

**AMERICAN BAR ASSOCIATION**

**COMMISSION ON ETHICS 20/20**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED: That the American Bar Association amends the ABA Model Rules of  
2 Professional Conduct dated August 2012, to provide guidance regarding lawyers' use of  
3 technology and client development as follows (insertions underlined, deletions ~~struck~~  
4 ~~through~~):

5  
6 (a) the black letter and Comments to Model Rule 1.18 (Duties to Prospective Client);

7 (b) the Comments to Model Rule 7.1 (Communications Concerning a Lawyer's  
8 Services);

9 (c) the Comments to Model Rule 7.2 (Advertising);

10 (d) the title, black letter, and Comments to Model Rule 7.3 (Direct Contact with  
11 Prospective Clients); and

12 (e) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional  
13 Practice of Law).

14  
15 **Rule 1.18: Duties to Prospective Client**

16  
17 (a) A person who ~~discusses~~ consults with a lawyer about the possibility of  
18 forming a client-lawyer relationship with respect to a matter is a prospective client.

19 (b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had~~  
20 ~~discussions with~~ learned information from a prospective client shall not use or  
21 reveal that information learned in the consultation, except as Rule 1.9 would permit  
22 with respect to information of a former client.

23 (c) A lawyer subject to paragraph (b) shall not represent a client with  
24 interests materially adverse to those of a prospective client in the same or a  
25 substantially related matter if the lawyer received information from the prospective  
26 client that could be significantly harmful to that person in the matter, except as  
27 provided in paragraph (d). If a lawyer is disqualified from representation under this  
28 paragraph, no lawyer in a firm with which that lawyer is associated may knowingly  
29 undertake or continue representation in such a matter, except as provided in  
30 paragraph (d).

31 (d) When the lawyer has received disqualifying information as defined in  
32 paragraph (c), representation is permissible if:

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33 (1) both the affected client and the prospective client have given  
34 informed consent, confirmed in writing, or:

35 (2) the lawyer who received the information took reasonable measures  
36 to avoid exposure to more disqualifying information than was reasonably  
37 necessary to determine whether to represent the prospective client; and

38 (i) the disqualified lawyer is timely screened from any  
39 participation in the matter and is apportioned no part of the fee  
40 therefrom; and

41 (ii) written notice is promptly given to the prospective client.  
42

### 43 Comment

44 [1] Prospective clients, like clients, may disclose information to a lawyer, place  
45 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A  
46 lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time  
47 and depth and leave both the prospective client and the lawyer free (and sometimes  
48 required) to proceed no further. Hence, prospective clients should receive some but not  
49 all of the protection afforded clients.

50 [2] ~~Not all persons who communicate information to a lawyer are entitled to~~  
51 ~~protection under this Rule. A person becomes a prospective client by consulting with a~~  
52 ~~lawyer about the possibility of forming a client-lawyer relationship with respect to a~~  
53 ~~matter. Whether communications, including written, oral, or electronic communications,~~  
54 ~~constitute a consultation depends on the circumstances. For example, a consultation is~~  
55 ~~likely to have occurred if a lawyer, either in person or through the lawyer's advertising in~~  
56 ~~any medium, specifically requests or invites the submission of information about a~~  
57 ~~potential representation without clear and reasonably understandable warnings and~~  
58 ~~cautionary statements that limit the lawyer's obligations, and a person provides~~  
59 ~~information in response. See also Comment [4]. In contrast, a consultation does not~~  
60 ~~occur if a person provides information to a lawyer in response to advertising that merely~~  
61 ~~describes the lawyer's education, experience, areas of practice, and contact information,~~  
62 ~~or provides legal information of general interest. A person who communicates~~ Such a  
63 person communicates information unilaterally to a lawyer, without any reasonable  
64 expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer  
65 relationship, and is thus not a "prospective client," ~~within the meaning of paragraph (a).~~  
66 Moreover, a person who communicates with a lawyer for the purpose of disqualifying the  
67 lawyer is not a "prospective client."

68 ...

69 [4] In order to avoid acquiring disqualifying information from a prospective  
70 client, a lawyer considering whether or not to undertake a new matter should limit ~~the~~  
71 ~~initial interview~~ the initial consultation to only such information as reasonably appears  
72 necessary for that purpose. Where the information indicates that a conflict of interest or  
73 other reason for non-representation exists, the lawyer should so inform the prospective  
74 client or decline the representation. If the prospective client wishes to retain the lawyer,  
75 and if consent is possible under Rule 1.7, then consent from all affected present or former  
76 clients must be obtained before accepting the representation.

