

ADVERTISING & SOLICITATION

MRPC 7.1-7.6

Bates v. State Bar of Arizona

433 U.S. 350 (1977)

First Amendment protects truthful newspaper advertising by lawyers regarding fees and services.

Former legal aid lawyers provided routine legal services for moderate income persons who could not qualify for governmental aid. They advertised their fees and services, a violation of Arizona law. State Bar imposed a one week suspension of each lawyer.

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)

- **States may prohibit in-person solicitation by lawyers.**
- Lawyer approached teenager in the hospital after a car accident, convinced her to hire him.
- Then he approached her fellow passenger at home (another teen), whose parents declined to hire him. First teen then also fired the lawyer

In re Primus

436 U.S. 412 (1978)

- ACLU lawyer spoke in person to a group of women, and then through a letter, offering free legal services – **First Amendment protection protects this solicitation.**
- South Carolina had a policy of sterilizing certain women as a condition of receiving welfare. Primus sent letters to women who had been thus sterilized, offering the legal assistance of the ACLU.
- The South Carolina's Supreme Court disciplinary board reprimanded Primus for violating South Carolina bar rules against soliciting business. Primus appealed to the U.S. Supreme Court.

RULE 7.1 COMMUNICATIONS

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.

RULE 7.1 COMMENT 2

[2] Misleading truthful statements are also prohibited by this Rule.

A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading...

RULE 7.1 COMMENT 2

[2] . . . A truthful statement is also misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

RULE 7.1 COMMENTS

[2] ...A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

RULE 7.1 - COMMENT 3

[3] 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.

RULE 7.1 - COMMENT 3

[3] . . . Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated.

The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

RULE 7.1 - COMMENT 5

[5] Firm names, letterhead and professional designations **are communications** concerning a lawyer's services.

A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a **trade name** if it is **not false** or misleading.

A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading.

RULE 7.1 - COMMENT 5

[5] . . . A law firm name or designation is **misleading** if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization.

