concerns

The current rules contain a patchwork of exceptions that recognize that lawyers can ethically have a number of different corporate relationships. These exceptions have allowed some of the innovations like those noted above to take hold, but otherwise limit the ability of lawyers to partner with other business entities. When the rules and exceptions are viewed together, these broader prohibitions do not make sense from a legal or practical standpoint.

The rules allow lawyers to pay an outside entity for “leads” that have the potential to become clients, but if the lawyer actually gets a client through that entity, the lawyer is prohibited from paying a share of the client fee under the rules.

In addition, the rules allow lawyers to partner with outside entities that offer legal insurance to consumers and then connect those consumers to the lawyer when they have a problem. In these instances, the company actually delivers a client to the lawyer, but because the entity is the one paying the lawyer, it is not considered a violation of the rules on fee sharing.

Larger firms also can and do hire marketing and business professionals to work full-time for their firm without violating the rules. While it may be indirect, there is no doubt that client fees are paying for these other professionals. Yet solo or small firms that are not large enough to hire these other professionals on a full-time basis are prohibited from sharing their fees with outside entities or networks that provide the same services.

And finally, there is a broad exception for nonprofit bar association lawyer referral panels. These panels can share fees with lawyers on the panel in ways that are prohibited for any other entity.

When viewed together, the rules essentially open the door to some of the new business partnerships that are needed in the market, but do so in a logically inconsistent manner

that artificially limits when and how lawyers can do so. And when viewed through the prism of who and what we are trying to protect under these rules--the public and lawyer independence--there is no evidence that the risks from these already recognized exceptions are materially different from the risks posed when lawyers partner with other business entities.

The problems with the rules as they currently stand go beyond the concerns about access to justice and the health of our profession. Given the clear evidence of the market failure described above, maintaining this artificial patchwork of restrictions and exceptions in the rules increasingly raises the specter of antitrust as well (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3139030).

The State Bar of California, newly formed to regulate the legal profession in California after previously being part of the state bar association, recently commissioned a report on the state of the legal market landscape. The report's executive summary includes the following observations about the current market failure, and the State Bar has created a Task Force to review potential changes to the Rules to address these issues:

> *The legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services.*
>
> *Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession.*

F. What a Well-Functioning Consumer Legal Market Would Look Like

A well-functioning consumer market for legal services would look like more like the consumer markets for other professional services. Consumers would have a variety of legal service options that range from free and low-cost "self-help" resources, to various forms of limited scope representation, to full representation. And they would be able to obtain those services through a transparent and competitive market that includes a number of different options:

- Online self-help resources like Illinois Legal Aid Online and Legal Zoom
- Traditional, independent law firms

- Bar association lawyer referral programs
- Other for profit and nonprofit lawyer matching services
- Local, regional and national legal services networks
- Prepaid legal insurance plans

Most of these market options currently exist in some form, but not in a transparent or easily navigable market for consumers. While a change in the rules won't get us there overnight, there is no way we will ever even approach that ideal without business and marketing professionals and entities being a more integrated part of the solution.

An entity like Legal Zoom could involve lawyers from the start of its process and still offer the flat fees, customer service guarantees, and marketing muscle that has allowed it to reach a national scale. Local and regional networks like the JEP could become more visible to the public with the flexibility to partner with business and marketing professionals to increase their scale and efficiency. Solo and small firm lawyers would have new options to grow their practices and better connect with clients. And all lawyers and the public would benefit from this more competitive market with a better informed public.

IV. There is a Better Way Forward

As a profession, lawyers are known as problem solvers. This time the problem is us, and we have the power to solve it for the benefit of all concerned.

We should not wait for the inevitable antitrust complaint or challenge to our profession's ability to self-regulate the legal market. And we should not just tinker around the edges of the rules when we know the current system is not working well for our profession or the public. Instead, we propose a new approach that opens the door to more innovative business models while staying grounded in the fundamental purposes of these rules.

At its core, the current failure in the legal market is an access to justice problem, and we should be doing everything we can to help Illinois lawyers connect to the people who need or could benefit from their services.

While some opponents of this proposal suggest (without evidence) that these changes would be a threat to the livelihoods of solo and small firm lawyers, the proposed changes actually will provide new business options for these attorneys and give them access to scores of potential new clients.

Many solo and small firm lawyers who are very good at their craft do not have the same propensity for marketing or business savvy that is key to surviving in the new world. If these lawyers were able to join networks that have the scale to handle marketing and other business aspects of their practice in a cost-effective way (as doctors, dentists and other professionals already can and do), serving the consumer market in an economically sustainable way would be a more realistic option for many more lawyers.

By recognizing that lawyers need the ability to responsibly partner with business, marketing or other professional disciplines to succeed in the modern practice and need to communicate more freely about their services to compete in today's market, the Illinois Supreme Court once again can be at the forefront in using its leadership to improve access to justice.

Our proposed changes to Rule 5.4 of the Rules of Professional Conduct to achieve these goals follows below.

Proposed Amendments to *Rule 5.4*

These proposed amendments to Rule 5.4 are intended to give lawyers the ability to use modern marketing services, including online services and regional or national lawyer networks, to better promote the value of their legal services and connect with clients who need their help.

