

Comments on: **Proposed Amendments to Model Rules of Professional Conduct 7.1 to 7.5—Lawyer Advertising and Solicitation**

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Responsive Law thanks the ABA for the opportunity to present its testimony on the proposed amendments to MRPC 7.1-7.5. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the public.

A year ago, Responsive Law submitted testimony in support of the amendments proposed by the Association of Professional Responsibility Lawyers (APRL) in its 2016 report to the ABA. While we believed that much more streamlining of the rules was needed, we thought that the 2016 APRL proposal took significant steps toward reforming many of the advertising rules in a way that would allow consumers greater access to information about legal services without diminishing consumer protection.

Unfortunately, the current draft amendments before the Committee make only incremental changes to the existing rules. **We recommend that the Committee reject these proposed amendments and instead adopt amendments in line with those recommended by APRL in its original 2015 report.**

Consumers Have Little Awareness of Their Legal Needs or How to Find Legal Help

Most low- and middle-income individuals, families, and organizations have little awareness of how to go about getting help for their legal matters. The source of this problem is twofold.

First, due to a lack of sophistication regarding the legal system, many individuals in need of legal services fail to even recognize that their problems contain a legal issue. As noted by the American Bar Association Commission on the Future of Legal Services, past

promotional efforts by state bars have proven insufficient to raise public awareness of its need for legal assistance.¹

Second, even when a given consumer does recognize that her need is legal in nature, she may be at a loss in determining what sort of aid is needed and how it can be located. A 2013 study found that two-thirds of random adults in a mid-sized American city experienced at least one significant civil justice legal issue within an 18-month period, but only one-fifth of those experiencing such a situation sought any formal help.² A significant factor in the justice gap stems from the difficulty inherent in identifying particular consumers' needs and connecting them to appropriate legal aid providers. Under the regulatory regimes currently active in many states, the system through which consumers access legal services is "confusing, opaque, and inefficient for many people."³ When faced with a civil justice issue, up to half of those who do not choose to seek outside help fail to do so because they believe that such help would be ineffective, too difficult to locate, or too costly.⁴

Advertising Raises Public Awareness of Lawyer Services and Makes Those Services More Accessible.

Advertising has an important role to play in making members of the public aware of the legal components of their problems and in serving as a valuable aggregator of legal information and resources.

Under current regulatory regimes, a latent demand for legal services goes largely unmet due to myriad barriers preventing consumers from connecting with service providers and accessing the preliminary information needed to make informed decisions about the nature of their legal needs and the best avenue by which to meet

¹ ABA Commission on the Future of Legal Services, "Report on the Future of Legal Services in the United States," 2016, <http://abafuturesreport.com/#1>.

² Sandefur, Rebecca L., "Accessing Justice in the Contemporary USA: Finding from the Community Needs and Services Study," submitted to the American Bar Foundation August 8, 2014.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040.

³ Carter, Stephen, "The Legal Services Corporation Launches Pilot Program to Increase Access to Justice," quoting Legal Services Corporation President James J. Sandman, April 19, 2016, <http://www.lsc.gov/media-center/press-releases/2016/legal-services-corporation-launches-pilot-program-increase-access-0>.

⁴ Sandefur, *supra*, n. 2.

them. Demand in this “latent legal market” vastly outstrips the resources available to serve it, having a disproportionate adverse effect on low- and middle-income individuals, organizations, and associations. Among those low- and middle-income Americans with justiciable civil legal issues, nearly a quarter report taking no action at all.⁵

The First Amendment Protects Consumers’ Right to Receive Information, Outweighing the Speculative Harm from Lawyer Communications

In nearly any other area of human need, advertising plays a major role in helping educate the public about how a type of service—not only the particular business being advertised—may benefit them. For example, even if a Jiffy Lube commercial doesn’t convince me to go to Jiffy Lube, it’s likely to remind me to get my car’s oil changed regularly. Unfortunately, the labyrinthine restrictions on lawyer advertising have prevented the public from being made aware of their legal rights and needs to the same extent they are aware of how to maintain their cars.

