VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of October, 2019.

On June 19, 2019 came the Virginia State Bar, by Marni E. Byrum, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10-4, and filed a Petition requesting amendments to Legal Ethics Opinion No. 1750.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1750 be amended as follows, effective immediately:

LEGAL ETHICS OPINION 1750. LAWYER ADVERTISING AND SOLICITATION.

* * *

Opinion

The appropriate and controlling rules of professional conduct relevant to the questions raised are Rules 7.1 and 7.3(d):

RULE 7.1. Communications Concerning A Lawyer's Services.

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 7.3. Solicitation of Clients.

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(d) A lawyer shall not compensate, give, or promise anything of value to a person who is

not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

* * *

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

A. Use of Actors in Lawyer Advertising.

The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The Committee is of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading. For example, some advertisements feature actors who use first person references to themselves as lawyers or as members of the law firm being advertised. When the advertisement implies that an actor is actually a lawyer or client of the law firm, a disclosure that the actor is not associated with the firm, or that the depiction is a dramatization, is necessary to prevent the advertisement from being misleading.[1]

B. Use of "No Recovery, No Fee."

The Committee considered whether the language "no recovery, no fee" or language of similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was false or misleading pursuant to Rule 7.1, as the

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[1]There may also be legal requirements to disclose compensation given in exchange for endorsements or testimonials in advertising. These requirements are beyond the purview of the Committee. *See*, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

client might still be responsible for advanced costs and expenses regardless of whether any recovery was obtained.

The Committee determined that use of the explicit phrase "no recovery, no fee" in the solicitation of contingent fee cases is misleading when the lawyer or law firm may or will require the client to remain responsible for costs and expenses of litigation. According to Rule 1.8(e), a lawyer is permitted, but not required to, make repayment of costs and expenses contingent on the outcome of litigation. Thus, an advertisement or other public communication may only use the phrase "no recovery, no fee" when the lawyer or law firm has already made the decision that the client's responsibility for advanced costs and expenses will be contingent on the outcome of the matter. If the lawyer or law firm intends that the client will be ultimately responsible for the costs and expenses of litigation, it is misleading to use the phrase "no recovery, no fee" with no additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the terms "fee" and "costs." *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-3 (1985) (finding that "[t]he State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed"). The statement "no recovery, no fee" is misleading if a client is or may be liable for costs even if there is no recovery. *See* Rule 1.8(e).

Also, the Committee considered the propriety of such phrases as "we guarantee to win, or you don't pay," "we are paid only if you collect," "no charge unless we win," or other language not making explicit reference to a legal "fee." Language of this type that does not make explicit

reference to a "fee" may be false and misleading in violation of Rule 7.1 if the language includes the implication that the client will not be required to pay either expenses or attorney's fees if there is no recovery, but the lawyer does not intend to make the costs and expenses contingent on the outcome of the matter. *See also* Rule 1.8(e).

C. Firm Names and Offices.

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D. Advising That an Attorney Must Be Consulted.

The question arises whether it is permissible for an advertisement to state that an individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual "will have to consult an attorney," the proposed advertisement would be in violation of Rule 7.1.

E. Participation in Lawyer Referral Services.

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false or misleading. *See* Rule 7.1. Lawyers may pay the "usual charges" of a legal service plan or not-for-profit lawyer referral service. *See* Rule 7.3(d) and LEO 1751. The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are misleading. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral services would create automatic rules violations by the

participating attorneys. The following practices of lawyer referral services are misleading:

* * *

In order to qualify as a lawyer referral service for purposes of these rules, the service must: be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or removal of a lawyer from any panel; and not make any fee-generating referral to any lawyer who has an ownership interest in the service, or to that lawyer's law firm. *See also* LEOs 910, 1014, and 1175.

F. Advertising Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements.

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G. Statements by Third Parties.

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In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This Committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent rule and the spirit behind it.

H. Communications Involving Listing in Publications such as *The Best Lawyers in America.*

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I. Use of "Specialist" or "Specializing In."

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J. Use of "Expert" and "Expertise."

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A Copy,

Teste:

Clerk