The rationale for new proposed new subsection (a)(5) is similar to the reasoning for why prepaid legal services already are permitted today.

The proposed new subsection (6) of this Rule uses an analogous approach to Rule 1.115(h)(1) for financial institutions holding IOLTA accounts, and draws in part from the ABA Model Supreme Court Rules for Lawyer Referral Services (https://www.americanbar.org/groups/lawyer_referral/policy.html).

……..

Proposed Amendments

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

….

(5) NEW

A lawyer or law firm may pay a portion of a legal fee to an entity that connects potential clients with lawyers or provides other business and administrative services if:

(a) There is no interference with the lawyer's professional independence of judgment or with the lawyer-client relationship;

(b) The total fee charged to the client would not be an excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services;

(c) The amount is a standard, reasonable charge for marketing, business or administrative services and is not contingent on the merits or outcome of any individual matter;

(d) No services provided by the entity involve the practice of law; and

(e) The relationship between the entity and the lawyer or law firm is transparent to the client.

(f) the entity is registered under Rule 5.4(a)(6)

(6) NEW

The Illinois Attorney Disciplinary and Registration Commission shall maintain a list of entities that connect potential clients with lawyers or law firms or provide other business and administrative services, and that have agreed to comply with this Rule and have registered with the Commission. In addition to compliance with all administrative requirements of the Commission, entities registering with the Commission under this Rule must annually certify that they meet the following requirements:

(a) That the entity operates in a manner that enables participating lawyers to comply with the Rules of Professional Conduct at all times, including Rule 5.4(a)(5);

(b) That the entity discloses to the Commission, all participating lawyers, and the public all standards or requirements for participation, and specifically discloses whether participating lawyers are required to carry malpractice insurance, do in fact carry malpractice insurance, meet minimum experience requirements, and meet any other ongoing requirements to maintain their participation with the entity;

(c) That the entity discloses to the public that the entity has a business relationship with the lawyer or law firm and, where applicable, that a portion of a client's fee will be paid to the entity;

(d) That the entity has a transparent process to receive and address all complaints from customers of the entity that involve services provided by participating lawyers;

(e) That the lawyer's participation in the service is open to all Illinois lawyers who are in good standing and meet the minimum eligibility requirements of the entity to participate;

(f) That the entity has written procedures for the admission, suspension or removal of a lawyer from participation with the entity; and

(f) That the entity complies with all applicable governmental consumer protection rules and meets basic standards of financial responsibility for the size and scope of its business.

An entity registered and in good standing under this Rule can renew its status each year by filing an annual renewal application with the Illinois Attorney Registration and Disciplinary Commission. In the event a registered entity is no longer in compliance with the requirements of this Rule, the Illinois Attorney Registration and Disciplinary Commission can remove that entity from the list of approved entities.

….

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

....

Comment (3) New:

A lawyer or law firm who engages the services of an entity that connects potential clients with lawyers or provides other business and administrative services has a duty to use due diligence to ensure that is registered and approved under Rule 5.4 (a)(6) and otherwise meet the requirements of Rule 5.4(a)(5).

The fee paid by the lawyer may vary by the type of service or matter involved so long at is a reasonable charge for the marketing, business or administrative services; is standard for each particular type of service or matter; and is not contingent on the merits or outcome of any individual matter. The sharing of fees that are contingent on the merits or outcome of an individual matter raises heightened concerns for protecting clients from misleading and coercive conduct, and thus is only allowable between lawyers when the requirements of Rule 1.5 (d) and (e) are met.

Comment (4) New:

Rule 5(a)(6) establishes minimum standards that, when met, provide lawyers with a safe harbor for complying with Rule 5.5(a)(5). The registration requirement under Rule 5.4(a)(6) is intended to protect potential clients and the public.

Proposed Amendments to *Rules 7.1 through 7.4*

Some of the solutions here require changes to Rule 5.4 and are covered in our parallel proposal above. Our proposed changes to the Rule 7 series of the Rules of Professional Conduct to achieve these goals follows below.

Rules 7.1 and 7.3 (a) and (b) define the core principles for lawyers and the marketing of legal services: *i.e.*, lawyers should refrain from making any false, misleading, coercive or harassing communications. Other than some clarifying amendments to Rule 7.3 (a) and (b), these parts of the Rules should remain intact and stand alone as the guiding principles for lawyers on these issues.

Rule 7.2, Rule 7.3 (c) and (d), and Rule 7.4 are confusing, unnecessary, duplicative, and/or overly prescriptive and have a chilling effect on lawyers using both innovative and proven means to market their services to potential clients. As a result, other for-profit legal providers increasingly are attracting customers who would be better served by a lawyer representing them, but are not connecting to lawyers due to obstacles created by the current rules.

Apart from the chilling effect the current rules create around marketing of legal services, there are two other issues that create more practical challenges for lawyers trying to serve the consumer market:

- Rule 7.2, which prohibits a lawyer from giving anything of value to someone recommending their services. This is unnecessarily restrictive and should be allowed so long as the lawyer does not violate the core principles of the Rule 7.1; and
- Rule 7.3 on solicitation, which prohibits solicitation of a client known to be in need of legal services. This is overbroad and only should be prohibited where it involves coercion, duress or harassment or the client has indicated they do not wish to be solicited.