77 [5] A lawyer may condition ~~conversations~~ a consultation with a prospective client

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78 on the person's informed consent that no information disclosed during the consultation  
79 will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e)  
80 for the definition of informed consent. If the agreement expressly so provides, the  
81 prospective client may also consent to the lawyer's subsequent use of information  
82 received from the prospective client.

83 ...  
84

### 85 **Rule 7.1 Communications Concerning a Lawyer's Services**

86  
87 **A lawyer shall not make a false or misleading communication about the lawyer or**  
88 **the lawyer's services. A communication is false or misleading if it contains a**  
89 **material misrepresentation of fact or law, or omits a fact necessary to make the**  
90 **statement considered as a whole not materially misleading.**

91  
92 **Comment**

93 ...

94 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of  
95 clients or former clients may be misleading if presented so as to lead a reasonable person  
96 to form an unjustified expectation that the same results could be obtained for other clients  
97 in similar matters without reference to the specific factual and legal circumstances of  
98 each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or  
99 fees with the services or fees of other lawyers may be misleading if presented with such  
100 specificity as would lead a reasonable person to conclude that the comparison can be  
101 substantiated. The inclusion of an appropriate disclaimer or qualifying language may  
102 preclude a finding that a statement is likely to create unjustified expectations or otherwise  
103 mislead the public. ~~a prospective client.~~

104 ...

105

### 106 **Rule 7.2 Advertising**

107

108 **(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services**  
109 **through written, recorded or electronic communication, including public media.**

110 **(b) A lawyer shall not give anything of value to a person for recommending the**  
111 **lawyer's services except that a lawyer may**

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

114 **(2) pay the usual charges of a legal services plan or a not-for-profit or**  
115 **qualified lawyer referral service. A qualified lawyer referral service is a**  
116 **lawyer referral service that has been approved by an appropriate regulatory**  
117 **authority;**

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

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

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

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

124 (c) Any communication made pursuant to this Rule shall include the name and office  
125 address of at least one lawyer or law firm responsible for its content.

126

127 **Comment**

128 [1] To assist the public in learning about and obtaining legal services, lawyers  
129 should be allowed to make known their services not only through reputation but also  
130 through organized information campaigns in the form of advertising. Advertising  
131 involves an active quest for clients, contrary to the tradition that a lawyer should not seek  
132 clientele. However, the public's need to know about legal services can be fulfilled in part  
133 through advertising. This need is particularly acute in the case of persons of moderate  
134 means who have not made extensive use of legal services. The interest in expanding  
135 public information about legal services ought to prevail over tradition. Nevertheless,  
136 advertising by lawyers entails the risk of practices that are misleading or overreaching.

137 [2] This Rule permits public dissemination of information concerning a lawyer's  
138 name or firm name, address, email address, website, and telephone number; the kinds of  
139 services the lawyer will undertake; the basis on which the lawyer's fees are determined,  
140 including prices for specific services and payment and credit arrangements; a lawyer's  
141 foreign language ability; names of references and, with their consent, names of clients  
142 regularly represented; and other information that might invite the attention of those  
143 seeking legal assistance.

144 [3] Questions of effectiveness and taste in advertising are matters of speculation  
145 and subjective judgment. Some jurisdictions have had extensive prohibitions against  
146 television and other forms of advertising, against advertising going beyond specified facts  
147 about a lawyer, or against "undignified" advertising. Television, the Internet, and other  
148 forms of electronic communication are is now ~~one of~~ among the most powerful media for  
149 getting information to the public, particularly persons of low and moderate income;  
150 prohibiting television, Internet, and other forms of electronic advertising, therefore,  
151 would impede the flow of information about legal services to many sectors of the public.  
152 Limiting the information that may be advertised has a similar effect and assumes that the  
153 bar can accurately forecast the kind of information that the public would regard as  
154 relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of~~  
155 ~~information about legal services, and lawful communication by electronic mail is~~  
156 ~~permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against the a solicitation of  
157 ~~a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that~~  
158 ~~is not initiated by the prospective client.~~

159 ...

