

To: Supreme Court Committee to Study Lawyer Advertising Rules
From: Margaret Raymond
Date: June 27, 2011
Re: Comparison of Iowa's advertising rules with the ABA Model Rules

This memo will compare Iowa's advertising rules with the ABA Model Rules. The format of the Model Rules is similar to the format of the current Iowa rules; each numbered rule is followed by numbered comments, which the Scope Note to the Rules defines as "guides to interpretation." I will discuss the rules below and mention the comments as relevant.

This memo will be my last act as a member of this committee, as I am leaving the state for another job. I appreciate very much the opportunity to serve and wish you all the best in completing the committee's work.

Model Rule 7.1 vs. Iowa Rule of Professional Conduct 32:7.1

Model Rule 7.1 is a brief rule. It provides: "A lawyer shall not make 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."

The comments indicate that this rule applies to "all communications about a lawyer's services, including advertising permitted by Rule 7.2." Comment [1] to MR 7.1. Comment [3] suggests some types of advertising that might be misleading, such as an advertisement "that truthfully reports a lawyer's achievements on behalf of clients or former clients...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," or an "unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers" if a reasonable person would conclude that the comparison "can be substantiated." The comment suggests that including a disclaimer or qualifying language might avoid the conclusion that the statements are misleading.

The first paragraph of Iowa Rule of Professional Conduct 32:7.1 is identical to Model Rule 7.1. But the Iowa rule contains another paragraph. Iowa RPC 7.1(b) provides, "A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services." Comment [3] to this rule is very different from Comment [3] to the Model Rule, addressing specifically the appropriate tone and content of advertising material. It provides, "A lawyer should ensure that information contained in any advertising which the lawyer publishes, or causes to be

published, is relevant, is dignified, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems that hinder rather than facilitate intelligent selection of counsel. Appeal should not be made to the prospective client's emotions, prejudices, or personal likes or dislikes. Care should be exercised to ensure that false hopes of success or undue expectations are not communicated. Only unambiguous information relevant to a layperson's decision regarding legal rights or the selection of counsel, provided in ways that comport with the dignity of the profession and do not demean the administration of justice, is appropriate in public communications."

Model Rule 7.2 vs. Iowa Rule of Professional Conduct 32:7.2

Model Rule 7.2 is captioned "Advertising" and deals specifically with advertising but says almost nothing about it. In contrast to the Iowa rule, it is extremely short. Subsection (a) says that a lawyer may advertise, subject to rules 7.1 and 7.3, "through written, recorded or electronic communication, including public media." Subsection (b) deals with paying others for recommending the lawyer's services (prohibited except in specific circumstances, including paying for advertising). Subsection (c) provides that any communication made pursuant to the rule must "include the name and office address of at least one lawyer or law firm responsible for its content." While Comment [1] indicates that advertising, while important, "entails the risk of practices that are misleading or overreaching," the following comments do not proscribe particular advertising techniques. Comment [2] lists unobjectionable types of communication that are permitted. While Comment [3] notes that "[s]ome jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against 'undignified' advertising," the Comment discourages such prohibitions, on the grounds that television is an important vehicle for providing information to the public, "particularly persons of low and moderate income," and that limiting information that can be advertised "assumes that the bar can accurately forecast the kind of information that the public would regard as relevant." The Comment also notes that electronic media, "such as the Internet, can be an important source of information about legal services."

By contrast, Iowa RPC 32:7.2 is an extraordinarily long and detailed rule governing advertising.

It first, in 7.2(a), defines communications that will not be treated as advertising (communications between lawyers, communications with existing clients, and communications by a lawyer "that are in reply to a request for information by a member of the public that was not prompted by unauthorized advertising by the lawyer; information available through a hyperlink on a lawyer's Web site shall constitute this type of communication.").

It then, in 7.2(b), indicates that advertising “through written, recorded, or electronic communication, including public media,” is permitted, “[s]ubject to the limitations contained in these rules.”

There are then specific and detailed rules about the content of telephone or city directory listings (Rule 7.2(c)(1)-(d)(3)), and about radio, television, or electronic media advertising (Rule 7.2(e)). This rule is particularly notable; it provides that “Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer.”

