

## “RED-LINE” VERSION OF PROPOSED NEW RULE

### **Rule 7.2 Publicity and Advertising**

~~(a) Subject to the requirements of this rule, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television or through other public communication.~~

(a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term “advertise” as used in these rules refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer or law firm or any employee of either, involving the practice of law or law-related services.

~~(b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.~~

~~In order to facilitate the process of informed selection of a lawyer by potential consumers of legal service, a lawyer may advertise so long as said advertising is done in a dignified manner. The following constitute examples of permissible areas in which a lawyer may advertise:~~

- ~~(1) name, including name of law firm and names of professional associates; addresses and telephone numbers;~~
- ~~(2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;~~
- ~~(3) date and place of birth;~~
- ~~(4) date and place of admission to the bar of state and federal courts;~~
- ~~(5) schools attended, with dates of graduation, degrees and other scholastic distinctions;~~
- ~~(6) public or quasi-public offices;~~
- ~~(7) military service;~~
- ~~(8) legal authorship;~~
- ~~(9) legal teaching position;~~
- ~~(10) memberships, offices, and committee assignments, in bar associations;~~
- ~~(11) memberships and offices in legal fraternities and legal societies;~~
- ~~(12) technical and professional licences;~~
- ~~(13) memberships in scientific, technical and professional associations and societies;~~

- (14) foreign language ability;
- (15) names and addresses of bank references;
- (16) prepaid or group legal services programs in which the lawyer participates;
- (17) whether credit cards or other credit arrangements are accepted;
- (18) office and telephone answering service hours;
- (19) the following information:

- (A) fee for an initial consultation;
- (B) availability upon request of a written schedule of fees and/or estimate of the fee to be charged for specific services;
- (C) contingent fee rates provided that the statement discloses whether percentages are computed before or after deduction of costs;
- (D) range of fees for services, provided that the statement discloses that the specific fee within range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
- (E) hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information; and
- (F) fixed fees for specific legal services, the description of which would not be understood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

(b) A lawyer shall not initiate, knowingly participate in, authorize, or support advertising which (1) contains a false or misleading statement or claim, or (2) which promotes behavior which is illegal or a violation of these Rules or the Rules of Admission and Discipline.

~~(e) Without limitation a false, fraudulent, misleading, deceptive, self laudatory or unfair statement or claim includes a statement or claim which:~~

- ~~(1) contains a material misrepresentation of fact;~~
- ~~(2) omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;~~
- ~~(3) is intended or is likely to create an unjustified expectation;~~
- ~~(4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;~~

~~(5) is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;~~  
~~(6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation of implication not deceptive.~~

~~(d) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:~~

(c) In the absence of special circumstances which serve to protect the probable targets of an advertisement from being misled or deceived or led into behavior in violation of law such advertisement shall be presumed to violate the terms of Rule 7.2(b) if it:

- ~~(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;~~
- ~~(2) contains statistical data or other information based on past performance or an express or implied prediction of future success;~~
- ~~(3) contains a testimonial about or endorsement of a lawyer;~~
- (3) contains a claim about a lawyer, made by a third party, which the lawyer could not personally make consistently with the requirements of this rule;
- ~~(4) contains a statement or opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services;~~
- ~~(5) (4) appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion; or~~
- (5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;
- (6) contains any reference to results obtained in a manner that creates an expectation of similar results in future matters;
- (7) contains a dramatization or recreation of events unless the advertising clearly and conspicuously discloses that dramatization or recreation is being presented;
- ~~(1) (8) contains a material misrepresentation of fact; (2), or omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;~~
- ~~(3) (9) contains a testimonial or endorsement of a lawyer or other statement which in light of all the circumstances is intended or is likely to create an unjustified expectation about the abilities of a lawyer or law firm or a person's legal rights ;~~
- ~~(4) (10) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;~~
- ~~(5) (11) is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official, or will receive any favored treatment from a court tribunal or any other public body or official;~~

~~(6)~~ (12) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation of implication not deceptive.

~~(6)~~ (13) is prohibited by Rule 7.3.