160 **Paying Others to Recommend a Lawyer**

161 [5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~awyers are not  
162 permitted to pay others for ~~channeling professional work~~ recommending the lawyer's  
163 services or for channeling professional work in a manner that violates Rule 7.3. A

164 communication contains a recommendation if it endorses or vouches for a lawyer's  
165 credentials, abilities, competence, character, or other professional qualities. Paragraph  
166 (b)(1), however, allows a lawyer to pay for advertising and communications permitted by  
167 this Rule, including the costs of print directory listings, on-line directory listings,  
168 newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees,  
169 ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may  
170 compensate employees, agents and vendors who are engaged to provide marketing or  
171 client development services, such as publicists, public-relations personnel, business-  
172 development staff and website designers. Moreover, a lawyer may pay others for  
173 generating client leads, such as Internet-based client leads, as long as the lead generator  
174 does not recommend the lawyer, any payment to the lead generator is consistent with  
175 Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the  
176 lead generator's communications are consistent with Rule 7.1 (communications  
177 concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead  
178 generator that states, implies, or creates a reasonable impression that it is recommending  
179 the lawyer, is making the referral without payment from the lawyer, or has analyzed a  
180 person's legal problems when determining which lawyer should receive the referral. See  
181 also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of  
182 nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).  
183 ~~who prepare marketing materials for them.~~

184 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit  
185 or qualified lawyer referral service. A legal service plan is a prepaid or group legal  
186 service plan or a similar delivery system that assists people who seek ~~prospective clients~~  
187 to secure legal representation. A lawyer referral service, on the other hand, is any  
188 organization that holds itself out to the public as a lawyer referral service. Such referral  
189 services are understood by ~~lawyers~~ the public to be consumer-oriented organizations  
190 that provide unbiased referrals to lawyers with appropriate experience in the subject  
191 matter of the representation and afford other client protections, such as complaint  
192 procedures or malpractice insurance requirements. Consequently, this Rule only permits a  
193 lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A  
194 qualified lawyer referral service is one that is approved by an appropriate regulatory  
195 authority as affording adequate protections for the public. ~~prospective clients.~~ See, e.g.,  
196 the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral  
197 Services and Model Lawyer Referral and Information Service Quality Assurance Act  
198 (requiring that organizations that are identified as lawyer referral services (i) permit the  
199 participation of all lawyers who are licensed and eligible to practice in the jurisdiction  
200 and who meet reasonable objective eligibility requirements as may be established by the  
201 referral service for the protection of the public ~~prospective clients~~; (ii) require each  
202 participating lawyer to carry reasonably adequate malpractice insurance; (iii) act  
203 reasonably to assess client satisfaction and address client complaints; and (iv) do not  
204 make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the  
205 referral service).

206 [7] A lawyer who accepts assignments or referrals from a legal service plan or  
207 referrals from a lawyer referral service must act reasonably to assure that the activities of  
208 the plan or service are compatible with the lawyer's professional obligations. See Rule  
209 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective~~

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210 ~~clients the public~~, but such communication must be in conformity with these Rules. Thus,  
211 advertising must not be false or misleading, as would be the case if the communications  
212 of a group advertising program or a group legal services plan would mislead the public  
213 ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state  
214 agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time  
215 contacts that would violate Rule 7.3.

216 ...

217

### 218 **Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients**

219

220 **(a) A lawyer shall not by in-person, live telephone or real-time electronic contact,**  
221 **solicit professional employment ~~from a prospective client~~ when a significant motive**  
222 **for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:**

223 **(1) is a lawyer; or**

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

226 **(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by**  
227 **written, recorded or electronic communication or by in-person, telephone or real-**  
228 **time electronic contact even when not otherwise prohibited by paragraph (a), if:**

229 **(1) the ~~prospective client~~ target of the solicitation has made known to the**  
230 **lawyer a desire not to be solicited by the lawyer; or**

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

232 **(c) Every written, recorded or electronic communication from a lawyer soliciting**  
233 **professional employment from anyone a ~~prospective client~~ known to be in need of**  
234 **legal services in a particular matter shall include the words "Advertising Material"**  
235 **on the outside envelope, if any, and at the beginning and ending of any recorded or**  
236 **electronic communication, unless the recipient of the communication is a person**  
237 **specified in paragraphs (a)(1) or (a)(2).**

238 **(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate**  
239 **with a prepaid or group legal service plan operated by an organization not owned or**  
240 **directed by the lawyer that uses in-person or telephone contact to solicit**  
241 **memberships or subscriptions for the plan from persons who are not known to need**  
242 **legal services in a particular matter covered by the plan.**

243

### 244 **Comment**

245 [1] A solicitation is a targeted communication initiated by the lawyer that is  
246 directed to a specific person and that offers to provide, or can reasonably be understood  
247 as offering to provide, legal services. In contrast, a lawyer's communication typically  
248 does not constitute a solicitation if it is directed to the general public, such as through a  
249 billboard, an Internet banner advertisement, a website or a television commercial, or if it  
250 is in response to a request for information or is automatically generated in response to  
251 Internet searches.

