

## Professional Responsibility

Eric M. Fink  
Elon Law School  
Fall 2019

# Advertising & Solicitation

## 1 Scope of Regulation

MRPC Rule 7.1

- Prohibits false or misleading communication about lawyer or lawyer's services

1st Amendment

- Applies to attorney advertisements and solicitations
- Commercial speech doctrine
  - State may regulate ads only if the regulation
    - protects a substantial interest, and
    - the regulation is no broader than necessary
- Substantial interests justifying regulation of attorney advertising & solicitation:
  - Preventing false, misleading, and potentially misleading ads.
  - Protecting against undue interference with client choice
- Taste, decorum, dignity, tradition, etc. are not substantial interests

## 2 Advertising

### 2.1 Definition

Communications aimed at large groups (i.e. the general public or a broad target audience), not targetted to particular individuals or limited groups of persons known to be in need of legal services.

May be delivered through various media: - television, radio - newspapers, magazines - yellow pages - billboards - bulk mail, mass email - websites, internet ads

### 2.2 Limits & Requirements

#### 2.2.1 No False, Misleading, or Deceptive Statements

Claims about quality

- Non-verifiable claims or comparisons (e.g. "Best auto accident lawyer in Jacksonville") are improper.
  - Accolades or recognition are permissible if true and source is identified (e.g. "Chosen as Superlawyer by Philadelphia Lawyer magazine.")
- Statements about past experience or performance must not be misleading.
  - Example: "Never lost a jury trial" would be misleading if the lawyer has never had a jury trial, or only had a few.

Client Testimonials & Past Results

- Permitted if
  - information is true,
  - makes clear that the results of each case are different (i.e., disclaimer), and
  - client consents to the use of name

Factual professional and personal information about attorney is permitted - if true, and - does not imply an

ability to use improper influence

### Examples

*My name is Saul Goodman. I am an attorney and a C.P.A. I handle medical malpractice and personal injury cases. I graduated first in my class from Elon University School of Law in 2010, and I have a degree in accounting from the University of North Carolina at Chapel Hill. I was raised in Greensboro, serve as President of the Fisher Park Neighborhood Association, and volunteer as a youth soccer coach. I speak fluent Spanish. If you have a legal problem, please call me or send me an email. Your initial consultation is free. My office accepts credit cards.*

- Proper, as long as all statements are true.

*As many of you know, my father has been a judge on the NC Court of Appeals for 20 years and my brother was recently elected to as a District Court judge in Guilford County. Please call me should you need any legal assistance.*

- Improper, even if true, because it implies ability to use improper influence.

## 2.2.2 Identification of Attorney Advertising

### MRPC Rule 7.2(c)

Advertisements must include the name and office address of at least one lawyer or law firm responsible for its content

# 3 Solicitation

## 3.1 Definition

### MRPC Rule 7.3(a)

*[C]ommunication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.*

- In-person, face-to-face communication
- Live telephone calls
- Targeted, direct-mail
- Real-time electronic contacts (e.g., instant and text messaging)

## 3.2 Restrictions

### MRPC Rule 7.3(b) & (c)

- Solicitations are prohibited unless
  - Lawyer has prior professional (attorney-client) relationship with person
  - Prospective client and lawyer are family members
  - The person solicited is a lawyer, or
  - Lawyer's primary motive is not pecuniary gain
    - Solicitation of clients by nonprofit organizations offering free representation for litigation aimed at advancing political goals is permitted, based on 1st Amendment. *In re Primus* (U.S. 1978); *NAACP v. Button* (U.S. 1963)
    - See also, MRPC Rule 6.1 (Voluntary Pro Bono Service)
- Even if otherwise permitted, solicitation is prohibited if
  - Prospective client has requested that lawyer not solicit, or
  - Solicitation involves coercion, duress, harassment

### 3.3 Direct Mail & Recorded Phone Messages

Targeted, “truthful and nondeceptive” direct mail or recorded phone message solicitations of “potential clients known to face particular legal problems” are generally protected commercial speech under the 1st Amendment. *Shapiro v. Kentucky Bar Assn.* (U.S. 1988)

- States may restrict targeted direct mail or recorded phone message solicitations within a limited time of the incident giving rise to the need for legal services.
  - See *Florida Bar v. Went for It, Inc.* (U.S. 1995) (upholding 30 day waiting period)
- States may require that direct-mail and recorded telephone solicitations are identified (on the envelope, or at the beginning & end of the recorded message) as “Lawyer Advertising”

### 3.4 Prepaid Legal Services Plans

A lawyer may be a member of a prepaid legal services plan which solicits prospective members in-person or by live telephone calls

- The lawyer may not have an ownership or management interest in the plan, nor may the lawyer personally participate in the solicitation
- The plan may not solicit persons who it knows are in need of legal services in a particular matter

