

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-09-0010
PETITION TO AMEND SUPREME COURT)
RULE 42; ERs 5.5, 7.1 and 7.3)
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_____)

**ORDER
AMENDING RULE 42, RULES OF THE SUPREME COURT,
ERS 5.5, 7.1, AND 7.3**

A petition having been filed proposing to amend ethical rules pertaining to information that may be used in attorney advertising or other communications, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 42, Rules of the Supreme Court, Ethical Rules 5.5, 7.1, and 7.3, be amended in accordance with the attachment hereto, effective January 1, 2010.

DATED this _____ day of September, 2009.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution

ATTACHMENT*

RULES OF THE SUPREME COURT

Rule 42. Arizona Rules of Professional Conduct

* * *

ER 5.5. Unauthorized Practice of Law

(a)-(g) [No change in text.]

Comment

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[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] Lawyers who are not members of the State Bar of Arizona may comply with paragraph (b)(2) by stating in any advertisement or communication that targets or specifically offers legal services to Arizona residents that: (1) the non-member is not licensed to practice law by the Supreme Court of Arizona; or (2) the non-member's practice is limited to federal or tribal legal matters (for example, a non-member may state his or her practice is limited to immigration matters).

* * *

* Changes or additions in text are indicated by underlining and deletions from text are indicated by ~~strikeouts~~.

ER 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make or knowingly permit to be made on the lawyer's behalf a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by ER 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. A clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is false or misleading.

[2] [No change in text.]

[3] Promising or guaranteeing a particular outcome or result is misleading. A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. ~~But see ER 7.2(e)(1).~~ Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of ~~an appropriate~~ a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] [No change in text.]

[5] Whether a communication about a lawyer or legal services is false or misleading is based upon the perception of a reasonable person.

[6] See comment to ER 5.5(b)(2) regarding advertisements and communications by non-members. A non-member lawyer's failure to inform prospective clients that the lawyer is not licensed to practice law by the Supreme Court of Arizona or has limited his or her practice to federal or tribal legal matters may be misleading.

* * *

ER 7.3. Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client or employ or compensate another to do so when a motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) [No change in text.]

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(1) ~~a~~At the time of dissemination of such written communication, a written copy shall be forwarded to ~~the Clerk of the Arizona Supreme Court and the State Bar of Arizona at its Phoenix office.~~

(2) ~~w~~Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(3) ~~i~~f a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line.

(4) ~~t~~The lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose:

~~(A) how the identity and specific legal need of the potential recipient were discovered; and~~

~~(B) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.~~

(d) [No change in text.]

Comment

[1]-[7] [No change in text.]

[8] Lawyers may comply with the requirement of paragraph (c)(1) by submitting (a) a copy of every written, recorded or electronic communication soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter, or (b) a single copy of any identical communication published or sent to more than one person and a list of the names and mailing or e-mail addresses or fax numbers of the intended recipients and the dates identical solicitations were published or sent. Lawyers may comply with the requirement of paragraph (c)(1) by submitting the required communications and information to the State Bar on a monthly basis.

[9] The State Bar may dispose of the submissions received pursuant to paragraph (c)(1) after one year following receipt.

[8][10] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with ERs 7.1, 7.2 and 7.3(b). See ER 8.4(a).

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