252 [+2] There is a potential for abuse when a solicitation involves inherent in direct  
253 in-person, live telephone or real-time electronic contact by a lawyer with someone a  
254 prospective client known to need legal services. These forms of contact ~~between a lawyer~~

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255 ~~and a prospective client subject the lawyer~~ a person to the private importuning of the  
256 trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who  
257 may already feel overwhelmed by the circumstances giving rise to the need for legal  
258 services, may find it difficult fully to evaluate all available alternatives with reasoned  
259 judgment and appropriate self-interest in the face of the lawyer's presence and insistence  
260 upon being retained immediately. The situation is fraught with the possibility of undue  
261 influence, intimidation, and over-reaching.

262 [23] This potential for abuse inherent in direct in-person, live telephone or real-  
263 time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly  
264 since lawyers have advertising and written and recorded communication permitted under  
265 Rule 7.2 offer alternative means of conveying necessary information to those who may be  
266 in need of legal services. ~~Advertising and written and recorded~~ In particular,  
267 communications, can which may be be mailed or autodialed or transmitted by email or  
268 other electronic means that do not involve real-time contact and do not violate other laws  
269 governing solicitations. These forms of communications and solicitations make it  
270 possible for the public ~~a prospective client~~ to be informed about the need for legal  
271 services, and about the qualifications of available lawyers and law firms, without  
272 subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time  
273 electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

274 [34] The use of general advertising and written, recorded or electronic  
275 communications to transmit information from lawyer to the public ~~prospective client~~,  
276 rather than direct in-person, live telephone or real-time electronic contact, will help to  
277 assure that the information flows cleanly as well as freely. The contents of advertisements  
278 and communications permitted under Rule 7.2 can be permanently recorded so that they  
279 cannot be disputed and may be shared with others who know the lawyer. This potential  
280 for informal review is itself likely to help guard against statements and claims that might  
281 constitute false and misleading communications, in violation of Rule 7.1. The contents of  
282 direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer~~  
283 ~~and a prospective client~~ contact can be disputed and may not be subject to third-party  
284 scrutiny. Consequently, they are much more likely to approach (and occasionally cross)  
285 the dividing line between accurate representations and those that are false and  
286 misleading.

287 [45] There is far less likelihood that a lawyer would engage in abusive practices  
288 against ~~an individual who is~~ a former client, or a person with whom the lawyer has close  
289 personal or family relationship, or in situations in which the lawyer is motivated by  
290 considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for  
291 abuse when the person contacted is a lawyer. Consequently, the general prohibition in  
292 Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.  
293 Also, paragraph (a) is not intended to prohibit a lawyer from participating in  
294 constitutionally protected activities of public or charitable legal-service organizations or  
295 bona fide political, social, civic, fraternal, employee or trade organizations whose  
296 purposes include providing or recommending legal services to ~~its~~ their members or  
297 beneficiaries.

298 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation  
299 which contains information which is false or misleading within the meaning of Rule 7.1,  
300 which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or

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301 which involves contact with a ~~prospective client~~ someone who has made known to the  
302 lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is  
303 prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as  
304 permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate  
305 with the recipient of the communication ~~prospective client~~ may violate the provisions of  
306 Rule 7.3(b).

307 [67] This Rule is not intended to prohibit a lawyer from contacting representatives  
308 of organizations or groups that may be interested in establishing a group or prepaid legal  
309 plan for their members, insureds, beneficiaries or other third parties for the purpose of  
310 informing such entities of the availability of and details concerning the plan or  
311 arrangement which the lawyer or lawyer's firm is willing to offer. This form of  
312 communication is not directed to people who are seeking legal services for themselves. a  
313 ~~prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary  
314 capacity seeking a supplier of legal services for others who may, if they choose, become  
315 prospective clients of the lawyer. Under these circumstances, the activity which the  
316 lawyer undertakes in communicating with such representatives and the type of  
317 information transmitted to the individual are functionally similar to and serve the same  
318 purpose as advertising permitted under Rule 7.2.

319 [78] The requirement in Rule 7.3(c) that certain communications be marked  
320 "Advertising Material" does not apply to communications sent in response to requests of  
321 potential clients or their spokespersons or sponsors. General announcements by lawyers,  
322 including changes in personnel or office location, do not constitute communications  
323 soliciting professional employment from a client known to be in need of legal services  
324 within the meaning of this Rule.

