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The Proposed Rules on Advertising and Solicitation

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THE PROPOSED RULES ON ADVERTISING AND SOLICITATION

STATE BAR OF TEXAS RULES VOTE, FEBRUARY 2 TO MARCH 4, 2021

WRITTEN BY VINCENT R. JOHNSON

Note: This article addresses the rule proposal appearing as ballot item E.

The proposed rules dealing with lawyer advertising and solicitation seek to clarify, simplify, and modernize this area of the law, while nevertheless continuing to endorse principles and practices that have proved to be sound. Here are some of the high points.

Proposed Rule 7.01: Communications Concerning a Lawyer's Services

Front and center, this provision states the basic rule that is the cornerstone in this area of the law: namely, a lawyer shall not make a false or misleading statement about legal services. This rule, which is rooted in constitutional jurisprudence, applies to all communications offering legal representation.

The proposed provision then defines what constitutes an “advertisement” or a “solicitation communication.” These definitions are structurally important because certain rules laid down in subsequent sections apply only to advertisements or solicitation communications.

In general, an advertisement is a communication directed to the public at large, whereas a solicitation communication is directed to a specific person. However, as defined by this rule, a communication falls into neither category unless it is “substantially motivated by pecuniary gain.” This means that lawyers promoting various forms of nonprofit legal services, such as legal aid for the poor, do not need to worry about complying with the disclosure and filing requirements that are applicable to advertisements and solicitation communications. (Of course, they must still comply with the ban on false or misleading statements.)

Because statements that are truthful and not misleading are constitutionally protected, this rule abandons the traditional prohibition against the use of trade names. Unless it is false or misleading, use of a trade name is permitted. A large majority of jurisdictions now permit the use of trade names.

Proposed Rule 7.02: Advertisements

The requirements of this rule dealing with advertisements will feel familiar because they are rooted in earlier law. An advertisement:

- must identify a lawyer responsible for its content (and the lawyer's primary practice location);
- may disclose that the lawyer has been certified or designated

as possessing special competence, including by the Texas Board of Legal Specialization, if certain requirements are met; and

- must disclose whether a client who is represented on a contingent fee basis will be obligated to pay for other expenses, such as costs of litigation.

The rule also addresses how long a lawyer must conform to a specific fee or range of fees promoted in an advertisement.

Proposed Rule 7.03: Solicitation and Other Prohibited Communications

This rule carries forward traditional prohibitions against in-person solicitation. However, the rule now makes clear that the anti-solicitation ban applies not only to in-person contact, but also to “telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.”

For the first time in Texas, this rule expressly indicates that it *does not* prophylactically ban all solicitation communications with “a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.” In such situations there is little risk of abuse. However, the rule continues to prohibit any communication that involves “coercion, duress, overreaching, intimidation, or undue influence.”

A solicitation communication must not be “misleadingly designed to resemble a legal pleading or other legal document” and, with limited exceptions, must be “plainly marked” ADVERTISEMENT.

This provision continues the traditional rule that a lawyer may not pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients, except that now “nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services” are permitted.

In addition, reciprocal referral agreements with another lawyer or nonlawyer professional are now allowed provided “(i) the ... agreement is not exclusive; (ii) clients are informed of the existence and nature of the agreement; and (iii) the lawyer exercises independent professional judgment in making referrals.”

The rule continues the prohibition against paying or giving anything of value to a prospective client (other than certain litigation expenses and other financial assistance permitted by the rules), except that now “ordinary social hospitality of nominal value” will be permitted.

Proposed Rule 7.04: Filing Requirements for Advertisements and Solicitation Communications

This rule continues the filing requirements for certain advertisements and solicitation communications. It also continues to allow lawyers to seek preapproval of advertisements and solicitation communications.

Proposed Rule 7.05: Communications Exempt from Filing Requirements

This rule greatly expands the number of situations in which advertisements or solicitation communications are exempt from the filing requirements of Rule 7.04. In particular, “(a) any communication of a bona fide nonprofit legal aid

organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services” is exempt.

