

Standing Committee on Lawyer Advertising and Solicitation Proposes Proposed Rule Change Regarding Communication and Lawyer Advertising

The Virginia State Bar's Standing Committee on Lawyer Advertising and Solicitation (SCOLAS) approved proposed amendments to the Rules of Professional Conduct (RPC) 7.1 at its meeting November 14, 2001. The SCOLAS Committee will submit these rule amendments to the Council of the Virginia State Bar for approval at its next meeting on February 22 and 23 at the Holiday Inn-Select Koger Center in Richmond, Virginia.

The Committee decided to split Rule 7.1 as originally adopted into two rules and create new Rule 7.2. Rule 7.1 applies to all communications from a lawyer including advertising that is covered under Rule 7.2. Rule 7.2 was specifically segregated due to the unique issues created by the inclusion of paragraph (e) and the fact that the committee determined these specifics were meant to apply to advertising but not generically to all communications. The committee expanded paragraph (c) to include all written and e-mail communication. Paragraph (a)(3) is a new provision that specifically prohibits "advertising specific and cumulative case results," which has no direct counterpart in Virginia code, but incorporates the longstanding opinion of the committee, as previously outlined in their written opinions. If the proposed amendments are approved by Council, the bar will petition the Virginia Supreme Court to approve the proposed amendments.

Any individual or business which seeks to make comment in support of, or opposition to, the proposed rule amendments must submit ten (10) copies of written comments to Thomas A. Edmonds, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, on or before February 4, 2002.

RULE 7.1 – VIRGINIA RULES OF PROFESSIONAL CONDUCT, EFF. JAN. 1, 2000

Proposed Revisions to Rule 7.1, Virginia Rules of Professional Conduct INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 Communications And Advertising Concerning A Lawyer's Services

- (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication or advertisement violates this Rule if it:
- (1) contains false or misleading fee information; or
 - (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or
 - (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;
 - (4) ~~contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or~~

- (5) ~~contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization.~~

~~In the determination of whether a communication or advertisement violates this Rule, the communication or advertisement shall be considered in its entirety including any qualifying statements or disclaimers contained therein.~~

- (b) ~~A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. If such communication is disseminated to the public by use of electronic media, it shall be prerecorded and the prerecorded communication shall be approved by the lawyer before it is broadcast. A recording of the actual transmission shall be retained by the lawyer for a period of one year following the last broadcast date and shall be provided to the Standing Committee on Lawyer Advertising and Solicitation upon its request.~~
- (c) ~~A written communication that is contained in an envelope bearing the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective nonlawyer client who is not~~
 - (1) ~~a close friend, relative, current client, former client, or~~
 - (2) ~~one who has initiated contact with the attorney, or~~
 - (3) ~~one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter~~

~~shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL."~~

~~The required statement shall be displayed in the lower left hand corner of the front of the envelope in type size at least equal to the largest type used on the envelope, and also on the front of the first page of the communication contained in the envelope, in type size at least equal to the largest type used on the page.~~

~~Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer.~~

~~This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.~~

~~(d) or~~

- (4) 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 Rules of Professional Conduct or other law.

- (b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.
- (c) Any communication made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content.

COMMENT

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- [1] This Rule governs all 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 it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. 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.
- [3] The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system, with particular reference to legal problems that frequently arise. Preparation of advertisements, communications and professional articles for lay publications, participation in seminars, lectures, and civic programs, and other forms of permitted communications by lawyers to the public should be motivated by a desire to increase the public's awareness of legal needs and its ability to select the most appropriate counsel, rather than for the sole purpose of obtaining publicity for particular lawyers.
- [24] These Rules recognize the value of giving assistance in the lawyer selection process through forms of communications that furnish identification of a lawyer while avoiding falsity, deception, and misrepresentation. All such communications should be evaluated with regard to their effect on the reasonably prudent layperson. The nonlawyer is best served if communications about legal problems and lawyers contain no misleading information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney-client relationship should result from a free and informed choice by the layperson. Unwarranted promises of benefits, over persuasion, or vexatious or harassing conduct are improper.
- [3] The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. To achieve these objectives, advertising must not be false, fraudulent, misleading or deceptive. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit.

- [4] Advertisements and personal communications which are not misleading or deceptive will make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Because fee information frequently may be incomplete and misleading to a layperson, a lawyer should exercise great care that fee information is complete and accurate. Because of the individuality of each legal problem, statements regarding average, minimum or estimated fees may be deceiving; as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or other claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly likely to be deceptive. Statistical data or other information based on past performance or prediction of future success is deceptive because it ignores important variables. Only factual assertions, and not opinions, should be made in such communications. Commercial publicity and personal communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must communication be truthful but its meaning must be capable of being understood by the reasonably prudent layperson.
- [5] The regulation of advertising and personal communications by lawyers is rooted in the public interest. Advertising through which a lawyer seeks business by use of extravagant, or self laudatory statements or appeals to fears and emotions could mislead laypersons. Furthermore, public and personal communications that produce unrealistic expectations in particular cases may bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such statements regarding professional services. The attorney-client relationship, being personal and unique, should not be established as the result of pressures and deceptions. All lawyers should remain vigilant to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system. Only unambiguous information relevant to a layperson's decision regarding legal rights or selection of counsel is appropriate in communications.
- [6] Advertisements and public communications should be formulated to convey information that is useful to a layperson in making an appropriate selection. Self laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, such as: name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; languages spoken and written; and office hours; (2) biographical information; (3) description of the practice, but only by using designations and definitions authorized by Rule 7.4; and (4) fee information.
- [5] An unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.