## 4 Communicating Fields of Practice

MRPC Rule 7.4

- A lawyer may identify fields of practice in which the lawyer does (or does not) practice
  - “Practice limited to ....”
  - “We handle ....”
  - “Jones & Smith. Personal injury, medical malpractice ....”
- But a lawyer may not identify as a “specialist” unless certified as such
  - Must identify the certifying body
    - “Certified as a Trial Specialist by the State of Ohio,”
    - “Certified as a Trial Specialist by National Association of Trial Attorneys”

*Hayes v. NY Attorney Grievance Committee* (required disclosure for identification as certified specialist violates 1st Amendment and is unconstitutionally vague)

### 4.1 Specialist Certification in NC

- A lawyer may not claim that he or she is a “specialist” unless the lawyer is certified as a specialist by the North Carolina State Bar’s Board of Legal Specialization or a certifying organization that has been approved by the American Bar Association.
- Requirements:
  - Must be licensed and in good standing to practice law in North Carolina;
  - Must be substantially involved in the practice area, usually for a minimum of five years;
  - Must take a certain number of continuing legal education credits in the specialty area during the three years prior to application;
  - Must make a satisfactory showing of qualification in the specialty through peer review; and
  - Must achieve a satisfactory score on a written examination in the practice area.
- Areas of Certification:
  - Bankruptcy (subspecialties in consumer & business bankruptcy);
  - Criminal law (subspecialties in state & appellate criminal law);
  - Family law;
  - Estate planning and probate law;
  - Immigration law;

- Real property (subspecialties in residential & commercial real property);
- Workers' compensation law;
- Social security disability law.

## 5 Firm Names and Letterheads

### 5.1 General Rule

No false or misleading names may be used

### 5.2 Trades names ("The ABC Law Firm")

Permissible as long as such names do not imply a connection with government ("Greensboro Law Firm") or with a public or charitable legal organization ("Red Cross Legal Clinic")

- If such implications are made, a disclaimer ("Not associated with the Red Cross") would be required.

A lawyer or firm may also use a distinctive website address (as long as it's not misleading).

### 5.3 Multistate firms

A multistate law firm may use the same name ("Sidley & Austin") in each state as long as its letterhead clearly identifies lawyers not licensed in the state where the letterhead is being used:

#### Example

*Smith, Jones & Davis.*  
*Offices in New York, Chicago, and Los Angeles.*  
*Ms. Jones is licensed to practice law in California and New York.*  
*Mr. Davis and Mr. Smith are licensed to practice law in Illinois.*

- Permitted if information is truthful and not misleading.

### 5.4 Inclusion of attorney names:

- Names of deceased and retired partners may continue to be used
- If lawyer leaves a firm to assume public office for a "substantial period," lawyer's name must be removed

#### Examples

- Partner Jones is elected as a full-time judge; Jones' name must be removed
- Partner Jones is appointed to fill a judicial vacancy for two weeks; Jones' name need not be removed
- Partner Jones is appointed as a part-time judge but continues to practice with firm in accordance with state law; Jones' name need not be removed

### 5.5 Partnerships, Associations, & Affiliations

Firm name may not imply a partnership or association where none exists

- A and B share office space but are not partners. It is improper for A & B to use letterhead, signs, etc. saying "A & B, Attorneys at Law".

A lawyer may not identify herself as a "partner," "associate," "of counsel," or "counsel" with another lawyer or law firm unless such a relationship truly exists.

Firms may claim that they are "affiliated" or "associated" if they have a regular, ongoing relationship (but this may create conflicts of interest)

- Jones & Smith's letterhead states "affiliated with Lopez and Sanchez, Mexico City"

- Proper if there is an ongoing relationship between firms

## **6 Payments in Exchange for Referrals**

### **6.1 Referral Fees**

MRPC Rule 7.2(b)

- Referral fees are prohibited
- Exceptions
  - Advertising costs
  - Fees for membership in legal services plan or non-profit referral service
  - Payment for acquiring a law practice
  - Reciprocal referrals to other lawyers or non-lawyer professionals, if arrangement is non-exclusive and disclosed to client

Examples of Improper Payments

- Lawyer pays a “runner” \$1,000 for each referral
- Lawyer pays real estate agent 10% fee for referrals
- Lawyer gives accountant a gift for years of referrals

### **6.2 Political Contributions**

A lawyer may not make political contributions so as to obtain legal engagements or appointments

Example

- ABC Law Firm donates \$50,000 to the election campaign of Judge X. ABC rarely makes political donations. Judge X is elected and immediately appoints ABC to handle all guardianships for the court. In such case, an inference arises that ABC “bought” the appointments.