~~(e)~~ (d) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other ~~communication-~~ advertising medium in anticipation of or in return for professional publicity in a news item. An advertisement must be identified as such unless it is apparent from the context that it is an advertisement. ~~A copy or recording of an advertisement shall be approved by the lawyer and shall be kept for six years after its dissemination along with a record of when and where it was used.~~

### Comment

[1] This rule concerns the public rather than the private communications made, initiated or supported by lawyers. The method by which the communication is made is not nearly so important as the size and nature of the audience the communication is reasonably expected to reach. The Rule is not intended to reach private communications unless by repetition they become public, such as when the same item is used to reach many people or entities. The repeated use of a private form letter or business card are examples of items which could be distributed privately, but are ultimately intended for a wide audience.

[2] Lawyer advertising can serve a valuable public purpose by informing persons about lawyers and the law, making both more available, affordable, and useful to the public. By informing the public on matters such as how to obtain a lawyer, the cost of legal services and the background and experience of lawyers, access to legal services is improved. In contrast, advertising which blankets the legal profession in a fog of puffery or diminishes respect for courts, the law or lawyers is inconsistent with the public's best interests.

[3] Many forms of advertising are recognized as legitimate and helpful. Examples of permissible subjects of advertising include:

~~(1)~~ (A) ~~name, including~~ the name of an attorney and the name of a law firm and ~~names of professional associates; addresses and telephone numbers~~ of associated attorneys;

~~(2)~~ (B) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;

~~(3)~~ (C) date and place of birth;

~~(4)~~ (D) date and place of admission to the bar of state and federal courts;

~~(5)~~ (E) schools attended, with dates of graduation, degrees and other scholastic distinctions;

held; (6) ~~(F) academic, public or quasi-public offices~~ military or professional positions

~~(7) military service;~~

~~(8) (G) legal authorship;~~

~~(9) legal teaching position;~~

~~(10) (H) memberships, offices, and committee assignments, in bar~~ professional, scientific or technical associations or societies ;

~~(11) memberships and offices in legal fraternities and legal societies;~~

~~(12) (I) technical and professional licences;~~

~~(13) memberships in scientific, technical and professional associations and societies;~~

~~(14) (J) foreign language ability;~~

~~(15) names and addresses of bank references~~ (K) malpractice insurance

coverage;

~~(16) (L) prepaid or group legal services programs in which the lawyer participates as allowed by Rule 7.3(e);~~

~~(17) (M) whether credit cards or other credit arrangements are accepted;~~

~~(18) (N) office and telephone answering service hours;~~

~~(19) (O) the following information:~~ fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services. Provided, however, that even as to these subjects the advertising must comply with the other requirements of these Rules.

~~(A) fee for an initial consultation;~~

~~(B) availability upon request of a written schedule of fees and/or estimate of the fee to be charged for specific services;~~

~~(C) contingent fee rates provided that the statement discloses whether percentages are computed before or after deduction of costs;~~

~~(D) range of fees for services, provided that the statement discloses that the specific fee within range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;~~

~~(E) hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information; and~~

~~(F) fixed fees for specific legal services, the description of which would not be understood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.~~

[4] Subjective advertising poses particular problems because it is inherently not subject to verification or objective analysis. For example, claims of intentions to “fight”, to be “tough” or to be “aggressive” do little or nothing to actually inform the public but may well create impressions or imply comparisons which are false or misleading. Furthermore, subjective advertising which panders to a public impression of attorneys as combative, devious or underhanded is inconsistent with the efficient, effective and equitable application of the law and inherently deceptive. The use of subjective advertising also imposes difficult enforcement problems upon the Courts, requiring the use of valuable resources to determine whether such advertising contravenes these Rules. For these reasons, such advertising is to be discouraged, unless it is the only means by which helpful information can be conveyed to the public. Advertising containing objective information is preferred, not only because it can presumably be substantiated, but also because it allows prospective clients to draw their own conclusions regarding the importance of the information.

There may be circumstances in which a lawyer or law firm can make subjective statements which are useful to prospective clients and pose little risk to the public or the legal system. For example, statements concerning a lawyer’s past successes, operating philosophy, and approach to client services, if true, can provide helpful information to members of the public seeking information about the selection of a lawyer. Where subjective statements are targeted to other lawyers, or experienced or sophisticated consumers of legal services, there is little if any risk to the public or the legal system from those statements.

### **Rule 7.3. Recommendation or Solicitation of Professional Employment**

(a) A lawyer shall not seek or recommend by in-person contact, ~~or (either in the physical presence of, or by telephone, or by real-time electronic contact),~~ the seek from or recommend to a non-lawyer the professional employment, ~~as a private practitioner, of the lawyer, another lawyer associated with the lawyer's partner, associate law firm or employer, or the lawyer's firm, to a nonlawyer who has not~~ law firm or employer unless the contacted non-lawyer has sought advice regarding the employment of a lawyer, or ~~assist another person in so doing unless the contacted non-lawyer has a family, close personal, or prior professional relationship with the lawyer.~~ As used in this paragraph and elsewhere in this rule, the phrase "in-person contact" includes a communication in the physical presence of the non-lawyer or by telephone, and extends to such communications initiated in behalf of the lawyer by employees or agents of the lawyer or the lawyer's law firm or employer; and the phrase "professional employment" means employment for the purpose of performing legal services for which the lawyer expects to receive a fee.

(b) ~~A~~ Even when not otherwise prohibited by paragraph (a), a lawyer shall not solicit professional employment from a prospective client by written or recorded communication, including a written or recorded communication conveyed by electronic means, or by in-person ~~or telephone, or by real-time electronic contact even when not otherwise prohibited by paragraph (a),~~ if:

- (1) ~~the~~ The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; ~~or~~
- (2) ~~the~~ The solicitation involves coercion, duress ~~or~~, overreaching, harassment, intimidation, undue influence, or any communication prohibited by Rule 7.2;
- (3) ~~Every written, recorded, or electronic communication from a lawyer~~ The solicitation concerns an action for arrest or criminal charge or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;
- (4) The solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or
- (5) The lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) Every written or recorded communication, including a written or recorded communication conveyed by electronic means, sent, transmitted, delivered, or otherwise provided by or in behalf of a lawyer for the purpose of soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family, close personal, or prior professional relationship, shall include is subject to the following requirements:

(1) Except as provided in subparagraph (3), the words “Advertising Material” “ADVERTISING MATERIAL” shall be conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any or recorded communication. A Furthermore, the following shall be conspicuously placed at the end of such communication: “THE INDIANA SUPREME COURT, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF INDIANA, NEITHER PROMOTES NOR PROHIBITS THE WRITTEN OR RECORDED SOLICITATION OF CLIENTS. ANY COMPLAINTS ABOUT THIS COMMUNICATION MAY BE DIRECTED TO THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION.

(2) Except as provided in subparagraph (3), a copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars (\$50.00) payable to the “Supreme Court Disciplinary Commission Fund” shall accompany each such filing. In the event a written, or recorded or electronic communication is sent or distributed to multiple specific prospective clients, a single copy of the mailing communication, less information specific to the intended recipients, such as name, contact information (i.e., address, (including e telephone number, facsimile number, e-mail address, and/or user or screen name) and date of mailing sending or distribution, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing sending or distribution. The lawyer shall retain a list containing the names and addresses, including e-mail addresses, contact information of all persons or entities to whom each communication has been mailed sent or distributed for a period of not less than one (1) year following the last date of mailing sending or distribution. Communications filed pursuant to this subdivision subparagraph shall be open to public inspection.

(3) A communication falling within the provisions of paragraph (c) is exempt from the requirements of subparagraphs (1) and (2) of that paragraph if the communication was solicited by a prospective client, provided that the solicitation by the prospective client was not caused or induced by an act or communication proscribed by these rules.

(d) If success in asserting rights or defenses of ~~his clients in~~ a lawyer's client(s) in litigation in the nature of a class action is dependent upon the joinder of others, ~~the~~ lawyer may accept employment from those ~~he~~ the lawyer is permitted under applicable law to contact for the purpose of obtaining their joinder. The content of such contact, however, is subject to the prohibitions in Rule 7.2 on the use of misleading or deceptive communications.

