Update Regarding New ABA Rules on Advertising and Solicitation

In August 2018, the American Bar Association amended Rules 7.1 through 7.5, consolidating five rules into three rules and easing some of the former restrictions on advertising and solicitation by lawyers. Some but not all of the substance of the rules remains the same, but some rules were moved and renumbered. As you know, each state will decide which if any of these changes to adopt as state ethics rules.

The new rules render some of the Practice Questions in Section 14 the 2017-18 Supplement (starting at p. 217) and their answers (starting at p. 254) obsolete or wrong. Please disregard Practice Questions 14a, 14d and 14e.

The changes in the advertising and solicitation rules were prompted in part by concerns about a dizzying variety of state advertising and solicitation rules currently in effect. Also there was a concern to reduce needless restriction on lawyers’ use of Internet-based communications to make their services available. The Standing Committee on Ethics and Professional Responsibility, in reporting out the proposed amendments, explained some of the reasons for the changes:

It is hoped that the US jurisdictions will follow the ABA’s lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

Here is a summary of some of the substantive changes in the Model Rules:

--It is now permissible for lawyers to express appreciation to others for recommending a client by giving them nominal gifts, provided that the gift is neither intended nor expected to be a referral fee. The new rules don’t specify a particular value distinguishing a nominal gift from a referral fee. Instead, a comment says that “the gift may not be more than a token item as might be given for holidays, or other social hospitality.”

--The rules no longer require communications sent by lawyers to offer professional services to be labeled as “lawyer advertising.”

--Live, person-to-person” solicitation of clients is still prohibited when a significant motive for the lawyer’s contacting the person is pecuniary gain. The old rule allowed in-person solicitation only if the prospective client was a lawyer or a person who had a close personal, family or professional relationship with the soliciting lawyer. The amended rule allows in-person solicitation also if it is directed to people involved in businesses that routinely use the type of legal services that the lawyer offers. All solicitation is barred if the target has communicated to the lawyer a desire not to be solicited; solicitation that involves coercion, duress or harassment also is barred. See Rule 7.3(c).
--Live person-to-person solicitation is re-defined. Comment 2 to Rule 7.3 defines this term to include “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection.” These forms of solicitation are still barred unless the recipient is excepted as described above. But lawyers may now solicit clients in though text messages and chat rooms “or other written communications that recipients may easily disregard.” Rule 7.3, comment 2.

--Comment 3 to Rule 7.1 had explained that

It is misleading for a communication to provide information about a lawyer’s fee without indicating the client’s responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication may not indicate that the lawyer’s fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and expenses of litigation. See Rule 1.5(c). This comment was deleted.

A “redline” showing the changes that the ABA made in 2018 to the advertising and solicitation rules is available at https://georgetown.box.com/s/gopqixqja2u9e32ls74gsgj4nplkpps0