

Dave Byers¹
Executive Director, Administrative Office of Courts
Member, Task Force on the Delivery of Legal Services
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: (602) 452-3301
Projects2@courts.az.gov

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-20-____
PETITION TO AMEND)
RULE 42, OF THE SUPREME)
COURT RULES, ERs 7.1 to 7.5)
_____)

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Task Force on the Delivery of Legal Services (“Task Force”) petitions the Court to amend Rule 42 of the Arizona Rules of the Supreme Court, as reflected in the attachments hereto, effective January 1, 2021.

I. Introduction and Background.

Established on November 21, 2018, by Arizona Supreme Court Administrative Order 2018-111, the Task Force was asked to address five charges and to make recommendations on each. The Administrative Order gave the chair

¹ Mr. Byers files this petition in his capacity of a member of the Task Force.

discretion to consider and recommend other rule changes on any topic concerning the delivery of legal services.

The Task Force presented its recommendation to the Arizona Judicial Council (“AJC”) on October 24, 2019. The Report and Recommendations of the Task Force (*Report*), along with other Task Force information, can be found at the Task Force’s webpage: <https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force>. The AJC approved all recommendations of the Task Force, including the recommendation to amend ethical rules (ERs) 7.1 through 7.5 of Supreme Court Rule 42, which was Recommendation 2 of the report.

A clean version of the proposed amendments for ERs 7.1 through 7.5 is attached at Appendix 1A, and a redline version of the proposed amendments is attached at Appendix 1B.

II. Summary of Proposed Amendments to ERs 7.1 through 7.5.

The proposed amendments address lawyer advertising and incorporate many of the 2018 ABA Model Rule amendments and fulfill the Task Force’s charge to identify issues and improvements in the delivery of legal services. As evidenced by Recommendation 2, the Task Force recommends eliminating or amending ethical rules that impede lawyers’ ability to provide cost-effective legal services.

The proposed amendments to these ethical rules would:

- retain the rules’ primary regulatory mandate of refraining from making false and misleading communications;
- set forth the requirements for who may identify themselves as a “certified specialist” in an area of law;
- maintain reasonable restrictions on direct solicitation of specific potential clients; and
- eliminate obsolete and anticompetitive provisions that unreasonably restrict the dissemination of truthful advertising.

The most significant amendment, which goes beyond the 2018 ABA Model Rule amendments, would eliminate current ER 7.2(b)’s prohibition against giving *anyone* anything of “value” for recommending a lawyer or referring a potential client to a lawyer. Anecdotally, it has been observed that this provision is violated daily because, taken literally, this provision prohibits taking an existing client golfing to say thank you for a referral or giving a firm paralegal a gift card or sending flowers for referring a family member to the firm. Similarly, there are many ethics opinions issued both in Arizona² and around the United States that provide convoluted attempts to distinguish between what is permissible “group advertising” versus what is an impermissible “referral service.” Not only do these technical interpretations serve no productive regulatory purpose, but the unnecessary complexity in the

² See State Bar of Ariz. Ops.05-08 (2005), 06-06 (2006); 10-01 (2010), and 11-02 (2011).

regulations stifles lawyers' ability to embrace more efficient online marketing platforms for fear the website or service may be deemed a for-profit referral service.

Rule 7.2(b)'s prohibition against "giving anything of value" exists although there is no quantifiable data evidencing that *for-profit* referral services or even paying for referrals confuses or harms consumers. Consumers do not expect online marketing platforms to be nonprofit operations – which are the only referral services permissible under the current regulatory framework. Note that Florida, one of the most restrictive lawyer advertising jurisdictions in the country, already permits for-profit referral services.

The following summarizes the changes proposed for each ER.

ER 7.1 Communications Concerning a Lawyer's Services

The amended rule retains the existing prohibition against "false and misleading" communications about a lawyer's services. Most bar regulators in the United States have expressed the view that this provision is the rule primarily relied on to regulate lawyer advertising. The current requirements for identifying a lawyer as a "certified specialist" were moved from current ER 7.4 into new ER 7.1(b) and the proposed amendment updates the language from restricting use of the term "specialist" to restricting only the use of the phrase "certified specialist," consistent with the ABA Model Rule. This change avoids constitutional challenges to the overly restrictive prohibition in current ER 7.4, which limits use of the term

“specialist.” The proposed changes would also bring Arizona’s rule in line with the ABA Model Rule language in noting that lawyers may not identify themselves as “*certified* specialists” unless they comply with the requirements set forth in court rules. The reference in new ER 7.1(b) to new criteria for certified specialist is contained in Supreme Court Rule 44, and this cross-reference will assist lawyers researching Arizona’s certified specialist advertising requirements. Explanatory comments from current ER 7.4 have been moved to the comments of ER 7.1 to reassure patent attorneys that their specialization is still recognized.

The amendments also move the requirement that all communications must contain the name of a lawyer or law firm and some “contact” information from ER 7.2(c) into new ER 7.1(c). Comments to 7.1 also now include explanatory comments regarding law firm names that were in current ER 7.5. This is consistent with the 2018 Amendments to the ABA Model Rules of Professional Conduct and clarifies that disbarred lawyers’ names and names of lawyers on disability inactive status must be removed from a firm name.