If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

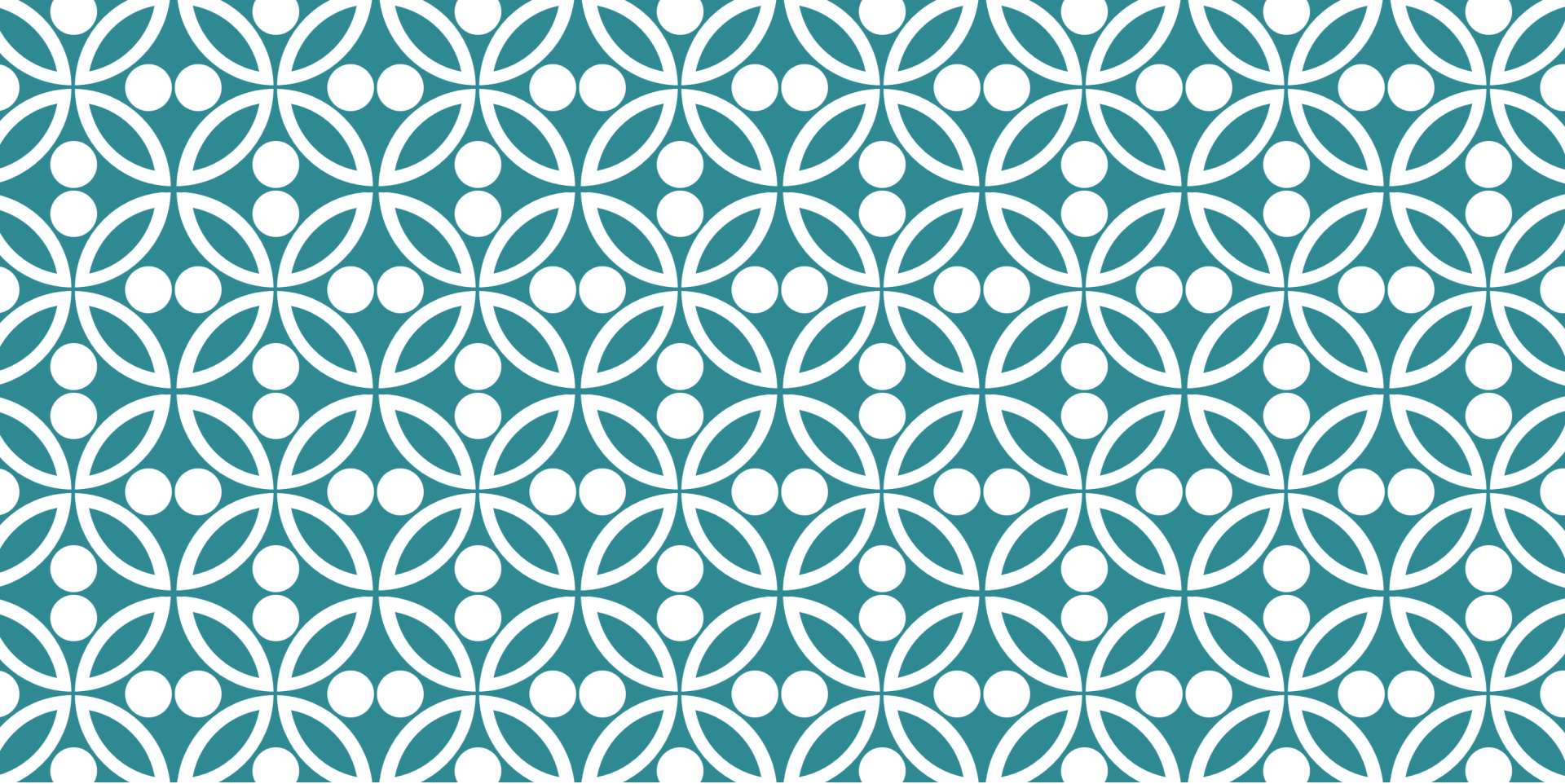
RULE 7.1 - COMMENT 7

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are **not a firm**, as defined in Rule 1.0(c), because to do so would be false and misleading.

[Rule 1.0(c) - "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.]

RULE 7.1 COMMENT 8

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.



RULE 7.2 – ADVERTISING

MRPC 7.1-7.6

RULE 7.2 - ADVERTISING

**(a) A lawyer may advertise
communicate information regarding the
lawyer's services through any media.**

RULE 7.2 - ADVERTISING

(b) A lawyer shall not **compensate**, give, or promise anything of value to a person for **recommending** the lawyer's services **except** that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.;

RULE 7.2 - ADVERTISING

(b) . . . **except** that a lawyer may:

(3) **pay for a law practice** in accordance with Rule 1.17; and

[Rule 1.17 – seller **ceases** to engage in private practice of law, or in the area of practice that has been sold, in the jurisdiction; **entire practice** is sold to lawyer(s); seller gives **written notice to each client** about the sale, client's right to change lawyers and get files, and **fees** charged clients shall **not be increased** by reason of the sale.]

RULE 7.2 - ADVERTISING

b) . . . **except** that a lawyer may:

(4) **refer clients** to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is **not exclusive**, and

(ii) the **client is informed** of the existence and nature of the agreement.

RULE 7.2 - ADVERTISING

b) . . . **except** that a lawyer may:

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

[added Aug. 2018]

RULE 7.2 - ADVERTISING

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

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

RULE 7.2 - ADVERTISING

(d) Any communication made under this rule must include the contact information of at least one lawyer or law firm responsible for its content.

RULE 7.2 – COMMENT 1

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

RULE 7.2 – COMMENT 2

[2] Except as permitted under paragraphs (b)(1)-(b), lawyers are not permitted to **pay others for recommending** the lawyer's services.

A communication contains a recommendation if it endorses or **vouches** for a lawyer's credentials, abilities, competence, character, or other professional qualities.

Directory listings and group advertisements that list lawyers by practice area, without more, do **not** constitute impermissible "recommendations."

RULE 7.2 – COMMENT 4 [NEW 2018]

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client.

The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality.

RULE 7.2 – COMMENT 4 [NEW 2018]

[4] . . . A gift is prohibited if **offered or given in consideration** of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

RULE 7.2 – COMMENT 5

[5] A lawyer may pay others for **generating client leads**, such as Internet-based client leads, as long as the lead generator **does not recommend** the lawyer [and no fee sharing with nonlawyers, no false statements, etc.]

RULE 7.2 – COMMENT 5

[5]...To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.

RULE 7.2 – COMMENT 6

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.

A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation.

A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service.

RULE 7.2 – COMMENT 8

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer.

Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services . . .

RULE 7.2 – COMMENT 8

[8]. . . Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must **not pay anything solely for the referral**, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement.

RULE 7.2 - COMMENTS

[8] . . . Conflicts of interest created by such arrangements are governed by Rule 1.7.

Reciprocal referral agreements should not be of **indefinite duration** and should be reviewed periodically to determine whether they comply with these Rules.

This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

RULE 7.2 - COMMENTS

[9] Paragraph (a) of this Rule **permits** a lawyer to communicate that the lawyer **does or does not** practice in **particular areas** of law.

