

## VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the 15th day of* April, 2013.

On November 7, 2011, March 29, 2012 and December 4, 2012 came the Virginia State Bar, by George Warren Shanks, its President, and Karen A. Gould, its Executive Director, and presented to the Court a petition, approved by the Council of the Virginia State Bar, and modified proposals, respectively, praying that Rules 7.1-7.5, be approved to read as follows:

### INFORMATION ABOUT LEGAL SERVICES.

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

(a) 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 when omission of such fact makes the statement materially false or misleading as a whole.

(b) A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to

advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

(c) Any advertising pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content; or, in the alternative, a law firm may file with the Virginia State Bar a current written statement identifying the lawyer responsible for the law firm's advertising and its office address. The law firm shall promptly update the written statement if there is any change in status.

(d) A lawyer shall timely respond to and fully cooperate with any requests for information by Ethics Counsel regarding the lawyer's advertising.

#### **COMMENT**

[1] This Rule governs all communications about a lawyer's services, including advertising. The purpose of lawyer advertising is to promote or propose the hiring of the lawyer. Communications about a lawyer's services are statements or claims made about the lawyer or lawyer's services that are intended, in whole or in part, to inform others about the availability of the lawyer's services. Communications through public media as well as communications targeted to one or more persons are subject to this Rule. This Rule is not intended to regulate forms of non-commercial speech by lawyers such as political or religious commentary. Whatever means are used to communicate regarding a lawyer's services, statements about them must be truthful and not misleading. A statement or claim is misleading if it is likely to mislead the public or a

prospective client. For example, a statement that "you pay nothing unless we win" is false and misleading if the client is held responsible for payment or reimbursement of costs or expenses related to the client's case, as required by Rule 1.8(e). Similarly, a statement or claim that a lawyer handles a particular type of case, i.e., products liability, is false and misleading if the lawyer does not practice in that area of law and the lawyer's only involvement is to intake the client and then refer the client to another lawyer outside the firm.

[2] Advertisements and other communications about a lawyer or a lawyer's services that are not false or misleading will make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Due to fee information that may frequently be incomplete and misleading to a layperson, a lawyer should exercise great care that fee information is complete and accurate. Due to the individuality of each legal problem, statements regarding average, minimum, or estimated fees may be misleading, as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or other claims that convey an impression that the ingenuity of the lawyer, rather than the justice of the claim is determinative are similarly likely to be misleading. Advertising and other communications stating specific or aggregate case results should disclose the impossibility of assuring any particular result. Not only must a communication be truthful, but its meaning must be capable of being

understood by the reasonably prudent layperson.

[3] 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. A good example of a truthful statement that is misleading by omission of a material fact is the statement "We won a \$2 million verdict in this case" when in fact the verdict had been overturned by the court. The omission of that key fact makes the statement itself misleading.

[4] A statement or claim that an outcome was not or will not be related to the facts or merits of the particular matter is false or misleading and, therefore, improper. An advertisement 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. Further, any statement or claim that is likely to create an unjustified expectation about the results the lawyer can achieve is misleading. The inclusion of the disclaimer required by paragraph (b) of this Rule is necessary to avoid creating unjustified expectations or misleading a potential client. The required disclaimer must precede each and every statement of specific or cumulative case results.

[5] 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.

[6] Statements or claims made by others about the lawyer's services are governed by this rule if the lawyer adopts them in his or her communications. See also Rule 8.4(a) regarding violations of the Rules of Professional Conduct through the agency of another.

[7] This Rule permits public dissemination of information concerning, for example, a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

#### **COMMITTEE COMMENTARY**

The Committee has revised Rules 7.1-7.5 in their entirety. Rule 7.2 has been eliminated and relevant parts of Rule 7.2 regarding lawyer advertising are incorporated within Rule 7.1 as that Rule covers all communications including lawyer advertising; relevant parts of Rule 7.2 regarding solicitation and paying others to recommend a lawyer have been incorporated within Rule 7.3.

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

**RULE 7.3 Direct Contact With Potential Clients**

(a) 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.

(b) 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 or communications permitted by this Rule and Rule 7.1;

(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.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall conspicuously display the words "ADVERTISING MATERIAL" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication:

- (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.

**COMMENT**

*Direct Contact between Lawyers and Laypersons*

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, 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 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.

[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(a), 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(a), 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(a). 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 channeling professional work. However, Paragraph (b)(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. 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.

[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.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists potential clients to secure legal representation. Not-for-profit lawyer referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule permits a lawyer to pay only the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a not-for-profit lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and not-for-profit lawyer referral services may communicate with potential clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead potential clients to think that it was a lawyer referral service sponsored by a state agency

or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] The requirement in Rule 7.3(c) that certain communications be marked "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.

#### **COMMITTEE COMMENTARY**

The Committee changed the rule to refer to the "potential" client as a result of the recent adoption of Rule 1.18 which narrowly defines the "prospective" client.

#### **RULE 7.4 Communication Of Fields Of Practice And Certification**

Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1 and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

- (a) A lawyer admitted to engage in patent practice before the

United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) A lawyer engaged in Admiralty practice may use as a designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation;

(c) A lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., "certified mediator" or a substantially similar designation;

(d) A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.

**COMMENT**

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to public communications concerning a lawyer's services.

[2] However, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long-established

policy of the Patent and Trademark Office as reflected in paragraph (a). Paragraph (b) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Because Virginia has no procedure for approving organizations granting certifications of other specialties, lawyers communicating the fact that they have been certified as specialists in a field of law by a named organization (other than the Supreme Court of Virginia as provided in paragraph (c)) must clearly disclose that there is no procedure in Virginia for approving certifying organizations (paragraph (d)).

#### **VIRGINIA CODE COMPARISON**

Rule 7.4(a) and (b) are substantially the same as DR 2-104(A). Paragraph (c) is new, and paragraph (d) follows one of the two options in ABA Model Rule 7.4(c).

#### **COMMITTEE COMMENTARY**

The Committee maintained the current DR 2-104(A) approach in the first two paragraphs of this Rule.

Because national organizations are increasingly certifying specialists in different areas of the law, the Committee determined to permit Virginia lawyers to describe such certifications. However, Virginia has no procedure for state approval of such certifications. For this reason, the Committee adopted the alternative ABA Model Rule 7.4(c) that requires lawyers communicating certified specializations to make the additional clear disclosure that Virginia has no procedure for approving certifying organizations. This additional disclosure balances

Virginia clients' interest in receiving additional information about lawyers and the need to avoid misleading clients by implying some government-approved certification. At the same time, it was deemed that any certification process implemented by the Supreme Court of Virginia (under (d)) would obviously be reliable, so as to eliminate the necessity for any disclaimer.

**RULE 7.5 Lawyer and Firm Names And Letterheads**

(a) A lawyer shall not use a name, firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictions in which they are licensed to practice if they are not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

**COMMENT**

[1] 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 comparable professional designation. Although the Supreme Court of the United States 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 that 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 retired or 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.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners 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.

[3] Lawyers should practice using the official name under which they are licensed or seek an appropriate and legal change of name from the Supreme Court of Virginia. The lawyer's use of a name other than the lawyer's name on record with the Virginia State

Bar may be a misleading communication about the lawyer's services to the public in violation of Rule 7.1.

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Upon consideration whereof, it is ordered that the Rules 7.1-7.5, be and the same hereby are amended in accordance with the prayer of the petitions aforesaid, effective July 1, 2013.

A Copy,

Teste:

A handwritten signature in cursive script that reads "Pat L. Hamming".

Clerk