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April 25, 2018

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

RE: ADM File No. 2016-27: Proposed Amendment of Rule 7.2 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

At its April 20, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendment published by the Court for comment. The Representative Assembly (RA) originally recommended amendments to Rule 7.2 of the Michigan Rules of Professional Conduct (MRPC) to protect consumers from potentially misleading attorney advertisements that fail to disclose the names of the attorneys or law firm providing the advertised services. The RA's proposed amendments are set forth in the Court's Order as Alternative A.

After considering recommendations from the Professional Ethics Committee, Alternative Dispute Resolution Section, and Solo & Small Firm Section, the Board voted unanimously to support Alternative A.

The MRPC commentary recognizes that attorney advertising serves the public, particularly "persons of modest means," by expanding public knowledge about the availability of legal services.¹ The benefits of attorney advertising, however, must be balanced against "the risk of practices that are misleading or overreaching."² Indeed, the United States Supreme Court has recognized the need for regulating legal advertising to ensure that consumers are not misled, noting the important role that state bar associations play in "assuring that advertising by attorneys flows both freely and cleanly."³

¹ MRPC Rule 7.2, Comment 1.

² *Id.*; see also ABA Model Rules of Professional Conduct Rule 7.2, Comment 1 ("[T]he public's need to know about legal services . . . is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of traditions. Nevertheless, advertising by lawyers entails the risk of practices that are misleading and overreaching.").

³ *Bates v State Bar of Arizona*, 433 US 350, 383-384 (1977).

Although many states have adopted more expansive disclosure rules for attorney advertisements,⁴ the State Bar has endorsed the more narrowly tailored Alternative A to focus on the truly problematic forms of legal service advertisements. Advertisements purporting to provide legal services under the heading of a telephone number, web address, image, or icon – without disclosing the attorney or law firm providing the service – have the unique potential to mislead and confuse consumers as to (1) the type of service being advertised, (2) who will perform the service, and (3) the geographic location of the lawyer or law firm.

Questions Posed by Justice McCormack

1. Is MPRC 7.1 already an adequate mechanism for protecting the public?

No. MRPC 7.1 prohibits a communication from an attorney that “contain[s] a material misrepresentation of fact or law, or omit[s] a fact necessary to make the statement considered as a whole not materially misleading.” This prohibition does not adequately protect unsophisticated consumers of legal services to whom these types of vague advertisements are targeted. For example, consider a billboard advertisement simply setting forth a telephone number, such as 1-800-Law-Firm, or similar website address located by a Michigan highway. This advertisement, while vague, contains no material misrepresentations; however, such an advertisement may lead an unsophisticated legal consumer to assume that a law firm located in Michigan with attorneys licensed to practice in Michigan is offering its legal services, even if this is not actually the case. Without the proposed amendment, MRPC 7.1 would not bar such an advertisement, absent a showing

⁴ See, e.g., Fla Rules of Prof Conduct Rule 4-7.12(a)(1) (requiring all advertisements for legal employment to include “the name of at least 1 lawyer, the law firm, the lawyer referral service if the advertisements is for a lawyer referral service, or the lawyer direction if the advertisement is for a lawyer directory, responsible for the content of the advertisement[.]”); Fla Rules of Prof Conduct Rule 4-7.12(a)(2) (requiring all advertisements for legal employment to include “the city, town, or county of 1 or more bona fide office locations of the lawyer who will perform the services advertised”); NY Rules of Prof Conduct Rules 7.1(H) (“All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.”); SD Rules of Prof Conduct Rule 7.1(c)(11) (“A communication is false or misleading if it . . . fails to contain the name and address by city or town of the lawyer whose services are described in the communication[.]”); Kentucky Supreme Court Rule 3.130(3) (requiring attorney advertising to include “the name and office address of at least 1 lawyer or the name of a law firm”); La Rules of Prof Conduct Rule 7.2(a)(2) (requiring advertisements and unsolicited written communications to “disclose, by city or town, one or more bona fide office location(s) of the lawyer or lawyer who will actually perform the services advertised”); Pa Rules of Prof Conduct Rule 7.2(i) (“All advertisements and written communications shall disclose the geographic location by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law.”); SC Rules of Prof Conduct Rule 7.2(h) (“All advertisements shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law.”); Tex Disciplinary Rules of Prof Conduct Rule 7.04(j) (“A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer’s or firm’s principal office.”).

of a material misrepresentation. Therefore, to adequately protect legal consumers, the Board proposes amending the rule to require certain attorney advertisements to disclose the names of the attorneys or law firm that will be providing the services advertised.