(e) A lawyer shall not accept referrals from, make referrals to, or solicit clients in behalf of any lawyer referral service unless such service falls within ~~subparts 1~~ one of subparagraphs (e) (1) through (e)4 of this Rule 7.3(e) A. ~~The lawyer or his partner or associates or any~~ , another lawyer affiliated associated with him or his the lawyer's law firm or employer, or the lawyer's law firm or employer may be recommended, employed, or paid by, or may cooperate with, one of the following offices or organizations that promote the use of ~~his the lawyer's~~ services ~~or, those of his partner or associates or any another lawyer affiliated associated with him or his firm~~ the lawyer's law firm or employer, or those of the lawyer's law firm or employer, if there is no interference with the exercise of independent professional judgment on behalf of ~~his~~ the lawyer's client:

(1) A legal office or public defender office:

(A) ~~operated~~ Operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

(B) ~~operated~~ Operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;

(C) ~~operated~~ Operated or sponsored on a not-for-profit basis by a governmental agency; and

(D) ~~operated~~ Operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Indiana Defense Lawyers Association, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission.;

(2) A military legal assistance office;

(3) A lawyer referral service operated, sponsored, or approved by any organization listed in ~~Rule 7.3~~ subparagraph (e)(1)(D); or

(4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:

(A) The primary purposes of such organization do not include the rendition of legal services;

(B) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary ~~purpose~~ purposes of such organization;

(C) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and

(D) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.

(f) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure ~~his~~ the lawyer's employment by a client, or as a reward for having made a recommendation resulting in ~~his~~ the lawyer's employment by a client, except that ~~he~~ the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of ~~Rule 7.3~~ paragraph (e).

(g) A lawyer shall not accept employment when ~~he~~ the lawyer knows, or ~~it is obvious~~ reasonably should know, that the person who seeks ~~his~~ the lawyer's services does so as a result of lawyer conduct prohibited under this disciplinary rule.

### Comment

[1] There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect. The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies the 30-day restriction under subparagraph (b)(3), particularly since lawyer advertising permitted under these rules offers an alternative means of communicating necessary information to those who may be in need of legal services. Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers, or their law firms or employers, without subjecting the prospective client to direct personal persuasion that may overwhelm the person's judgment. The use of general advertising to transmit information from the lawyer, or the lawyer's law firm or employer, to a prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is often in public view and thus

subject to scrutiny by those who know the lawyer or the lawyer's law firm or employer. Moreover, this informal review is itself likely to help guard against statements and claims that might constitute the false, misleading, and other types of communications prohibited by Rule 7.2. Direct private communications from a lawyer to a prospective client are not subject to such third-party scrutiny and consequently are much more likely to approach (and perhaps cross) the dividing line between accurate representations and those that are false and misleading.

[2] Persons with whom the lawyer has a prior professional relationship are exempted from the general prohibition against direct solicitation by in-person or other means of contact. A prior professional relationship requires that the lawyer personally had a direct and substantive relationship with the person in the lawyer's capacity as a lawyer. Thus, a lawyer with a continuing relationship as the patient of a doctor, for example, does not have the professional relationship contemplated by the rule because the lawyer is not involved in the relationship in the lawyer's professional capacity. Similarly, a lawyer who is a member of a charitable organization totally unrelated to the practice of law and who has a direct personal relationship with another member of that organization does not fall within the definition. On the other hand, a lawyer who is the legal advisor to a charitable board and who has direct, substantive relationships with members of that board does have prior professional relationships with those board members as contemplated by the rule. Additionally, a lawyer who has a direct, substantive relationship with a non-lawyer where both are members of a trade organization related to both the lawyer's and the non-lawyer's practices would also fall within the definition. A lawyer's relationship with a doctor because of the doctor's role as an expert witness is another example of a prior professional relationship as provided in the rule. However, a lawyer who merely shared a membership in an organization in common with another person without any direct, personal contact would not meet the test. **Other circumstances which allow a prospective client to have a direct and personal opportunity to assess the lawyer's capability as a lawyer separately from and prior to any solicitation will satisfy the requirement of a direct and substantive relationship. An example of such circumstances would be an opportunity to observe the attorney making a substantive presentation at a seminar. Such circumstances would normally permit direct solicitation of the attendee at a later date.**

[3] A situation that commonly arises during litigation involves the lawyer's representation of an organizational client where the client has a former employee who has acquired knowledge of issues in the lawsuit while still employed by the organization. Because of this knowledge, the former employee may properly become the target of non-party discovery attempts, such as depositions and production requests, because of which the former employee may desire or require legal representation. Although the lawyer represents the organization, Rule 1.13(a) recognizes that the true representation is of "the organization acting through its duly authorized constituents." Thus, the lawyer is deemed to have a direct and substantive relationship with a current employee of the organization for litigation in which the employee may become involved in his or her capacity as a representative of the organization. Likewise, the same principle may extend, in some instances, to former employees. For example, if the lawyer's employment by the

