

The Ethical Limits on Lawyer Advertising and Solicitation

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It is well established that advertising and solicitation by lawyers are protected by the First Amendment, but that a state may place reasonable restrictions on these activities. *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). The revisions to the Massachusetts Rules of Professional Conduct that became effective July 1, 2015 contain modifications to the rules on attorney advertising and solicitation. The primary principle underlying Mass. R. Prof. C. 7.1 through 7.5 is honesty in communications about legal services. This article will address the requirements of Mass. R. Prof. C. 7.1 through 7.5, as well as highlight the 2015 modifications.

Mass. R. Prof. C. 7.1 prohibits false or misleading communications about a lawyer's services. It defines a false or misleading communication as a statement containing a material misrepresentation of fact or law, or omissions that make the statement false or misleading. The rule applies to all communications about a lawyer's services, including advertising permitted by Mass. R. Prof. C. 7.2, the advertising rule.

The text of Rule 7.1 was not revised in 2015, but several comments were added. Comment 2 clarifies that truthful statements that are misleading may violate this rule and adopts a "substantial likelihood" test to make this determination. Comment 3 relates to truthful advertisements concerning a lawyer's success on behalf of clients and comparisons to other lawyer's services that may require a disclaimer or qualifying language to preclude unjustified expectations by the public. Comment 4 cross-references Rule 8.4(e), which prohibits lawyers from stating or implying an ability to improperly influence a government agency or official or that they can achieve results by means that violate the rules or other law.

Mass. R. Prof. C. 7.2 specifically addresses advertising by lawyers. Consistent with the need to recognize and permit new technology, paragraph (a) was revised in 2015 to omit the names of specific types of media in which lawyers could advertise in favor of a more general description. Paragraph (b) addresses issues relating to client referrals and prohibits a lawyer from giving anything of value to a person recommending the lawyer's services other than actual reasonable advertising costs and charges for membership in certain organizations. The prior requirement that lawyers maintain a copy or recording of advertisements for two years has now been omitted. Paragraph (b)(4) concerns reciprocal referral agreements between lawyers and nonlawyer professionals and permits such referrals if the reciprocal referral agreement is not exclusive and if the client is informed of the existence and nature of the agreement. This section would seem to apply, among other possibilities, to professional networking organizations.

Changes were also made in 2015 to the comments to Rule 7.2. Comment 3A recognizes the use of digital media for advertising and solicitation and expressly defines a website as advertising as opposed to solicitation. Comments 5 through 8 contain an expanded discussion of the interpretation of, and obligations of a lawyer under, paragraphs (b)(1) through (5).

Comment 7 specifically requires lawyers receiving assignments or referrals from legal service plans or lawyer referral services to act reasonably to ensure that the activities of the plan or service are compatible with their professional obligations. Comment 8 clarifies that reciprocal referral agreements referenced in paragraph (b)(4) are governed by Rule 1.7 on conflicts of interest and therefore, pursuant to the amendments to that rule, require the client's informed consent confirmed in writing.

Mass. R. Prof. C. 7.3 addresses the issue of targeted solicitation of individual or particular clients. The rule attempts to balance the interests of the public in receiving useful information about legal services with protection of the public from overreaching or undue influence. The revisions to this rule clarify the situations in which solicitation of clients is permissible and those in which it is impermissible.

Paragraph (a) to Rule 7.3 prohibits in-person, live telephone or real-time electronic contact, and sets forth the specific exceptions in which such live solicitation is permitted. Paragraph (b) applies to both live and written or recorded targeted solicitation, including email communication, and describes other situations in which a lawyer's solicitation of professional employment is impermissible. The 2015 revisions to this rule omit the prior paragraph that prohibited otherwise permissible written solicitation of a client known to be in need of legal services unless the lawyer retained a copy of the communication for two years.

Comment 1 to Rule 7.3 recognizes that communication regarding legal services directed to the general public, such as internet banners, websites, television advertisements, and information automatically generated by internet searches, does not constitute solicitation. Other comments recognize that the free flow of information through electronic means permitted under the advertising rule is beneficial to the public. The comments acknowledge that such advertisements provide a mechanism for protection of the public from false and misleading communications because of the informal scrutiny of these written advertisements by third parties.

Mass. R. Prof. C. 7.4 deals with issues relating to communications concerning a lawyer's field of practice. Pursuant to paragraphs (a) and (b) of this rule, lawyers may communicate the fields of law in which they practice, and may hold themselves out as specialists in certain areas, with the proviso that the communication is not false or misleading. The rule also places a higher standard of performance on those who hold themselves out as specialists in a particular service, field or area. Paragraph (c) requires that if a lawyer states or implies certification as a specialist in a particular field of law, the name of the certifying organization must be included, as well as whether the certifying organization is approved by an appropriate state authority or accredited by the American Bar Association. Comment 1 reiterates the underlying requirement that claims of specialization may not be "false and misleading" and are subject to the requirements of Mass. R. Prof. C. 7.1.

Mass. R. Prof. C. 7.5 relates to the use of firm names, letterheads and trade names. The rule clearly states that a firm name, letterhead or other professional designation must comply with Mass. R. Prof. C. 7.1 and provides additional information concerning multijurisdictional law practices. The rule prohibits using the name of a lawyer who is a public official in the firm

name while the lawyer is holding public office and states that lawyers practicing together may not state or imply that they practice in a partnership or other organization unless that is the fact. The text of the rule was not modified in 2015, but Comment 1 now specifically states that a lawyer or a law firm may be designated by a distinctive website address or comparable designation. Comment 2 provides specific examples of situations applicable to lawyers who share space but are not in fact partners. Comment 3 references S.J.C. Rule 3:06, which sets forth additional restrictions on the use of trade names for professional corporations or limited liability entities.

The 2015 revisions to Mass. R. Prof. C. 7.1 through 7.5 provide members of the bar of the Commonwealth greater and more up-to-date guidance in confronting advertising and solicitation issues. Lawyers are urged to carefully review the text of the rules and comments to these and other Massachusetts Rules of Professional Conduct when attempting to navigate ethical issues in their practices.