VIRGINIA CODE COMPARISON

Rule 7.1 is identical to incorporates the provisions of DR 2-101 of the *Virginia Code* with the exception of paragraph

(e), which is contained in ABA Model Rule 7.2 and is intended to provide for accountability if any issue regarding a particular communication should arise, as they apply to all of a lawyer's communications.

COMMITTEE COMMENTARY

The Committee concluded that it would be prudent to adopt DR 2-101, dealing with lawyer advertising, and add paragraph (e). The content of that Disciplinary Rule was the result of recent deliberations by the Bar and the Supreme Court of Virginia. Similarly, the Comment simply incorporates various Ethical Considerations from Canon 2 of the *Virginia Code*.

As originally adopted, Rule 7.1 addressed both lawyer communications and lawyer advertising without any distinction. As amended, Rule 7.1 applies to all lawyer communications, including lawyer advertising, whereas Rule 7.2 specifically applies to lawyer advertising. The amendment now clarifies, for example, that Rule 7.2(e) applies only to lawyer advertising.

Rule 7.2(d) was amended to include written and e-mail communications. Subparagraph (a)(3) was added to Rule 7.2 to prohibit "advertising specific or cumulative case results," which incorporates the Committee's longstanding opinion found in LEO 1750(F).

PROPOSED RULE 7.2 to Virginia Rules of Professional Conduct

RULE 7.2 Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety including any qualifying statements or disclaimers contained therein. Notwithstanding the foregoing, an advertisement violates this Rule if it:
- (1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or
 - (2) contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization; or
 - (3) advertises specific or cumulative case results.
- (b) A recording of the actual electronic media advertisement shall be approved by the lawyer prior to its broadcast and retained by the lawyer for a period of one year following the last broadcast date, along with a record of when and where it was used, which recording and date shall be provided to the Standing Committee on Lawyer Advertising and Solicitation upon its request.
- (c) 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 not-for-profit lawyer referral service or legal service organization; and

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

(d) A written or e-mail communication that bears the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective nonlawyer client who is not:

(1) a close friend, relative, current client, former client; or

(2) one who has initiated contact with the attorney; or

(3) one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter;

shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL."

The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, "ADVERTISING MATERIAL."

Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.

(e) Any advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content.

COMMENT

[1] The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. To achieve these objectives, advertising must not be false, fraudulent, misleading or deceptive. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit.

[2] Advertisements and personal communications which are not misleading or deceptive will make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated.

individually. Due to fee information that may frequently be incomplete and misleading to a layperson, a lawyer should exercise great care that fee information is complete and accurate. Due to the individuality of each legal problem, statements regarding average, minimum or estimated fees may be deceiving, as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. Disclaimers or qualifying statements are not effective to cure the misleading or deceptive nature of such advertisements. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or other claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly likely to be deceptive. Statistical data or other information based on past performance or prediction of future success is deceptive because it ignores important variables. Only factual assertions, and not opinions, should be made in such communications. Commercial publicity and personal communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must communication be truthful but its meaning must be capable of being understood by the reasonably prudent layperson.

- [3] The regulation of advertising and personal communications by lawyers is rooted in the public interest. Advertising through which a lawyer seeks business by use of extravagant, self-laudatory statements, or appeals to fears and emotions, could mislead laypersons. Furthermore, public and personal communications that produce unrealistic expectations in particular cases may bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such statements regarding professional services. The attorney-client relationship, being personal and unique, should not be established as the result of pressures and deceptions. All lawyers should remain vigilant to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system. Only unambiguous information relevant to a layperson's decision regarding legal rights or selection of counsel is appropriate in communications.

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VIRGINIA CODE COMPARISON

Rule 7.2 is similar to DR2-101 of the *Virginia Code* except for those provisions included in Rule 7.1. In addition, Rule 7.2 (a)(3) includes the specific prohibition against advertising specific and cumulative case results. Paragraph (d) also now includes the provisions that all written or e-mail communication must display the words "advertising materials."

Paragraph (e), which is contained in *ABA Model Rule 7.2*, is intended to provide accountability if any issue

regarding a particular communication should arise.

COMMITTEE COMMENTARY

The Committee decided to split the originally adopted Rule 7.1 into two rules and create Rule 7.2.

Rule 7.1 applies to all communications from a lawyer including advertising that is covered under Rule 7.2. Rule 7.2 was specifically segregated due to the unique issues created by the inclusion of paragraph (e) and the fact that the committee determined these specifics were meant to apply to advertising but not generically to all communications. The committee expanded paragraph (c) to include all written and e-mail communication.

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