325 [89] Paragraph (d) of this Rule permits a lawyer to participate with an  
326 organization which uses personal contact to solicit members for its group or prepaid legal  
327 service plan, provided that the personal contact is not undertaken by any lawyer who  
328 would be a provider of legal services through the plan. The organization must not be  
329 owned by or directed (whether as manager or otherwise) by any lawyer or law firm that  
330 participates in the plan. For example, paragraph (d) would not permit a lawyer to create  
331 an organization controlled directly or indirectly by the lawyer and use the organization  
332 for the in-person or telephone solicitation of legal employment of the lawyer through  
333 memberships in the plan or otherwise. The communication permitted by these  
334 organizations also must not be directed to a person known to need legal services in a  
335 particular matter, but is to be designed to inform potential plan members generally of  
336 another means of affordable legal services. Lawyers who participate in a legal service  
337 plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2  
338 and 7.3(b). See 8.4(a).

339

## 340 **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

341

342 **(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of**  
343 **the legal profession in that jurisdiction, or assist another in doing so.**

344 **(b) A lawyer who is not admitted to practice in this jurisdiction shall not:**



345 (1) except as authorized by these Rules or other law, establish an office or  
346 other systematic and continuous presence in this jurisdiction for the practice  
347 of law; or

348 (2) hold out to the public or otherwise represent that the lawyer is admitted  
349 to practice law in this jurisdiction.

350 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or  
351 suspended from practice in any jurisdiction, may provide legal services on a  
352 temporary basis in this jurisdiction that:

353 (1) are undertaken in association with a lawyer who is admitted to practice in  
354 this jurisdiction and who actively participates in the matter;

355 (2) are in or reasonably related to a pending or potential proceeding before a  
356 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer  
357 is assisting, is authorized by law or order to appear in such proceeding or  
358 reasonably expects to be so authorized;

359 (3) are in or reasonably related to a pending or potential arbitration,  
360 mediation, or other alternative dispute resolution proceeding in this or  
361 another jurisdiction, if the services arise out of or are reasonably related to  
362 the lawyer's practice in a jurisdiction in which the lawyer is admitted to  
363 practice and are not services for which the forum requires pro hac vice  
364 admission; or

365 (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are  
366 reasonably related to the lawyer's practice in a jurisdiction in which the  
367 lawyer is admitted to practice.

368 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or  
369 suspended from practice in any jurisdiction, may provide legal services in this  
370 jurisdiction that:

371 (1) are provided to the lawyer's employer or its organizational affiliates and  
372 are not services for which the forum requires pro hac vice admission; or

373 (2) are services that the lawyer is authorized to provide by federal law or  
374 other law of this jurisdiction.

375

376 **Comment**

377 ...

378 [21] Paragraphs (c) and (d) do not authorize communications advertising legal  
379 services to prospective clients in this jurisdiction by lawyers who are admitted to practice  
380 in other jurisdictions. Whether and how lawyers may communicate the availability of  
381 their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

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## **REPORT**

### **I. Introduction**

Lawyers regularly use the Internet to disseminate information about the law and legal services as well as to attract new clients. In general, this development has had the salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers. One of the goals of the ABA Commission on Ethics 20/20 has been to ensure that lawyers continue to provide this valuable information in a manner that is consistent with their ethical obligations.

As a result of its examination of these issues, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that Model Rule 7.1's prohibition against false and misleading communications is readily applicable to online advertising and other forms of electronic communications that are used to attract new clients. Thus, the Commission concluded that there is no need to develop new or different restrictions with regard to those communications. The Commission determined, however, that some Model Rules – specifically Model Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) – have unclear implications for new forms of marketing and that lawyers would benefit from several clarifying amendments.<sup>1</sup> As a result of these proposed changes, a conforming amendment also needs to be made to Comment [3] of Model Rule 7.1.