RULE 7.2 - COMMENTS

[9] . . . A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

RULE 7.2 – COMMENT 11

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law **if** such certification is granted by an organization approved by an appropriate authority of a state, etc.

RULE 7.2 – COMMENT 11

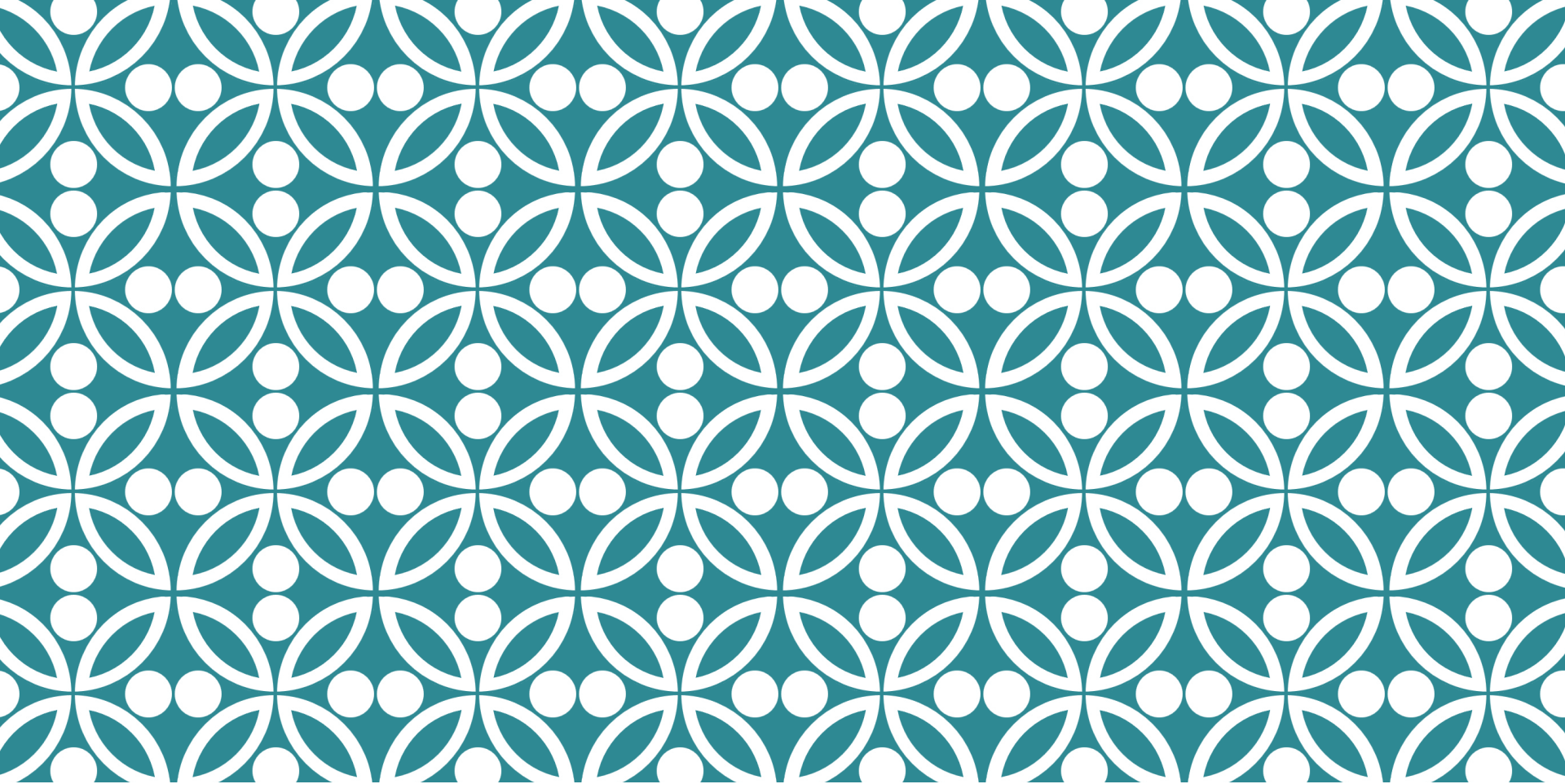
[11] . . . To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization **must be included** in any communication regarding the certification.

RULE 7.2 – COMMENT 12

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm.

Contact information includes a website address, a telephone number, an email address or a physical office location.



