

Regulation of Lawyer Advertising

Proposed Changes to the S.C. Rules of Professional Conduct

RULE 1.0 DEFINITIONS (additions)

a) Advertise: To disseminate an advertisement or cause an advertisement to be disseminated on one's behalf.

b) Advertisement: An advertisement for purposes of these Rules includes any communication, except as provided herein, made by or at the direction of a lawyer or law firm

- 1) that identifies the lawyer or law firm for the purpose of conveying to potential clients information about the nature, quality, cost, or availability of the lawyer's or law firm's services; or
- 2) that otherwise promotes to persons outside of the law firm the name, likeness, or logo of the lawyer or law firm, its services or reputation.

Communications with existing clients regarding the quality, availability, nature, or cost of legal services, made in the normal course of legal representation, including proposed fee agreements, are not considered to be advertisements for purposes of these Rules.

Comment

[1] Included within the definition of an advertisement is any form of media advertisement as defined in 1.0(c) as well as numerous other forms of communication, including, but not limited to, verbal communications, telephone calls, recordings, letters, electronic mail, electronic messaging, websites, brochures, and professional cards.

c) Media Advertisement: A media advertisement is an advertisement in the form of a communication disseminated by any of the following methods:

- 1) a newspaper, magazine, telephone directory, or other form of written media (other than those included within sections (c)(2), (c)(3), and (c)(4)) that is generally circulated to or available for purchase by members of the public;
- 2) a professional directory;
- 3) a newsletter or other similar form of written media other than one distributed solely within the law firm,
- 4) an event program, brochure, or similar publication distributed in connection with the activities of a school, charitable, or other not-for-profit organization;
- 5) a billboard or other form of advertising signage, other than office signage that identifies only the name and address of a lawyer's office; or
- 6) television, radio or other form of electronic media, including Internet advertising, electronic newsletters, and computer web logs, but excluding electronic mail, electronic messaging, and websites maintained by or on behalf of the advertising lawyer or law firm.

d) Solicit: To make a solicitation or cause a solicitation to be made on one's behalf.

e) Solicitation: A solicitation is an advertisement, initiated by a lawyer or law firm, in the form of

- 1) an in-person, live telephone, or real-time electronic communication, or
- 2) any personalized communication with regard to a specific matter or event directed to a person or a relative of a person known or believed to be in need of legal services. A communication is considered to be a personalized communication directed to a person if the communication is directed to a specific mail or electronic address, even if the communication does not include the name of a specific intended recipient.

Communications are not solicitations within these Rules if they that are not initiated by the lawyer or law firm and are made only in response to a specific request for information initiated by the person receiving the information. Such communications are subject, however, to Rules 7.1, 7.2, and 7.3.

RULE 7.1 ADVERTISEMENT; PROHIBITION OF FALSE OR MISLEADING ADVERTISEMENT; TESTIMONIALS

a) A lawyer may advertise legal services through oral, written, recorded, or electronic forms of communication, provided that

- 1) in-person, live telephone, or real-time electronic communications are permitted only as set forth in Rule 7.5;
- 2) the communication must not violate any of Rules 7.1 through 7.8;
- 3) the advertisement must not contain any statement, image, or other content that, alone or in the context of the advertisement, is false, misleading, or unfair or that is likely to create a false, misleading, or unfair impression in the mind of a reasonable person receiving the advertisement; and
- 4) the advertisement must not involve coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence.

b) A statement or the advertisement as a whole shall be considered to be false or misleading if it

- 1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, when considered as a whole, not materially misleading;
- 2) 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;
- 3) compares the lawyer's qualifications or services with those of other lawyers, unless the comparison can be factually substantiated;
- 4) contains a testimonial, unless the testimonial is an actual testimonial of a person, given without compensation of any type, and the name and relationship to the lawyer of the person giving the testimonial is provided in the advertisement;
- 5) contains a nickname, slogan, symbol, moniker, or trade name that implies a prohibited comparison with the qualifications or services of other lawyers, implies a willingness to

use inappropriate means to obtain results, or implies particular abilities to obtain particular results;

6) includes a representation, implied or expressed, that the lawyer will provide services that the lawyer is not, and is not reasonably likely to become, qualified or competent to provide;

7) is made to resemble legal pleadings or other legal documents;

8) implies that a lawyer is a specialist or expert in a particular field unless the lawyer is permitted to do so under Rule 7.9; or

9) implies or suggests that merely by contacting or hiring the lawyer, a client will obtain monetary gain or compensation in a matter.

If a testimonial is used in compliance with Rule 7.1(b)(4), the lawyer must retain, for a period of two (2) years after the advertisement is last disseminated, adequate records identifying the name and relationship to the lawyer of the person making the testimonial and showing that the testimonial is an accurate representation of actual comments made by that person.

c) A lawyer is responsible for the content of any advertisement placed or disseminated by the lawyer and has a duty to review the advertisement prior to its dissemination reasonably to ensure its compliance with the Rules of Professional Conduct.

d) 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 permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

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

e) No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses prominently the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

RULE 7.2 DIGNITY

No lawyer shall advertise in a manner that is likely to have a substantial adverse effect upon public confidence in the legal system, including an advertisement that is intended or likely to attract clients by use of showmanship, puffery, or hucksterism, including the use of slogans, jingles, or garish or sensational language or format.