First, the Commission is proposing amendments to Model Rule 1.18 (Duties to Prospective Clients) and its Comments that would clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments are designed to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

Second, the Commission is proposing amendments to the Comments to Model Rule 7.2 (Advertising). The Commission found that there is considerable confusion concerning the kinds of Internet-based client development tools that lawyers are permitted to use, especially because

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<sup>1</sup> The Commission has asked the ABA Center for Professional Responsibility to develop an informational report about the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that such a report would be desirable in light of recent court decisions holding that some states have imposed unconstitutional restrictions on lawyers' marketing-related communications. The informational report will explain the constitutional issues at stake and encourage jurisdictions to develop regulations that are more uniform and constitutionally defensible. The Commission also concluded that Model Rule 7.1 (Communications Concerning a Lawyer's Services), if read literally, could apply to lawyers' communications about their services even when those communications appear on lawyers' personal networking sites and are accessible only to close friends or family. Thus, the informational report would address these concerns. The Commission also has identified and referred to the Standing Committee on Ethics and Professional Responsibility several related topics that are not amenable to treatment in the Model Rules, but that would be more usefully addressed in a Formal Ethics Opinion.

of an ambiguity regarding the prohibition against paying others for a “recommendation.” To address this ambiguity, the Commission is proposing to define a “recommendation” in a Comment. Additional language in the same Comment would make clear that payments for “lead generation,” including online lead generation, are permissible as long as the generator of the lead complies with certain requirements.

Third, the Commission is proposing amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) that would change the title of the Rule and clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule. For example, a new Comment would explain that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”

Finally, the Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

## **II. Proposed Amendments to Model Rule 1.18 (Prospective Clients)**

Model Rule 1.18 was proposed by the ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission) and was adopted by the ABA House of Delegates in 2002. The purpose of the Rule is to identify a lawyer’s duties to prospective clients.

Critical to the application of Model Rule 1.18 is the definition of a “prospective client.” The Commission concluded that the definition must be sufficiently flexible to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services. In a recently released Formal Ethics Opinion, the ABA Standing Committee on Ethics and Professional Responsibility identified the circumstances under which these communications might give rise to a prospective client-lawyer relationship,<sup>2</sup> and the Commission concluded that lawyers and the public would benefit from a codification of elements of that Formal Opinion.

First, the Commission concluded that the definition of a “prospective client” needs to be updated in light of the various new ways in which lawyers and the public interact, including online. Thus, the Commission is proposing to replace the word “discusses” in paragraph (a) of Model Rule 1.18 with the word “consults.” This change would make clear what the Formal Opinion concluded: a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place.<sup>3</sup> The word “consults” makes this point more clearly than the word “discusses” and anticipates future methods of interaction between lawyers and the public.

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<sup>2</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010).

<sup>3</sup> *Id.* at 4.

The Commission is also proposing new Comment language that would elaborate on the meaning of the word “consults” and give lawyers more guidance about how to avoid the creation of an inadvertent client-lawyer relationship. The Comment emphasizes that such a consultation can occur, and a prospective client relationship can arise, if a lawyer specifically invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.

At the same time, the Commission sought to retain the idea that unilateral communications from a person to a lawyer are not sufficient to give rise to a prospective client relationship, even if the information is submitted through a lawyer’s website. For example, the Comment explains that a consultation does not occur, and a prospective client relationship does not arise, if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. The proposal, therefore, is consistent with ABA Formal Opinion 10-457, which reached a similar conclusion.<sup>4</sup> In sum, the word “consults,” when paired with the proposed new Comment language, will give lawyers more guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship.

For similar reasons, the Commission proposes to replace the phrase “had discussions with a prospective client” in paragraph (b) with the phrase “learned information from a prospective client.” The Commission is proposing conceptually similar changes in Comments [4] and [5].

Finally, the Commission proposes to add a sentence at the end of Comment [2] to make clear that a person is not owed any duties under Model Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent. Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior, which is commonly referred to as “taint shopping.”<sup>5</sup> In fact, some states have incorporated this concept into their own versions of Model Rule 1.18.<sup>6</sup> The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes this “taint shopping” possible.

### **III. Proposed Amendments to Model Rule 7.2 (Advertising)**

Model Rule 7.2(b) currently prohibits a lawyer from giving anything of value for recommending the lawyer’s services. The Rule, however, creates exceptions that permit a lawyer to pay for the “reasonable costs” of advertising and the “usual charges” of non-profit or state-qualified lawyer referral services. In practical effect, the Model Rule has been interpreted to mean that a lawyer may divide client fees with non-profit or approved referral services, but may only pay set costs to advertising programs, such as the cost of a television commercial or a newspaper advertisement.

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<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., N.Y.C. Bar Ass’n Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-02 (2006); Va. State Bar, Ethics Op. 1794 (2004).

<sup>6</sup> N.Y. Rules of Prof’l Conduct R. 1.18(e)(2).