Rule 7.2(f) requires a lawyer to preserve advertisements for a designated period. Rule 7.2(g) lists information that may be communicated in an advertisement, “provided it is presented in a dignified style.” Rule 7.2(h) contains detailed rules about the communication of fee information in an advertisement, including required disclosures for certain types of statements regarding fees. If the lawyer’s communication seeks to advise the institution of litigation, Rule 7.2(i) requires the communication to disclose “that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.”

The comments to Iowa RPC 7.2 are unremarkable, though Comment [2], dealing with advertising of attorney’s fees, is quite detailed: “In communications concerning a lawyer’s fees, the lawyer may use restrained subjective characterizations of rates or fees such as ‘reasonable,’ ‘moderate,’ and ‘very reasonable,’ but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, ‘cut rate,’ ‘lowest,’ ‘giveaway,’ ‘below cost,’ ‘discount,’ and ‘special.’” Comment [3] specifies the appropriate point size for obligatory disclosures and requires that websites display required disclosures on their home page.

Model Rule 7.3 vs. Iowa Rule of Professional Conduct 32:7.3

Model Rule 7.3 deals for the most part with solicitation (in-person, live telephone, or real-time electronic contact), but Rule 7.3(c) speaks directly to advertising, providing that “[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication.” Comment [3] reflects the view that advertising is better than direct solicitation because evidence of its contents can be preserved and proven; “The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the

information flows cleanly as well as freely.”

Iowa RPC 7.3 also deals with solicitation, imposing specific limitations on targeted solicitation letters. Rule 7.3(d) requires that such letters include the applicable disclosures required by Rule 7.2(h) and say “ADVERTISING ONLY” in a designated type size. The Comments to this rule are similar to the Model Rule’s comments.

Model Rule 7.4 vs. Iowa Rule of Professional Conduct 32:7.4

Model Rule 7.4 is captioned “Communication of Fields of Practice and Specialization.” The restraints are fairly limited. The rule permits a lawyer to “communicate the fact that the lawyer does or does not practice in particular fields of law” (Rule 7.4(a)); permits lawyers engaged in patent or admiralty law practice to use specific designations (Rules 7.4(b) and (c)); and permits a lawyer to “state or imply that a lawyer is certified as a specialist” only if the lawyer has been certified as a specialist by an “appropriate state authority” or one accredited by the ABA, and if the name of the certifying organization is clearly identified in the communication. Rule 7.4(d).

By contrast, Iowa’s RPC 7.4 is quite detailed. Section (a) permits lawyers to describe the lawyer’s field of practice using only those approved terms listed in the rule. Rules 7.4 (b) and (c) address patent attorneys and admiralty lawyers, respectively. Rule 7.4(d) permits a lawyer who wishes to “state or imply” that s/he is certified as a specialist in field of law to do so only if “the lawyer has been certified as a specialist by an organization that has been approved by the Iowa Supreme Court Attorney Disciplinary Board.”

Rule 7.4(e) imposes obligations on a lawyer who wishes to describe his/her practice using the terms in Rule 7.4(a). Under Rule 7.4(e)(1), lawyers who wish to designate an area in which they practice “must have devoted the greater of 100 hours or 10 percent of the lawyer’s time spent in the actual practice of law to each indicated field of practice for the preceding calendar year. In addition, the lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each indicated field of practice during the preceding calendar year.” Lawyers wishing to say that their practice is “limited to” an area or that they practice “primarily in” an area “must have devoted the greater of 400 hours or 40 percent of the lawyer’s time spent in the actual practice of law to each separate indicated field of practice for the preceding calendar year,” and must have completed fifteen hours of CLE in each such field of practice.

Rule 7.4(f) contains an exception to these rules; a lawyer who describes the lawyer’s practice as “General practice including but not limited to” followed by a practice designation approved in Rule 7.4(a) does not need to have any particular practice experience or CLE training to do so. There is no comment dealing with these extensive regulations of communicating fields of practice.