- 2. Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its submission letter, or should it apply to all advertisements, which is how the proposal is currently styled?**

The Board supports omitting “only” from the rule language. After considering the public comments that have been submitted to the Court, the Board agrees with Mr. Norman Tucker that limiting the rule to advertisements that only contain a phone number, web address, image, or icon could lead to gamesmanship to circumvent the intent and effectiveness of the rule.

- 3. Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-Law-Firm?**

Yes. Signage, even if it is in front of or attached to a building, still advertises the services of a lawyer or law firm. Alternative A applies to “[s]ervices of a lawyer or law firm that are advertised under the heading of a phone number . . .” Similarly, Alternative B applies to “[a]ny communication made pursuant to [Rule 7.2] . . .” Rule 7.2 specifically governs the ability of attorneys to advertise. The term “advertise” as used in both alternative rule language, is defined as “to announce or praise (a produce, service, etc.) in some public medium of communication in order to induce people to buy or use it.” In this example, a sign with 1-800-Law-Firm, not only announces the attorney’s or law firm’s physical office location, but it also publicly announces legal services to induce people to use them.

- 4. What is the scope of website advertising that would fall within this rule?**

For website advertisements, the language in Alternative A was intended to require the names of the attorneys or law firm providing the services on that attorney’s or law firm’s website. For third party advertisements – such as Craigslist, Facebook, or Google – the advertisement could simply provide a link to the attorney’s or law firm’s website instead of explicitly disclosing that information in the third party advertisement as long as the linked website contained the information required by the rule.

- 5. What are the proper definitions of “image” or “icon” as used in the proposal?**

The Merriam-Webster Dictionary defines “image” in relevant part as “a tangible or visual representation.” “Icon” is defined in relevant part as “a usually pictorial representation” or “a sign (such as a word or graphic symbol) whose form suggests its meaning.”

Advertisements using an image or icon as a heading have the potential to mislead legal consumers because they can be so vague that the consumer is unable to ascertain the lawyer or law firm that will be providing the service.

6. Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

Alternative A would regulate non-website advertising differently from website advertising. For print, radio, and television advertisements, under Alternative A, advertisements that fall within the regulated categories would be required to explicitly disclose the name of the attorney or law firm providing the service to allow legal consumers to further inquire as to the professionals offering the advertised services.

Alternative A would regulate website advertisements differently, requiring “[a]ny website advertising the services of a lawyer or law firm [to] contain the name(s) of the attorney(s) providing the service.” As discussed above, Alternative A was intended to require the names of the attorneys or law firm to be disclosed on the company’s website, but would only require third party web advertisements, including smart phone pop-up ads, to include a link to the company’s website that contains the names of the attorneys providing the services advertised.

This distinction of categories is appropriate. Website advertisements are unique in that the consumer can interact with the advertisement by clicking its links to find out more information, which is why a third party web advertisement would only need to contain a link to the attorney’s or law firm’s website as long as that website contained the names of the attorneys providing the service. Print, television, and radio advertisements, however, are static, which is why they need to disclose the identity of the law firm or attorneys providing the services in the actual advertisement.

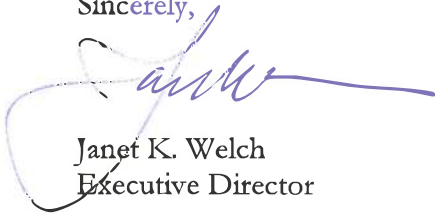
Alternative B appears to apply equally to non-website and website advertising, requiring the communication to disclose “the name and address of at least one lawyer or law firm responsible for its content.”

Conclusion

At its core, this rule proposal was intended to protect consumers by providing them with more information about advertised legal services to allow them to ascertain the attorney or law firm providing the service, the location of the lawyer, and whether that lawyer is in good standing with the State Bar. While the State Bar endorses the more narrowly tailored Alternative A, it would not object to the broader version proposed in Alternative B. Both alternatives would be a positive step forward in protecting Michigan legal consumers.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan