



NEW JERSEY STATE BAR ASSOCIATION

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Dear Committee Members:

On behalf of the NJSBA's 18,000 members, I write to express our gratitude to the members of the American Bar Association Standing Committee on Ethics and Professional Responsibility for their dedication, commitment, and willingness to receive and review the thoughts and input of the legal community. The NJSBA is grateful for your continued diligent work in examining if and how the American Bar Association Model Rules of Professional Conduct should be updated to reflect changing realities of legal practices and society, including the current proposals that focus on communications and solicitations by lawyers, which are central to how attorneys interact with the public.

For sure, the RPCs governing lawyer advertising and communication should be modernized to reflect changes to new and forthcoming technologies and means of information delivery. These advancements continue to evolve, fundamentally changing the way we practice law as well as how our clients seek and consume information. Indeed, those changes and advances are accelerating and disrupting the legal marketplace, but they also present great opportunity for attorneys to do what attorneys do best: help the public solve their problems and navigate to success in the daily issues and concerns that arise in their lives.

One thing that has not changed, however is the need to zealously safeguard the public by maintaining a body of smart and sensible rules. Those rules should govern the profession and guide attorneys to ethically meet the legal needs of society. I write to you now to share the NJSBA's serious concerns about some of the proposals that purport to modernize attorney ethical standards, but which pose significant harm to the public. Accordingly, for the reasons set forth below, these proposals erode the carefully crafted and much needed protection that the current rules provide to the public.

I will highlight three issues that are of most concern to the NJSBA:

R. 7.1. The proposal attempts to streamline and simplify the rules prohibiting false and misleading communications by collapsing R. 7.5 (relating to firms names) into the comments of R. 7.1.

At the outset, it must be acknowledged that a comment to a rule does not carry nearly the same weight or authority as an actual rule. Thus, for the Committee to make a substantive determination to remove and migrate a full rule into the comment section to another rule, the Committee must carefully consider the reasoning and public policy that previously informed installing certain pre- or proscriptive requirements as full rules, and explain why it is now sufficient to relegate those requirements to mere guidance. Either we still need them or we do not; by relegating the rule into commentary appears to reflect an effort to diminish its importance.

Moreover, another significant consideration for the Committee is the reality that not all states adopt comments associated with each rule. For example, in New Jersey, very few of the model rule comments have ever been adopted by our Supreme Court. Eliminating R. 7.5 and the important protections contained therein could result in the loss of any guidance on permissible firm names in states like ours and lead to potential abuses by unknowing lawyers and potential harm to a misled public.

R. 7.2. The proposal to allow lawyers to give “nominal gifts” to a person who has recommended their services is absolutely untenable, even with the proffered caveat that the gift is not intended to be a form of compensation. Indeed, the proposed rules appears to be internally inconsistent.

This change begins a slippery slope which ends only with a blemish on the public image of the profession. The questions it raises are numerous, including: How does one define nominal? Is there an acceptable dollar amount to stay within, and is that amount different depending on the jurisdiction where an attorney practices? What if an attorney requires a gift in exchange for referring work? Will attorneys refer work to attorneys based on the likelihood of receiving remuneration in the form of a gift rather than based on the receiving attorney’s skills and abilities to perform the required type of legal work?

It has never been, nor should it ever be, an ethical violation to send a colleague a gift. However, there should never be a potential *quid pro quo* where the gift is tied to a specific referral or recommendation. This time-tested prohibition is a critical underpinning of the independence of attorneys in serving their clients and should not be undone. This proposed change presents a practice that is unseemly on its face. It would necessarily erode the faith that clients place in the person who is expected to be a fair counselor and advocate in their time of need.

Of concern to the NJSBA is the appearance here that this proposed change is designed to bypass the numerous state opinions that have found corporate, non-attorney owned legal services entities to be impermissible fee sharing mechanisms. Indeed, the fact that some of those entities are so intently involved in the Committee’s current discussion supports our heightened concern and awareness here.

Further to that point, the NJSBA strongly opposes the deletion of Comment 7 to R. 7.2 (lines 172-179), which explains that lawyers have an obligation to ensure any referral service in which they participate complies with the lawyer’s professional obligations. That language is necessary because it includes an important recitation of an attorney’s obligations. Indeed, there is no evidence suggesting removal of such a simple and important requirement. Therefore, it should be retained in the comments.

R. 7.3. This proposal simply goes too far because it condones conduct that should be covered by the Rules of Professional Conduct. The solicitation of non-clients, especially those who lack sophistication about the legal system, must be regulated to ensure that all act with degree of professionalism that would engender respect and integrity by the public in the legal profession. In particular, we fail to understand or appreciate what an “experienced user” of legal services actually is, as well as what constitutes advertising material, solicitation in chat rooms or by text, and allowing multiple solicitations. Does this mean robo-calls and robo-texts will not be prohibited, as

they should be? While we must embrace and welcome new technology and means of communications with the public and clients, it must reflect the critical line between active versus aggressive pursuit of a client.

Legal services are not a fungible commodity. Our profession holds a vaunted role as officers of the courts of this nation. Regulatory oversight should be limited, for sure, but should not impose one-size-fits-all rules governing all attorney conduct.

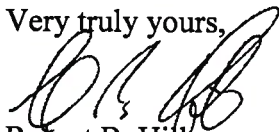
Moreover, labeling communications as "Advertising Material" serves a salutary purpose and not only provide appropriate notice of the nature of the communication, but also minimizes the possibility that it will be relied upon and misunderstood by uninformed members of the public.

In addition, the very notion of numerous, unsolicited written or electronic communications by a lawyer to non-clients is problematic. That conduct should be regulated. In fact, the ABA should focus its efforts in regulating non-lawyers who engage in that conduct.

As my colleague, NJSBA Immediate Past President Thomas Prol testified before the Committee one year ago, we believe limits on a lawyer's active quest for clients are not only appropriate, but vital. The current rules represent well-thought, balanced and needed protections for an unwary public.

In conclusion, on behalf of the largest professional organization of judges, lawyers and other legal professionals in New Jersey, I urge you to reject these proposals and refine them so they serve the dual purpose of protecting the profession and the clients our profession serves.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. B. Hille", written over a horizontal line.

Robert B. Hille

President