Prior to the Internet, this dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear. For example, new marketing methods have emerged, such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell's Lawyers.com that do not fit neatly into existing categories. Although the particular models vary, lawyers often pay these entities a fee for each client lead that is generated. An important question in this context is whether the lead generator is "recommending" the lawyer for whom the lead is generated. If so, any payments from the lawyer would violate Rule 7.2(b). The problem is that the existing version of Model Rule 7.2 does not clearly resolve this issue.<sup>7</sup>

To address this ambiguity, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to people (e.g., "runners" or "cappers") who might engage in conduct that the lawyer was not permitted to employ, such as engaging in in-person solicitations or using false or misleading tactics. *See also* Rule 8.4(a) (prohibiting the violation of the Rules of Professional Conduct "through the acts of another"). Another reason for the restriction is that nonlawyers typically do not have the expertise to know which lawyers are best able to handle a particular matter. A recommendation, therefore, can give the public a false impression about the appropriateness of using a specific lawyer. The Commission concluded that it should propose clarifying language regarding the scope of Model Rule 7.2 that is consistent with these rationales for the Rule, while not unreasonably limiting lawyers' ability to use new client development tools.

#### **A. The Commission's Proposal**

To clarify the scope of Model Rule 7.2's prohibition against paying for a recommendation, the Commission proposes to define the word "recommendation" in Comment [5]. The word would be defined as a "communication . . . [that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

This new definition would permit lawyers to use lead generation services, such as those that are increasingly prevalent online, but would require lawyers to ensure that the lead generators do not engage in the kind of conduct that the Model Rule was intended to prohibit. Namely, the definition would make clear that lawyers cannot pay lead generators who endorse or vouch for the lawyer's credentials, abilities, competence, character, or other professional qualities. This restriction is consistent with the idea that nonlawyers do not have the necessary expertise to know which lawyer has the necessary professional qualities to handle a particular matter.

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<sup>7</sup> A related question is whether such fees would be considered an impermissible form of fee sharing under Rule 5.4. There is considerable case law and numerous ethics opinions that define a "legal fee" for purposes of Rule 5.4, and the Commission concluded that no additional guidance is necessary to address the issue. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 00-10 (2000); Va. State Bar, Ethics Op. 1712 (1998).

The Commission concluded that there are other possible concerns associated with lead generation that should also be identified. First, the proposed Comment explains that, even if a lead generator does not “recommend” the lawyer, the lawyer’s use of the lead generator must be consistent with Model Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer). The reference to Model Rule 1.5(e) acknowledges that the lead generator may be another lawyer, *see* Model Rule 7.2(b)(4), in which case the restrictions on fee divisions in Rule 1.5(e) must be observed. The reference to Model Rule 5.4 is intended to remind lawyers that, although the lawyer can pay a fee to a nonlawyer for a client lead, the fee should typically not be contingent on a person’s use of the lawyer’s service. Such a fee would constitute an impermissible sharing of fees with nonlawyers under Model Rule 5.4(a). Moreover, the reference to Rule 5.4 is intended to remind lawyers that a nonlawyer lead generator should not in any way direct or regulate how the lawyer’s work is performed. *See* Model Rule 5.4(c).

Second, in order to ensure that the public is not misled, the proposed Comment language reminds lawyers that they should not use a lead generator unless the lead generator’s communications are consistent with Model Rule 7.1, which prohibits false or misleading communications. To comply with this obligation, the Comment explains that a lawyer should not pay a lead generator if the lead generator 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.

The Commission considered whether to require lead generators to state affirmatively that they are not recommending the lawyer and have not analyzed a person’s legal needs. The Commission concluded that lead generation takes many forms, and some of those forms will not require any affirmative statements from the lead generator in order to prevent misunderstandings. For example, “pay-per-click” advertising is a form of lead generation where a lawyer pays a fee to a nonlawyer (e.g., Google) each time someone clicks on the lawyer’s advertisement and is taken to the lawyer’s website. When someone clicks on such an advertisement, there is typically no reason to believe that the provider of the “pay-per-click” service (in this example, Google) is recommending the lawyer or that the provider of the service has, in some way, analyzed the person’s legal needs. The Commission concluded that, under these circumstances, it would be unnecessary to require the lead generator to state affirmatively that it is not recommending the lawyer or that it has not analyzed a person’s legal needs. It would be obvious from the context that the lead generator has not done so.

For these reasons, the Commission concluded that it would be more appropriate to state generally that lead generators should not state, imply, or create a reasonable impression that they are recommending the lawyer, have made the referral without payment from the lawyer, or have analyzed a person’s legal problems when determining which lawyer should receive the referral. In some circumstances, this requirement might mean that the lead generator has to make affirmative statements (e.g., that it is not recommending the lawyer, that it is getting paid for the lead, or that it has not analyzed the person’s legal problems). In other circumstances, however, where there is no reasonable likelihood of confusion (e.g., typical “pay-per-click” advertising), no such affirmative statements should be necessary.