organization commenced while the former employee was still employed by the organization, then the lawyer would be free to contact the former employee with an offer to represent the former employee in the litigation. Of course, the former employee is free to accept or reject the offer. In contrast, if the lawyer's employment by the organization commenced after the former employee had ceased to be employed by the organization, then, if the only connection between the lawyer and the former employee is the ongoing litigation, the connection may be insufficient to qualify as a prior professional relationship. As such, it would be impermissible for the lawyer to contact the former employee with an offer of representation unless another exception applied to render such contact permissible. Regardless, the former employee is no longer part of the organization and, therefore, cannot be considered to fall within the group of current employees who, for practical purposes, are represented by the lawyer by virtue of the lawyer's representation of the organization. Thus, when contacting a current client's former employee with an offer of representation that is permissible under these rules, the lawyer's representation of the former employee concurrently with the client remains subject to the rules regarding conflicts of interest.

[4] Direct written communications seeking employment by specific prospective clients generally present less potential for abuse or overreaching than in-person solicitation and are therefore not prohibited for most types of legal matters, but are subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure lawyer accountability if such should occur. This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated at least 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

[5] Written or recorded communications may be directed to a prospective client by a variety of means, including electronically. The phrase "communication conveyed by electronic means," as used in paragraphs (b) and (c), encompasses the entirety of the vast and constantly expanding universe of electronic-based methods and devices available for use in sending and receiving recorded, and especially written, communications.

[6] The provisions of paragraphs (b) and (c) apply only to those written or recorded communications that are directed to a specific prospective client; and, even then, the provisions of paragraph (c) apply only when the prospective client is potentially in need of legal services in a particular matter. A specific prospective client is a person to whom the lawyer intends to direct the communication. Thus, for example, if the lawyer sends a soliciting e-mail message to a specific e-mail address; sends a soliciting text-based or "instant" message to a specific user or screen name; directs a soliciting written communication to a specific user present in a "chat room"; sends a soliciting letter to a specific address; or directs a recorded solicitation message to a specific telephone number, then the lawyer has directed a communication to a specific prospective client, even if the lawyer knows nothing more about the individual contacted than the

information that enabled the lawyer to direct the communication to the individual. The rule also encompasses written or recorded communications contained within file attachments associated with electronic communications, as well as "links" included within any electronic communication for the purpose of directing the recipient of the communication to another written or recorded communication. In contrast, a message placed by the lawyer or the lawyer's law firm or employer on a billboard in public view, for example, does not fall within the provisions of paragraphs (b) and (c) because, although undoubtedly a form of communication, such a message is not directed to a specific person, but rather to random passers by who may (or may not) view the billboard and perceive the communication. Likewise, a message placed by the lawyer or the lawyer's law firm or employer within a data file or "page" available on a publicly accessible computer network, such as an "FTP" site, a website, or a publicly accessible site elsewhere on the internet, does not fall within the provisions of paragraphs (b) and (c) because, although undoubtedly a form of communication, such a message is not directed to specific persons, but rather—like a message on a billboard—to those who happen to access the data file or page containing the message. Messages such as those placed by the lawyer or the lawyer's law firm or employer on a billboard in public view or within a data file or "page" available on a publicly accessible computer network are more properly considered public communications falling within the scope of Rule 7.2.

[7] Although paragraphs (b) and (c) recite the phrase "a specific prospective client," the provisions of those paragraphs extend to situations where the lawyer directs written or recorded communications to multiple specific prospective clients, except the provisions of paragraph (c) will not apply unless one or more of the targeted prospective clients is potentially in need of legal services in a particular matter. The lawyer cannot permissibly direct written or recorded communications to multiple specific prospective clients in situations when, under the rule, it would be impermissible to do so in regard to only one specific prospective client or any member of a group of specific prospective clients.