RULE 7.3 – SOLICITATION OF CLIENTS

**Direct Contact
with
Prospective
Clients**

RULE 7.3 - SOLICITATION

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter. **[changed 2018]**

RULE 7.3 – SOLICITATION [CHANGED 2018]

(b) A lawyer shall **not solicit** professional employment by live person-to-person contact when a significant **motive** for the lawyer's doing so is the lawyer's or law firm's **pecuniary** gain, **unless** the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer. [NEW]

RULE 7.3 – SOLICITATION [CHANGED 2018]

(c) A lawyer **shall not** solicit professional employment even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

RULE 7.3 – SOLICITATION [CHANGED 2018]

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

[this provision added 2018]

RULE 7.3 – SOLICITATION [CHANGED 2018]

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.3: COMMENT 2

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection.

Such person-to-person contact does **not include chat rooms, text messages** or other written communications that recipients **may easily disregard. [NEW]**

RULE 7.3 COMMENT 2

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services.

These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter.

RULE 7.3 COMMENT 5

[5] There is far less likelihood that a lawyer would engage in overreaching against a **former client**, or a person with whom the lawyer has a **close personal, family, or business relationship**, or in situations in which the lawyer is motivated by considerations **other than the lawyer's pecuniary gain**.

Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to **routinely use the type of legal services** involved for business purposes. [NEW]

RULE 7.3: COMMENT 5

[5] . . . **Examples** include persons who **routinely hire outside counsel** to represent the entity; **entrepreneurs** who **regularly** engage business, employment law or intellectual property lawyers; **small business proprietors** who regularly **routinely** hire lawyers for lease or contract issues; and other people who routinely regularly retain lawyers for business transactions or formations. [NEW 2018]

RULE 7.3: COMMENT 5

[5] Paragraph (a) is not intended to prohibit a lawyer from participating in **constitutionally protected activities** of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[NEW 2018]

RULE 7.3 COMMENT 6

[6] . . . Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is **ordinarily not appropriate**, for example, the **elderly**, those whose first language is **not English**, or the **disabled**.

[added 2018]

RULE 7.3 COMMENT 7

[7] This Rule does **not prohibit** a lawyer from contacting representatives of organizations or groups that **may be interested** in establishing a **group or prepaid legal plan** for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

This form of communication is **not directed** to people who are **seeking legal services for themselves**.

RULE 7.3 COMMENT 7

[7] . . . Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer.

Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

RULE 7.3 COMMENT 8

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[added 2018]

CAUTION:

***Maracich v. Spears*, 570 U.S. 48 (2013)**

Attorneys submitted Freedom of Information Act (FOIA) requests to the state DMV to get the names and addresses of thousands of recent car purchasers. They were soliciting clients for a lawsuit they had pending against area car dealerships under state consumer protection laws.

Using the personal information provided by the DMV, the lawyers sent over 34,000 car purchasers letters, which were headed “ADVERTISING MATERIAL,” explained the lawsuit, and asked recipients to return an enclosed reply card if they wanted to participate in the case.

CAUTION:

***Maracich v. Spears*, 570 U.S. 48 (2013)**

Some of the recipients of the letters sued the lawyers for violating the federal Driver's Privacy Protection Act of 1994 (DPPA) by "obtaining, disclosing, and using" their personal information from DMV records for bulk solicitation without their express consent.

The lawyers claimed that their actions fell under a statutory exception "for use in connection with any civil, criminal, administrative, or arbitral proceeding," including "investigation in anticipation of litigation." 18 U. S. C. §2721(b)(4). **SUPREME COURT held: An attorney's solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception.**

TEXAS OPINION NO. 672 (MARCH 2018)