Our March 1, 2017 comments on the previous iteration of these proposed amendments discussed how the *Bates* decision protects consumers’ right to receive information. Those comments also noted APRL’s position, with which we concur, that lawyers should not be subject to discipline for advertisements that are “potentially misleading,” or which violate technical requirements.⁶

Furthermore, any restriction of the information received by consumers should weigh the actual harm caused to consumers by the types of communications being restricted against the value to the consumers of receiving information. Since complaints regarding lawyer advertising come almost exclusively from lawyers, rather

⁵ Sandefur, Rebecca L. 2007. “The Importance of Doing Nothing: Everyday Problems and Responses to Inaction.” Pp. 112-132 in *Transforming Lives: Law and Social Process*, edited by Pascoe Pleasence, Alexy Buck and Nigil Balmer. London: TSO: Rebecca L. Sandefur 2010: “The Impact of Counsel: An Analysis of Empirical Evidence.” *Seattle Journal of Social Justice* 9 (1): 51-95.

⁶ Association of Professional Responsibility Lawyers, 2015 Report of the Regulation of Lawyer Advertising Committee, p. 29 (June 22, 2015).

than from consumers⁷, it's reasonable to conclude that the harm from these communications is theoretical. Given this imbalance between benefit and harm, restrictions on attorney communication with potential customers should be far more narrowly tailored.

The U.S. Supreme Court's *Dental Examiners* Decision Subjects Restrictions on Lawyer Advertising to Antitrust Liability

The U.S. Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state action immunity only if it is subject to active supervision by the state.⁸

All state bar governing bodies consist either entirely or predominantly of lawyers, chosen by lawyers. Therefore, any action those bars take with regard to regulation of the legal profession is being made entirely by market participants. In many states, there is either no supervision by the state supreme court, or the state supreme court rubber stamps decisions of the bar. In either case, bars enacting anticompetitive regulations would not receive state action immunity and would be subject to antitrust action.

To the extent that states adopt the proposed model rules, they would be chilling not only the speech of lawyers, but their ability to compete by promoting their services in new and innovative ways. Advertising is one of the ways that new entrants into a market can gain inroads against benefits of the status quo. By favoring insiders over outsiders through advertising restrictions, bars would be engaging in anticompetitive behavior, in violation of *Dental Examiners*.

Consumers Are Not Stupid

Putting aside, for a moment, constitutional, ethical, and antitrust analysis, the current rules make no sense. My wife, who isn't a

⁷ *Id.* at 28-29.

⁸ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

lawyer, heard part of a conference call I was on recently with a state ethics committee. After hearing committee members parse the wording of a proposed ethics opinion and discuss whether certain words would be permissible in lawyer advertising, she asked, exasperated, “Do they think that people are stupid?”

Consumers are not stupid. In fact, they’re smarter now than they have ever been. They expect a lot of information from anyone whom they’re hiring, and understand how to evaluate the claims of anyone trying to sell them something. It’s patronizing to tell them that they can only receive information from lawyers under strictly proscribed circumstances because they would otherwise be hoodwinked into buying something they don’t need by lawyers’ Svengali-like argumentative skills. To the contrary, given that public opinion polls consistently place lawyers among the least trusted professions in America, consumers are more likely to exercise extra caution before spending hundreds or thousands of dollars on legal help.

As APRL noted, to the extent that there are “[l]egitimate professional responsibility concerns regarding referral fees and the division of fees, [they] are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4.”⁹ Additional regulation of the information that consumers can receive from lawyers is not only patronizing to consumers, but also provides them no additional protections.

Conclusion

APRL’s 2015 report was an excellent analysis of the existing lawyer advertising and solicitation rules, and its recommendations were sound. The ABA has diluted those recommendations to near homeopathic levels. **We urge the ABA to reject the current proposed amendments and replace them with new rules that include a simple “false or misleading” standard for lawyer communications about their services, and which eliminate the current Rule 7.2,** with its micromanaging standards that provide no protection to consumers while unconstitutionally chilling the information provided to them.

⁹ APRL Report, *supra* n. 6, at 30.