[8] A written solicitation communication and its envelope, if one is used, must be clearly marked with the statement "ADVERTISING MATERIAL." This will avoid the recipient's perceiving that there is a need to open the envelope because it is from a lawyer or law firm, only to find that the recipient is being solicited for legal services. With the envelope and letter marked "ADVERTISING MATERIAL," the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions. Likewise, recorded solicitation communications must include at the beginning of the recording a statement containing the same language. This permits the listener the opportunity to choose to ignore the solicitation or continue listening to the solicitation with the knowledge that the statements being made are for advertising purposes. Moreover, in the event that media containing a recorded solicitation communication is contained within an envelope, the envelope also must be clearly marked, "ADVERTISING MATERIAL," for the same reasons as an envelope containing a written solicitation communication. Both written and recorded solicitation communications, including those conveyed by electronic means, must conclude with a conspicuously placed statement indicating the Indiana Supreme Court's neutral position on the direct solicitation of prospective clients by

lawyers, as well as the information an aggrieved recipient of such a communication may use to contact the Indiana Supreme Court Disciplinary Commission to complain about the communication. In the case of either form of communication or an envelope containing either form of communication, and regardless of the means or media used to convey the communication, the language to be used for the beginning and ending statements required by the rule is the language specified in the rule.

[9] A lawyer is free to request from lawyer referral services operated or sponsored as described in the rule recommendations or referrals in behalf of the lawyer or another lawyer associated with the lawyer's law firm or employer. The long-time prohibition on paying for referrals or using "runners"—non-lawyers paid to steer business to the lawyer or the lawyer's law firm or employer—remains in force. Moreover, the rule protects prospective clients from the "referral lawyer," who advertises or promotes his or her practice, that of another lawyer associated with the lawyer's law firm or employer, or that of the lawyer's law firm or employer, for the primary purpose of acquiring prospective clients for referral to another lawyer or another lawyer's law firm or employer. The value of word-of-mouth recommendations of the services provided by lawyers or their law firms or employers is well recognized; however, other rules place certain limitations on the permissible uses for and substance of client testimonials or endorsements.

[10] Lawyer referral services, such as those described in paragraphs (e) and (f), contemplate that a lawyer, or another lawyer associated with the lawyer's law firm or employer, may be recommended by, or may cooperate with, a number of organizations that promote the use of the lawyer's services where there is no interference with the exercise of independent professional judgment **A lawyer who pays his or her annual dues to a bar association or who pays supplemental fees to defray the costs of the bar association's referral services, and who receives referrals from that association, does not run afoul of the rule. A not-for-profit organization or its affiliate must be organized and generally operated such that the income received by that organization is not primarily or substantially derived from the rendition of legal services by lawyers.** Neither the lawyer nor any other lawyer associated with the lawyer's law firm or employer shall have initiated or promoted such organization for the primary purpose of providing pecuniary or other benefits to the lawyer or the lawyer's law firm or employer. In other words, the referring entity must not be operated for the purpose of procuring legal work for the pecuniary benefit of the operating lawyer, another lawyer associated with the lawyer's law firm or employer, or the lawyer's law firm or employer.

[11] Irrespective of the manner in which a client selects a lawyer or law firm, in all circumstances, any lawyer so selected must remain free to exercise his or her independent professional judgment on behalf of the client.

## **DISCUSSION OF PROPOSED AMENDMENT TO RULE 7.4**

The changes to this Rule involve: 1) recognition of practice specialization; and, 2) setting general standards for pursuing and obtaining certification within an area of specialization. The role of the Indiana Commission on Continuing Legal Education is enhanced, with broad powers to superintend the certification process.

The changes and details for obtaining certification are designed to require demonstrated competence and capability within the field in which certification is sought. “Grandfathering” was not looked on favorably by the Committee.

**“RED-LINE” VERSION OF PROPOSED NEW RULE**

Rule 7.4. Communication of Specialty Practice

~~When the communication otherwise meets the requirements of Rules, 7.2, 7.3 and 7.5, a lawyer may:~~

(a) ~~A lawyer may~~ communicate the fact that the lawyer does or does not practice in particular fields of law, ~~but may not express or imply any particular expertise except as otherwise provided in Rule 7.4(b)~~

~~(b) communicate that the lawyer is certified as a specialist in a field of practice when the certification and communication are authorized under Admission and Discipline Rule 30.~~

(b) ~~Notwithstanding subsection (b), a~~ A lawyer admitted to engage in patent practice before the United Patent and trademark Office may use the designation “Patent Attorney” or a substantially similar, non-misleading, designation. ~~and~~

(c) a A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar, non-misleading, designation.