ER 7.2

Current ER 7.2 sets forth specific rules concerning lawyer advertising. The Task Force recommends deleting this rule and moving the substance of current ER 7.2(c) to new ER 7.1(c). Consumer protection afforded by current ER 7.2 can be provided by less non-competitive provisions. For instance, the rules on conflicts of

interest, including ERs 1.7, 1.8, and 1.10, protect clients/consumers because they restrict a lawyer's (and firm's) representation of a client if the lawyer's own interests could "materially limit" the lawyer's independent professional judgment in representing the client. Thus, a lawyer cannot be "forced" to represent a client simply because the client was referred by someone whom the lawyer pays as a referral source. The conflict of interest rules control who and how a lawyer may represent a client, and such representations must be free of any conflict that could materially limit the lawyer's objectivity. Additionally, disclosures revealing that a lawyer will pay referral fees sufficiently informs consumers about the referral system. Such disclosures may be required to comply with ER 7.1's "false and misleading" standard to assure that adequate information is conveyed to website visitors or referral sources about the fact that the site is not a nonprofit operation.

ER 7.3 Solicitation of Clients

Consistent with the 2018 Amendments to the ABA Model Rules, the title of this rule was modified, and a definition of "solicitation" was added. This rule governs direct marketing to individuals with specific needs for legal services, as opposed to general advertising on billboards, business cards, print advertisements, television commercials, websites, and the like. The proposed amendments are narrowly tailored to protect consumers who need legal services in particular matters from overreaching by lawyers. The amendments would preclude, for example,

solicitation letters sent to homeowners in a community where there are known construction defects, car accident victims, members of a neighborhood that has been affected by an environmental hazard, and individuals charged with crimes. As re-defined, “solicitation” would *not* include sending a letter to everyone in a certain zip code simply to introduce a law firm to a general community that does not have a specific legal need (such as an estate planning firm sending letters to everyone in Paradise Valley or a family law attorney sending announcement postcards to all businesses in her business complex, announcing the opening of her office). The definition of “solicitation” also would exempt class action court or rule-required notifications.

ER 7.3 retains the prohibition against in-person (face to face or door-to-door) and real-time electronic (such as telephone calls or Facetime) solicitation, unless the prospective client falls within certain categories of individuals not likely to be overwhelmed by a lawyer’s advocacy/solicitation skills, such as other lawyers, a former client, or a family member or friend of the lawyer. And even for these categories of prospective clients, a lawyer cannot solicit them (or anyone) if they have made known that they do not want to be solicited or the communication involves coercion, harassment, or duress. At the same time, an amendment to ER 7.3 adds an exception to the prohibition against in-person solicitation for communications directly with business people who regularly hire lawyers for

business legal services, consistent with the 2018 Amendments to the ABA Model Rules. The Task Force notes that this language was vetted extensively through ABA entities and Bar regulators to assure that the language could not be misinterpreted to mean, for instance, that a lawyer could call someone who regularly hires business lawyers to solicit business for criminal defense, bankruptcy, or family law matters. The language in the proposed amendment limits this category of prospective client to only those who regularly retain counsel for business purposes and therefore are experienced at receiving calls, emails, and meetings with lawyers seeking to represent their companies.

The proposed amendments delete the current Rule's "ADVERTISING MATERIAL" notation requirement for envelopes (and filing requirement), consistent with the 2018 Amendments to the ABA Model Rules. Several jurisdictions, including, for instance, the District of Columbia, Massachusetts, Maine, Pennsylvania, North Dakota, Oregon, and Washington either have never had a notation requirement or deleted the requirement years ago. None of these jurisdictions indicate any consumer confusion in receiving written communications from lawyers. Nor is there any empirical evidence to indicate that the notation serves a necessary purpose in alerting consumers to the contents of an envelope. Given the changes in technology and methods of direct marketing consumers receive on a regular basis, there is far less likelihood of a consumer being confused about the

purpose of a direct mail solicitation letter or email today, than perhaps existed in 1985 when the notation requirement was adopted.

ER 7.4

Current ER 7.4 concerns a lawyer's ability to communicate the lawyer's fields of practice. As noted previously, the requirements for identifying a lawyer as a "certified specialist" was moved to new ER 7.1(b). Comments to ER 7.4 regarding patent attorneys were moved to ER 7.1. The remainder of ER 7.4 has been deleted as duplicative of proposed ER 7.1.

ER 7.5

Current ER 7.5 concerns firm names and letterheads. The ABA deleted ER 7.5 as unnecessary, given that ER 7.5 simply described information in a firm name that might be false or misleading. The Task Force recommends deleting ER 7.5 because it is not needed to regulate law firm names. ER 7.1 is sufficient and is the more commonly used regulation. As previously explained, the Task Force recommends moving ER 7.5's comments to ER 7.1.

III. Conclusion

Petitioner respectfully requests that the Court consider this petition and proposed rule changes at its earliest convenience. Petitioner additionally requests that the petition be circulated for public comment, and that the Court adopt the proposed rules as they currently appear, or as modified considering comments received, with an effective date of January 1, 2021.

DATED this 10th day of January, 2020.

_____/s/_____
Dave Byers
Administrative Director
Arizona Administrative Office of Courts
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: (602) 452-3301
Projects2@courts.az.gov