In addition, “information and links posted on a law firm website, except the contents of the website homepage” are exempt.

Professional newsletters are exempt if they are sent to “(1) existing or former clients; (2) other lawyers or professionals; (3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters; (4) members of a nonprofit organization which has requested that members receive the newsletter; or (5) persons who have asked to receive the newsletter.”

There is also an exemption from filing for “a communication in social media or other media, which does not expressly offer legal services, and that: (1) is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or (2) consists primarily of the type of information commonly found on the professional resumes of lawyers.”

There are other exemptions that reduce the burdens of filing.

Proposed Rule 7.06: Prohibited Employment

This rule states when violation of various rules dealing with communications about legal services, or general principles of misconduct, result in personal disqualification, imputed disqualification of other lawyers in a firm, or restrictions on referral-related payments.

Voting in favor of this part of the referendum will reduce the uncertainties that too often surround speech about legal services in the digital age, while at the same time continuing to protect potential clients from the harm that may be caused by false and misleading statements or overreaching practices.



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LIMITED PRO BONO LEGAL SERVICES: THE CASE FOR PROPOSED RULE 6.05

WRITTEN BY M. LEWIS KINARD

Note: This article addresses the rule proposal appearing as ballot item D.

The need for Proposed Rule 6.05 in Texas became clear after Hurricane Ike in 2008. In the weeks after the rains stopped, I helped orient and encourage dozens of lawyers who wanted to

help people handle the critical, unexpected legal complications of surviving a huge natural disaster. Working with the Houston Bar Association, lawyers from Lone Star Legal Aid went over topics such as completing Federal Emergency Management Agency forms, alternative ways to prove ownership and identification, emergency food stamp and Medicare options, and who is responsible for removing a neighbor's fence or house from one's own yard.

It was great to see so many lawyers eager to go to the disaster relief centers where families poured in seeking help putting their lives back together. But when the disaster legal aid desks were set up, very few of those trainees appeared.

The same thing happened after Hurricane Harvey in 2017 and even the wildfire season of 2011. Most of the disaster legal aid work was handled by professional legal aid attorneys, a few volunteers provided through the American Bar Association, and standing pro bono programs in large counties.

What happened? When asked, those who gave an answer generally pointed to one thing: the fear of imputed conflicts of interest under Disciplinary Rules 1.06, 1.07, and 1.09. Many firms discouraged or restricted their associates from going out to remote help centers because there were few options and no time to complete conflicts checks before assisting each disaster victim. A well-meaning attorney might provide advice adverse to a lucrative present or future client of the firm, even if only represented by a distant office.

In response to stories like this around the country, the American Bar Association's Ethics 2000 Commission added Model Rule 6.5 in 2002. Every state except Texas and one other has adopted the rule or a version of it. We need this rule. More accurately, *Texans* need the bar to approve this rule.

Conflict of interest rules are important protections for clients—present, former, and future. But the drafters didn't contemplate situations where lawyers do not know all their firm's clients or, in an effort to address urgent, simple legal questions, might unknowingly cause significant economic consequences to the other lawyers in their firms as well as their other clients.

Rather than modify all rules with imputed conflict provisions, this new rule carves a very narrow exception in a way that strikes a balance between protecting the client's interests and keeping prohibitions against a firm representing a party adverse to another client.

The proposed rule describes when it applies (very limited help in a short period of time, such as a help desk), what a lawyer must do to earn and keep the exemption (avoid known conflicts and not share confidential client information with other firm lawyers, e.g.) and requires the services to be run by a court, bar association, law school, or nonprofit legal services program (for accountability).

The exception is narrow. The benefit to the public will be broad.



M. LEWIS KINARD

is executive vice president, general counsel, and assistant corporate secretary at the American Heart Association. He spent six years on the State Bar of Texas Committee on Texas Disciplinary Rules of Professional Conduct until it was disbanded in 2018. With over 30 years of legal and business experience, Kinard is serving as the first chairperson of the Committee on Disciplinary Rules and Referenda.