(d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Supreme Court of Indiana hereby vests exclusive authority within the State of Indiana for certification of specialization in legal practice areas and fields in the Indiana Commission for Continuing Legal Education. The Commission shall be the exclusive certifying body in Indiana, for purposes of Rule (d) (1), above; and shall promulgate Rules and Guidelines for certifying attorney specialization in practice fields. Those Rules and Guidelines shall include requirements of practice experience, continuing legal education, objective examinations; and, peer review and evaluation, with the aim of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization **demonstrate extraordinary competence and efficiency** within those areas of specialization. The Supreme Court of Indiana shall retain review oversight with respect to the Commission, its requirements, and its Rules and Guidelines; and, shall have the power to

alter or amend such requirements, Rules and Guidelines; and, to review the actions of the Commission generally in respect to this Rule.

## **DISCUSSION OF PROPOSED AMENDMENT TO RULE 7.5**

The Committee reviewed the current Rule 7.5 and considered case law that deals with the issue of firm names and letterheads. Indiana has traditionally taken a very restrictive position regarding the use of trade names. The Committee believed that some adjustment could be made to Rule 7.5(a) without violating the fundamental precept that firm names not be deceptive or misleading. In addition, the Committee proposes the adoption of ABA Model Rule 7.5(b), (c) and (d). These provisions deal with practicing under the same firm name in several jurisdictions, the use of the name of a lawyer holding public office in the firm name, and the prohibition that lawyers cannot state or imply that they practice in a partnership unless it is true. All of these provisions exist in the current Rule 7.5, although the order in the proposed amendment more closely tracks the ABA Model for purposes of uniformity with other states.

The proposed amendment to Rule 7.5(a) deals with permissible trade names. It is agreed that using the name of deceased or retired partners in the firm name is the use of a trade name, but one that has been historically permitted under Admission & Discipline Rule 27. A majority of the Committee believes that lawyers or law firms should be allowed to practice under a name that reflects a geographical area where the practice is based or mainly serves clients, language proficiency, or that the firm name may reflect the nature of the practice, so long as the firm name includes the names of persons practicing (or who practiced in the case of retired or deceased partners) in the firm. The Committee believes that such a relaxation of the rules does not violate the fundamental precept that lawyer advertising, firm names, or letterheads not be false or misleading. Thus, proposed Rule 7.5(a) has been modified to allow for the use of a second area of permissible non-deceptive trade names. The Comments from the ABA Model Rule 7.5 have been adjusted accordingly as well.

## “RED-LINE” VERSION OF PROPOSED NEW RULE

### Rule 7.5 Professional Notices, Letterheads, Offices, and Law Lists

~~—— (a) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, telephone directory listing, law lists, legal directory listings, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, deceptive, self laudatory or unfair within the meaning of or that violates the regulations contained in Rule 7.2.~~

~~—— (b) A lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self laudatory or unfair within the meaning of Rule 7.2, or is contrary to law. In that it is inherently misleading, a lawyer in private practice shall not practice under a trade name. However, the name of a professional corporation or professional association may contain “P.C.” or “P.A.” or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remaining in the name of the law firm or to be used in professional notices of or public communications by the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm and during such period other members of the firm shall not use his name in the firm name or in professional notices of public communications by the firm.~~

~~—— (c) A lawyer shall not hold himself out as having a partnership with one ore more other lawyers unless they are in fact partners.~~

~~—— (d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however the same firm name may be used in each jurisdiction.~~

### Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.2. 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 7.2. Examples of trade names which may be used are the following: 1) The name of a

professional corporation, professional association, limited liability partnership, or limited liability company may contain, “P.C., “P.A.,” “LLP,” or “LLC” or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. See Admission & Discipline Rule 27; and 2) **words** which identify the field of law in which the firm concentrates its work the geographic location of its offices and words which indicate a language fluency, so long as the name of a lawyer, as set forth above, is part of the firm name.

(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 jurisdictional limitations on those 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 which includes words which identify the field of law in which the firm concentrates its work, the geographic location of its offices and words which indicate a language fluency. Examples would be “De la Mirada Employment Law Firm of Greenwood” written in Spanish, or “Anderson’s Auto Accident Law, P.C.,” assuming that De la Mirada, Anderson are, or have been firm owners of these respective firms. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court 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 **location** 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, furthermore the name of the firm must also include the name of at least one of its members or deceased members. It may be observed that any firm name including the name of a 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 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, however if Smith and Jones indicate specifically the nature of their relationship, such a disclaimer may be sufficient to avoid a violation of the rule.