RULE 7.3 REQUIRED CONTENT OF ADVERTISEMENTS

- a) Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses. The advertisement must also disclose the exact terms of any fee or claim of any fee that the lawyer intends to assert against the client if the lawyer is later discharged from the representation.
- b) If an advertisement sets forth a specific fee or range of fees for a particular service, the lawyer shall honor the advertised fee or fee range for at least ninety (90) days following dissemination of the advertisement, unless the advertisement specifies a shorter period; provided that a fee advertised in a publication which is issued not more than annually, shall be honored for one (1) year following publication.
- c) Except as otherwise provided, any media advertisement, any law firm website home page, and any other advertisement directed to a specific individual or address, shall
- 1) include the name and address of at least one lawyer responsible for its content.
 - 2) disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

The provisions of this paragraph (c) shall not apply to a basic telephone directory listing; a professional directory listing; or any advertisement or solicitation directed only to a prospective client who is a lawyer, has a family, close personal, or prior professional relationship with the lawyer, or has first requested the solicitation.

Comment

The provisions of paragraph (c) do not apply to most forms of firm letterhead or professional cards or to items such as pens, hats, cups, tee shirts bearing the name or logo of a law firm or lawyer. Also excepted from the paragraph is a traditional white pages or basic Yellow Pages telephone listing of a lawyer's or law firm's name, address and telephone number and a professional directory listing. Display advertising in the Yellow Pages and other similar directories is subject to the requirements of the paragraph.

RULE 7.4 SOLICITATION

A lawyer may solicit professional employment from a prospective client, unless

- 1) the solicitation is prohibited under Rule 7.5;
- 2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
- 3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person unless the accident or disaster occurred more than thirty (30) days prior to the solicitation;
- 4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person solicited is represented by a lawyer in the matter; or
- 5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

RULE 7.5 IN-PERSON, LIVE, OR REAL-TIME SOLICITATION

(a) A lawyer may not solicit professional employment from a prospective client by in-person, live telephone, or real-time electronic contact, if a significant motive of the solicitation is the lawyer's pecuniary gain, unless the prospective client

- 1) is a lawyer; or
- 2) has a family, close personal, or prior professional relationship with the lawyer.

(b) Notwithstanding paragraph (a) of this Rule, a lawyer may make a speech, lecture, or similar presentation to an audience, in connection with which the lawyer or law firm is identified, even if a significant motive is to promote publicly the reputation of the lawyer or law firm, as long as the lawyer does not solicit a specific member of the audience, unless that person falls within one of the categories set forth in paragraph (a).

RULE 7.6 REQUIRED CONTENT OF SOLICITATIONS

a) Written solicitations mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted or certified delivery.

b) A written solicitation shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

c) If a lawyer reasonably believes that a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles the case or matter, or that the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the potential client.

(d) In addition to complying with paragraphs (a), (b), and (c) above, every solicitation permitted by Rule 7.4, except for those directed to a prospective client who is a lawyer, has a family, close personal, or prior professional relationship with the lawyer, or has first requested the solicitation, shall conform to the following provisions:

1) If the solicitation is in written form, the words "SOLICITATION and "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. If the solicitation is by recorded voice message, every such communication shall clearly state both at the beginning and at the end that the communication is an advertisement. If the solicitation is made by computer, including but not limited to electronic mail, the words "SOLICITATION" and "ADVERTISING MATERIAL" printed in capital letters and in prominent type, shall appear in any subject line of the message and at the beginning and end of the communication.

2) Each solicitation must include the following statements:

(1) "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll-free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer" and

(2) "The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary."

When the solicitation is written or by computer, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS COMMUNICATION OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE [LAWYER ADVERTISING COMMISSION] [COMMISSION ON LAWYER CONDUCT], POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211-TELEPHONE NUMBER 803-734-2038." When the solicitation is written or by computer, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

(4) Any solicitation prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

RULE 7.7 PREPAID AND GROUP LEGAL SERVICES

Notwithstanding Rule 7.5, 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. A lawyer may participate with a prepaid or group legal service plan only if the plan is established in compliance with all statutory and regulatory requirements imposed upon such plans under South Carolina law. Lawyers who participate in a legal service plan must make reasonable efforts to assure that the plan sponsors are in compliance with Rules 7.1 and 7.4.

RULE 7.8 FILING REQUIREMENTS

A copy of

- a) every solicitation except for those directed to a prospective client who is a lawyer or who has a family, close personal, or prior professional relationship with the lawyer, and
- b) all media advertisements included within Rule 1.0(c)(1), (5), and (6), with the exception of web logs and of non-display telephone directory listings

shall be filed with the [Lawyer Advertising Commission] [Commission on Lawyer Conduct] within ten (10) days after the advertisement or solicitation is first disseminated to the public, together with a fee of \$50. If the advertisement or solicitation is published in written or electronic form, a printed copy of the advertisement or solicitation as it appears shall be filed. If disseminated in video or audio form, a copy of the advertisement or solicitation as disseminated shall be filed in the form of an audio cassette, CD, DVD, or a video cassette in VHS format. If an advertisement or solicitation is disseminated on multiple occasions or in several publications without change in content, only one copy of the ad is required to be filed. The lawyer shall keep a copy or recording of every written or electronic advertisement for two (2) years after its last dissemination, along with a record of when and where it was disseminated. When advertising content on a lawyer's or law firm's website is revised, the lawyer shall maintain a copy of the previous content for two (2) years after the revision occurs. A lawyer who uses written, recorded, or electronic solicitation shall maintain a record for two (2) years showing the following:

- (1) the basis by which the lawyer knows the person solicited needs legal services; and
- (2) the factual basis for any statements made in the written, recorded, or electronic communication.

RULE 7.9, COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION, and RULE 7.10, FIRM NAMES AND LETTERHEADS, are renumbered (from 7.4 and 7.5, respectively) but no changes in wording are proposed.