



**ILLINOIS STATE**  
**BAR ASSOCIATION**

April 25, 2018

**Comments of the Illinois State Bar Association  
to the Revised (March 23, 2018 Draft)  
Proposed Amendments to the  
American Bar Association Model Rules of Professional Conduct  
on Lawyer Advertising**

To: American Bar Association  
Standing Committee on Ethics and Professional Responsibility  
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**Introduction**

On behalf of its more than 28,000 lawyer members, the Illinois State Bar Association is pleased to submit its comments on the Standing Committee on Ethics and Professional Responsibility's Revised (March 23, 2018 draft) Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising.

As stated in its Comments submitted on February 28, 2018 with respect to the Standing Committee's initial December 21, 2017 draft, the Illinois State Bar Association ("ISBA") supports the goals stated by the Standing Committee of "encouraging more national uniformity" and "simplifying the rules that are actually enforced by state regulators." The ISBA appreciates the positive changes made to the original proposal, as reflected in the March 23, 2018 draft. Unfortunately, however, as discussed below, the ISBA remains concerned that at least four of the proposed amendments would lead to less uniformity and more complexity in the enforcement of the lawyer advertising rules. As before, the ISBA is also concerned that adoption of these proposals would most likely result in less protection of the public from inappropriate or improper solicitation by some lawyers.

**Remaining Specific Concerns**

**1. Proposed relegation of current Rule 7.5(c) to commentary.**

The Standing Committee proposes to move the substance of current Rule 7.5(c), which prohibits the use of the name of a lawyer holding public office in a law firm name, to a new Comment [9] to revised Rule 7.1, as an "example" of a misleading communication.

The ISBA continues to believe that current Rule 7.5(c) is an important stand-alone black letter rule that impacts broader interests than lawyers in private practice. It has important implications for governmental and judicial ethics in assuring the public that a judge or government official is not biased or subject to improper influence from a prior law firm relationship. Recasting this rule as an “example” or a “guide to interpretation” as opposed to an authoritative, enforceable standard is simply inadequate. See ABA Model Rules: Scope, Comment [21]. Also, as the Standing Committee is surely aware, a number of jurisdictions have traditionally chosen not to adopt comments to their disciplinary rules; so there would be no standard or guidance on this important issue in such jurisdictions.

The ISBA urges the Standing Committee to retain the substance of current Model Rule 7.5(c) as an enforceable black letter standard in any revision of the advertising rules.

## **2. Proposed Relief for Directory Listings.**

The ISBA appreciates the revised proposal with respect to Rule 7.2, Comment [2] concerning expressed, implied, or suggested value of a lawyer’s services. Nevertheless, the ISBA continues to believe that the Committee’s proposed language excluding “directory listings and group advertisements that lists lawyers by practice area, *without more*, ...” is an insufficient safe harbor for bar association directories. Many of these not for profit bar association directories contain much more detailed information than simple practice area. To the extent that the Committee’s proposal would impede the ability of bar associations to utilize modern technologies to provide relevant and important information about their members to the public as part of paid member benefits and services, remains objectionable.

## **3. Proposed “experienced user” exception to the prohibition on in-person solicitation.**

The Standing Committee proposes to “slightly” expand the exceptions to the prohibition on in-person solicitation of Rule 7.3 to include any person “known by the lawyer to be an experienced user of the type of legal services involved for business matters.” However, proposed new Comment [5] to Rule 7.3 reveals the actual broad reach of the new exception. There is little practical guidance on when someone becomes an “experienced user” of a particular type of legal services for business matters. In this regard, it is disturbing to note that the sentence at lines 272 to 274 of the December 21, 2017 draft, which appeared to protect persons who had previously retained lawyers only for personal representations from the “experienced user” designation, was deleted from March 23, 2018 draft.

More concerning is that no threshold is offered in the draft rule or comment for determining when a person becomes an “experienced user” of legal services; a single retention would seem to suffice. And the Standing Committee’s apparent notion that the actual in-person solicitation of the hypothetical “experienced user” might somehow be limited to a particular “type of legal services involved” is simply not realistic. Once a person is deemed an “experienced user” subject to direct in-person contact, and a direct in-person contact is then made by a lawyer, there is no reasonable way to limit the subjects that might be discussed during the ensuing conversation. As a practical matter, virtually any person who has ever retained any lawyer for any business matter would become fair game for any other lawyer for in-person

solicitation regarding any type of legal representation. What the Standing Committee describes as “slight” expansion in theory would eviscerate the no-contact rule in practice.

