



## Major Shift in How Lawyer Advertising Will Be Regulated in Virginia

AFTER A LONG STUDY, the Virginia State Bar's Standing Committee on Legal Ethics proposed major changes to the Rules of Professional Conduct on how advertising should be regulated in Virginia. It relied for guidance, in large part, on the Association of Professional Responsibility Lawyers "2015 Report of the Committee on Lawyer Advertising Regulation." The VSB Council approved the proposed amendments by a vote of 65 to 1 at its meeting on February 25, 2017.

In its brief to the Supreme Court of Virginia, the VSB stated its rationale for proposing the substantial revisions to the advertising rules:

The regulation of lawyer advertising has been problematic for decades. State bars and regulatory officials have struggled attempting to address and balance legitimate regulatory goals with the constitutional restrictions on regulating commercial speech, and the understandable, but legally infirm, goal of "promoting professionalism" or promoting the public perception of lawyers. More recently, the explosion of the internet and media age has compounded these difficulties, with radical changes in the ways people exchange information, make decisions, and select professionals, and likewise the manner in which professionals network and promote their services.

To address these issues, and strike the appropriate regulatory balance, the Virginia State Bar Standing Committee on Legal Ethics ... has proposed and Council has endorsed significant revisions to Rules 7.1-7.5 of the Rules of Professional Conduct. The proposed revisions were guided by several basic

principles: (1) the advertising rules should be focused on the appropriate regulatory purpose, protecting the public; (2) the rules must facially and as applied withstand constitutional scrutiny; (3) the rules must be legally and practically enforceable; and (4) the rules should be practical in application to evolving means of communication and promotion of legal services.

The polestar of the proposed revised rules is a focus, albeit not exclusively, on the prohibition or restriction of any advertising or communication about a lawyer's services that is false or misleading, as broadly defined in the rule. False or misleading commercial speech is not constitutionally protected and harms the public.

The Court approved the proposed rule changes on April 17, 2017, effective July 1, 2017. In summary, the advertising rules have been changed in the following manner:

- Rule 7.1 is streamlined to a single admonition that communications about a lawyer's services may not be false or misleading;
- Rules 7.4 and 7.5 are deleted, but certain principles from those rules are addressed in new comments, and reinforce appropriate limitations on the solicitation of potential clients;
- Claims of specialization and the content of firm names, previously addressed by Rules 7.4 and 7.5 respectively, are now addressed by comments to Rule 7.1, because they are specific applications of the general obligation not to make false or misleading statements;

- The required disclaimer for statements of case results has been removed from Rule 7.1, again shifting to a general false or misleading standard rather than a mandatory technical requirement;
- Rule 7.3, which addresses solicitation of clients, is amended to more explicitly define the term "solicitation" and to expand the comments to more clearly explain its application to issues such as paying for marketing services or for lead generation.

The new advertising rules effective July 1, 2017, are as follows:

### INFORMATION ABOUT LEGAL SERVICES.

#### **RULE 7.1. Communications Concerning A Lawyer's Services.**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

#### **COMMENT**

[1] 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.

[2] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated 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. 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.

[3] In communications about a lawyer's services, as in all other contexts, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law. Rule 8.4(c). See also Rule 8.4(d) 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.

### **Areas of Expertise/Specialization**

[4] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training, or education, or is certified by a named professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

### **Firm Names**

[5] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or compara-

ble professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name such as "clinic" that also includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[6] Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

### **RULE 7.2. Advertising [DELETED].**

### **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 solicit employment from a potential client if:

- (1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.

(c) Every written, recorded or electronic solicitation from a lawyer shall conspicuously include the words "ADVERTISING MATERIAL" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic solicitation, unless the recipient of the solicitation:

- (1) is a lawyer; or
- (2) has a familial, personal, or prior professional relationship with the lawyer; or
- (3) is one who has had prior contact with the lawyer; or
- (4) is contacted pursuant to court-ordered notification.

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;
- (2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

### **COMMENT**

#### ***Direct Contact between Lawyers and Laypersons***

[1] 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 far less likelihood that a lawyer would engage in abusive practices against an individual who is a former

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client, or with whom the lawyer has a close personal or family relationship; nor is there a serious potential for abuse when the person contacted is a lawyer or when the person has already initiated contact with the lawyer. Consequently, the requirements of Rule 7.3(c) are not applicable in those situations.

[2a] The requirement in Rule 7.3(c) that certain communications include “ADVERTISING MATERIAL” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors; however, prior contact from the lawyer in the form of advertising material does not circumvent the need to include the words “ADVERTISING MATERIAL” in future contacts. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a potential client known to be in need of legal services within the meaning of this Rule.

[3] Even permitted forms of solicitation can be abused; thus, any solicitation that contains information that 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), or which involves contact with a potential client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b), is prohibited. Moreover, if after sending a letter or other communication to a potential client the lawyer receives no response, continued repeated efforts to communicate with the potential client may constitute harassment and therefore violate the provisions of Rule 7.3(b). Regardless of the form of the communication, its propriety will be judged by the totality of the circumstances under which it is made, including the potential client’s sophistication and physical, emotional, and mental state, the nature and characterization of the legal matter, the parties’ previous relationship, the lawyer’s conduct, and the words spoken.

***Paying Others to Recommend a Lawyer***

[4] Lawyers are not permitted to pay others for recommending the law-

yer’s services or for channeling professional work in a manner that violates Rule 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. However, Paragraph (d)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers, as long as the employees, agents, and vendors do not direct or control the lawyer’s professional judgment in violation of Rule 5.4(c). See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them. Moreover, a lawyer may pay others for generating client leads, such as internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.4, and the lead generator’s communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.

[5] Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and publicity and personal communications from lawyers may help to make this possible. A lawyer should not compensate another person for recommending him or her, for influencing a potential client to employ him or her, or to encourage future recommendations.



## Have You Moved?

To check or change your address of record with the Virginia State Bar, go to the VSB Member Login at <https://member.vsb.org/vsbportal/>. Go to “Membership Information,” where your current address of record is listed. To change, go to “Edit Official Address of Record,” click the appropriate box, then click “next.” You can type your new address, phone numbers, and email address on the form.

Contact the VSB Membership Department ([membership@vsb.org](mailto:membership@vsb.org) or (804) 775-0530) with questions.

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