The ABA recently revised the Rule 7 series of its Model Rules of Professional Conduct in a more limited way than we suggest here. While a modest improvement over the current rules, these changes to the Model Rules would leave an unduly complex and overly prescriptive set of rules that does not adequately resolve the practical challenges noted above and would continue to hinder innovation.

Virginia, on the other hand, recently approved a more streamlined approach similar to what we are suggesting for Illinois (deleting VA rules 7.2, 7.4, and 7.5 and consolidating them into one new rule 7.3): http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/.

The Association of Professional Responsibility Lawyers has recommended many of these changes as well: https://aprl.net/public-statements/ (https://aprl.net/wp-content/uploads/2016/07/APRL_2016_Lawyer-Advertising-Supplemental-Report_04-26-16_w-Attach.pdf) ("…legitimate regulatory objectives of preventing overreaching and coercion by lawyers who use in-person solicitation and targeted communications with the primary motivation of pecuniary gain can best be achieved by combining provisions of Model Rules 7.2 and 7.3 in a single rule…new Rule 7.2…)

A recent article from the United Kingdom sheds some light on why we have such a huge market failure now even though there are lots of lawyers out there: https://www.legalfutures.co.uk/latest-news/exclusive-competition-in-law-is-fierce-but-not-working-for-consumers. Two quotes in particular stand out:

> *"Where you've got a market that is very highly regulated in one way but where there can be limits to the information that is available to the consumers, it doesn't follow that the competition is fair and open, and that the consumers of legal services are the ones benefiting from the competition.*
>
> *"We should celebrate the fact that most people who use – and are lucky enough to be able to afford to use – legal services are satisfied with how they've been dealt with, but that shouldn't stop us from saying 'But a lot of people don't use them in the first place because they can't find out how to use them or they think they're too expensive,'"*

The approach we suggest for Illinois with respect to the Rule 7 series follows in that spirit, maintaining the fundamental ethical principles all agree that lawyers should abide by in marketing and communication but stripping out the overly prescriptive pieces of the current rules that have the effect of confusing lawyers and inhibiting innovation.

What follows is first the clean version of our proposed amendments, then a "track changes" or redlined version.

Proposed Amendments

(CLEAN)

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

NO CHANGE IN RULE; SUGGESTED UPDATES TO COMMENTS BELOW

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 commercial communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if:

(a) it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading;

(b) if there is a substantial likelihood 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; or

(c) it is presented in a way that leads a reasonable person to believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A commercial 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 the services or fees 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.

RULE 7.2: ADVERTISING

DELETE ENTIRELY

RULE 7.3: SOLICITATION OF CLIENTS

A lawyer shall not solicit professional employment if:

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

(b) the solicitation involves coercion, duress or harassment; or

(c) the lawyer knows or reasonably should know the person's circumstances could make the solicitation coercive.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication does not constitute 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 Internet searches.

[2] There is a potential for abuse when a solicitation involves direct real-time contact by a lawyer with someone known to need legal services when the person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest. The situation can be fraught with the possibility of undue influence, intimidation, and over-reaching. As a result, in addition to other prohibitions outlined in sections (a) and (b) of this Rule, the lawyer is prohibited from soliciting a person for legal services when the lawyer knows or reasonably should know that the person's circumstances could make the solicitation coercive.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

DELETE ENTIRELY

(TRACK)

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.

NO CHANGE IN RULE; SUGGESTED UPDATES TO COMMENTS BELOW

Comment

[1] This Rule governs all commercial communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if (a) it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading; (b). A truthful statement is also misleading if there is a substantial likelihood 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; or (c) it is presented in a way that leads a reasonable person to believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A commercial communication n advertisement 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 the services or fees 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] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

DELETE ENTIRELY

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give 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 lawyer referral service;

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

(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.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A solicitation is a communication initiated by or on behalf of a lawyer that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment if when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

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

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

(c) the lawyer knows or reasonably should know the person's circumstances could make the solicitation coercive.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in

a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute 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 Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services when These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. Tthe person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is can be fraught with the possibility of undue influence, intimidation, and over-reaching. As a result, in addition to other prohibitions outlined in sections (a) and (b) of this Rule, the lawyer is prohibited from soliciting a person for legal services when the lawyer knows or reasonably should know that the person's circumstances could make the solicitation coercive.

[3] This potential for abuse inherent in direct in-person, live telephone or real time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations 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 direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and

communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic 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 abusive practices against a former client, or a person with whom the lawyer has close personal or family 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 abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) 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] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which 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(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to 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] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit 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 (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to 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(b). See 8.4(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

DELETE ENTIRELY

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) The Supreme Court of Illinois does not recognize certifications of specialties in the practice of law, nor does it recognize certifications of expertise in any phase of the practice of law by any agency, governmental or private, or by any group, organization or association. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms “certified,’’ “specialist,’’ “expert,’’ or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements:

(1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1;

(2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.