The ISBA notes that APRL proposed a similar “sophisticated user” exception to the prohibition on in-person solicitation. The ISBA believes that the regulation of in-person solicitation is an important client-protection concern and that neither APRL nor the Standing Committee have adequately considered the implications of their respective proposals. For that reason, the ISBA opposes any expansion of the exceptions to the prohibition on in-person solicitation for either “sophisticated” or “experienced” users of legal services at this time.

#### **4. Proposed elimination of the “Advertising Material” legend from targeted solicitations.**

The Standing Committee proposes to eliminate the requirement, expressed in current Rule 7.3(c), that all targeted written or electronic communications soliciting professional employment be marked as “Advertising Material.” The Standing Committee’s explanatory memorandum does not mention the client-protection purpose of the marking requirement. As noted by Professors Rotunda and Dzienkowski: “The purpose of these warnings is to permit a targeted person to first know that the communication is from a lawyer seeking to offer them legal services and second to permit them to throw the envelope away, hang up the telephone, or delete the email without reading or listening to the entire communication.” Ronald D. Rotunda and John S. Dzienkowski, *Legal Ethics, The Lawyer’s Deskbook on Professional Responsibility* 2017-2018, § 7.3-2(c) at p. 1311 (2017).

In contrast, the Standing Committee proposes to shift the burden to consumers and declares (at p. 17), without any supporting evidence, that “... most consumers will not feel any compulsion to view the materials solely because they were sent by a lawyer or law firm.” The clear implication of this speculative assertion is that the Standing Committee believes it will always be safe for consumers to assume that any unmarked letters or emails from lawyers are junk mail. But an unmarked letter from a lawyer or law firm is not like mail from an insurance or real estate agent. Communications from lawyers can have real consequences. (For example, Federal Bankruptcy Rule 7004(b) permits service of process by first class mail.) If risk-averse consumers believe that unmarked letters or emails from a lawyer or law firm might affect their rights or interests, they will need to open and review all the letters or emails to determine whether the communications are in fact junk mail. Although the careful consumers may well decide quickly that the lawyers’ communications are junk, opening and reviewing all these communications still takes time. The cumulative annoyance and wasted time will be substantial.

Another concern with unmarked targeted communications is the potential for alarming or confusing recipients of the communications. A devious lawyer may easily craft communications that may not be objectively misleading, but which may nevertheless cause unsophisticated consumers to believe that they need to contact that lawyer. The Standing Committee memorandum dismisses this concern by stating (at p. 17) that if a solicitation is misleading, any harm is adequately addressed by Rule 7.1. But this approach overlooks two important client-protection factors. First, communications that disciplinary authorities might not find sufficiently false or misleading to justify a charge may nevertheless confuse and cause anxiety to many unsophisticated consumers. Second, the simple self-executing requirement of appropriate labeling would obviate the need for costly after-the-fact adjudications in the first instance.

In further support of its recommendation to delete the marking requirement, the Standing Committee memorandum states (at p. 17) that “no evidence was produced showing that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers.” Given that most states currently require marking (the placement of the “Advertising Material” legend on targeted solicitations), the alleged lack of evidence of harm from unmarked solicitation letters proves little. In contrast, the Standing Committee memorandum does not provide any evidence that the marking requirement is an undue burden on either lawyers or consumers. More important, the Standing Committee does not offer any evidence that the current marking requirement has prevented consumers from obtaining useful legal information that they wished to receive. The Standing Committee has simply failed to show that elimination of the marking requirement would benefit consumers in any way.

The ISBA also notes that the Association of Professional Responsibilities Lawyer’s (“APRL”) Report of April 26, 2016 recommended retaining the current Model Rules requirement for an “Advertising Material” legend on written solicitations and making that requirement part of the black letter in any revised rules.

Finally, should the proposed elimination of the “Advertising Material” legend from targeted written solicitations become part of the Model Rules, it is unlikely to be adopted in Illinois or in many other jurisdictions. The result will be less, rather than more, uniformity in the lawyer advertising rules among the jurisdictions.

The ISBA strongly opposes the proposed elimination of “Advertising Material” legend from targeted written solicitations. The ISBA believes that requiring a legend for targeted written solicitations is an important client-protection measure. The unsupported assumptions asserted by the Standing Committee to justify eliminating the requirement are not persuasive. Like APRL, the ISBA recommends retaining the substance of current Rule 7.3(c) in any revision of the advertising rules.

### **Conclusion**

For the reasons stated, the ISBA urges the Standing Committee to reconsider the March 23, 2018 version of its proposed amendments to the lawyer advertising rules in light of the comments of the ISBA and other interested persons and groups.

The ISBA also again requests that if and when the Committee proposes revised or additional amendments to the lawyer advertising rules, that the Committee afford the ISBA and other interested persons and groups sufficient time (at least 90 days) to review and formulate comments on the proposed amendments.