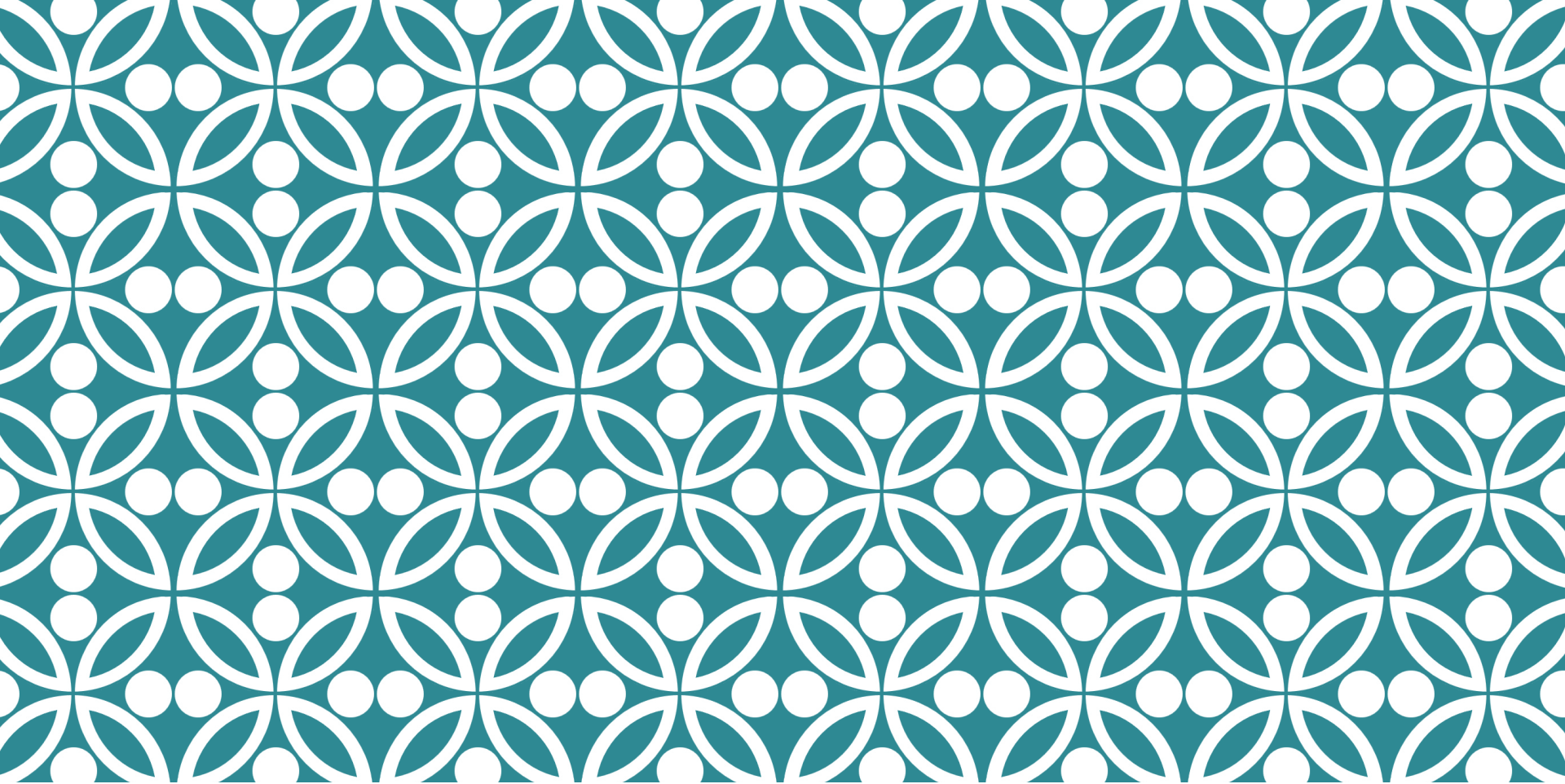
Question:

Does a written communication from a lawyer to employees in a particular position constitute direct mail solicitation if the communication does not directly offer to represent the recipients of the communication, but suggests to the recipients that they have claims because they are similarly situated to the plaintiffs in the lawsuit?

TEXAS OPINION NO. 672 (MARCH 2018)

ANSWER: Whether the lawyer's communication in question constitutes direct mail solicitation turns on the lawyer's intent to seek professional employment, significantly motivated by a desire for pecuniary gain.

In this case, the content of the communications with employee-recipients and the related circumstances **could support** a conclusion that the communications were made for the purpose of obtaining professional employment.



**RULE 7.6 - POLITICAL CONTRIBUTIONS
TO OBTAIN LEGAL ENGAGEMENTS OR
APPOINTMENTS BY JUDGES**

**MRPC 7
Information
About Legal
Services**

RULE 7.6 - POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

RULE 7.6 - COMMENT 2

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office.

Political contributions in initiative and referendum elections are not included. For purposes of this Rule, **the term "political contribution" does not include uncompensated services.**

RULE 7.6 - COMMENT 3

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge.

RULE 7.6 - COMMENT 3

[3] . . . Those terms do **not**, however, include (a) substantially **uncompensated** services; (b) engagements or appointments made on the basis of **experience**, expertise, professional qualifications and cost following a request for proposal or other process that is **free from influence** based upon political contributions; and (c) engagements or appointments made on a **rotational** basis from a list compiled without regard to political contributions.

[permissible appointments]

RULE 7.6 - COMMENT 5

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions.

The purpose may be determined by an examination of the circumstances in which the contributions occur.

RULE 7.6 - COMMENT 5

[5] ...other factors [may] weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate. **[permissible motives]**