Finally, the Commission is retaining the existing word “channeling” in Comment [5]. The Commission had considered deleting the word, because it is ambiguous and does not appear in the black letter. The Commission heard concerns, however, that some forms of lead generation might be problematic, even if no “recommendation” (as that word would be defined) is made. For example, someone might be paid to distribute a lawyer’s business cards to accident victims without actually “recommending” the lawyer in explicit terms. Such a person would be “channeling” professional work without “recommending” the lawyer. The Commission concluded that such activities would be prohibited as in-person solicitations under Model Rule 7.3 and that the word “channeling” will serve as a reminder about Rule 7.3’s restrictions. In sum, the retention of the word “channeling” is only intended as a reminder that lawyers should not use others to engage in forms of client development that violate Model Rule 7.3.

## **B. Alternate Approaches Considered**

The Commission considered several alternatives to amending Model Rule 7.2 and paid particular attention to one that would have had more significant implications than the approach that the Commission decided to propose. In particular, the Commission considered eliminating altogether Model Rule 7.2(b)’s prohibition against paying nonlawyers for recommendations. Such a change would have enabled lawyers to pay for such recommendations as long as the nonlawyers’ methods were consistent with the lawyer’s own ethical obligations. *See* Model Rule 8.4(a). For example, a lawyer under this alternate approach would have been permitted to pay a for-profit referral service for recommending the lawyer, but only if the service did not employ any methods that the lawyer could not employ (e.g., it did not use misleading communications or engage in in-person solicitations). The Commission learned that the District of Columbia has adopted a somewhat similar approach.<sup>8</sup>

This alternative would have retained the historical restrictions on paying others to engage in unethical conduct (such as paying “runners” to engage in in-person solicitation), but free lawyers to use new and innovative forms of marketing. For example, for-profit lawyer referral services would be able to recommend lawyers who are particularly well-suited to provide the specific services that a person is seeking, including offering a description of the lawyers’ qualifications and the cost of their services relative to other lawyers who offer similar services. Arguably, such a for-profit referral service would be able to match people with appropriate lawyers more effectively and efficiently than not-for-profit models and thus make the delivery of legal services more accessible, affordable, and transparent.<sup>9</sup>

The Commission nevertheless decided to retain the restriction on paying others for a recommendation. Concerns were raised that, by removing the restriction, for-profit entities

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<sup>8</sup> D.C. RULES OF PROF’L CONDUCT R. 7.1(b)(2) (“A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact”); D.C. Bar Legal Ethics Comm., Ethics Op. 342 (2007).

<sup>9</sup> The proposal also would be consistent with the Commission’s proposed approach to outsourcing under Rule 5.3. In particular, proposed Comment [4] to that Rule provides that, “[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” The premise of that proposal is consistent with the idea that lawyers should be permitted to pay others to perform services on the lawyer’s behalf as long as the services are performed in a manner that is consistent with the lawyer’s own professional obligations.

would develop undue influence over the referral of professional work, even if they do not have the expertise to do so. Moreover, there was concern that such entities might wield inappropriate influence over lawyers who want to be recommended, despite the restrictions contained in Model Rule 5.4. For these reasons, the Commission's current proposal retains the current prohibition against paying for a recommendation, but clarifies what counts as a "recommendation."

#### **IV. Proposed Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)**

Model Rule 7.3 regulates a lawyer's direct contacts with the public for the purpose of soliciting business. Paragraph (a) prohibits most kinds of in-person, live telephone, and real-time electronic solicitations, but the Model Rule permits and regulates other forms of solicitations, such as those sent by direct mail and email.

The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a "solicitation" and thus fall within the scope of Model Rule 7.3. In the early days of the Internet, little such guidance was needed. Ethics opinions had concluded that emails constituted a solicitation and were governed by Rule 7.3, but that less targeted forms of advertising (such as websites) were not governed by the Rule.<sup>10</sup> Today, however, lawyers can post information on their social or professional networking pages (which function like websites), but can control the viewers and enter into conversations via those pages (like email). Similarly, some websites allow lawyers and the public to interact, sometimes in "real-time" and sometimes not. The Commission was advised that lawyers are uncertain as to whether these new forms of Internet-based activities fall within Model Rule 7.3.

The Commission concluded that, to address this ambiguity, lawyers need a clearer definition of a "solicitation." A new proposed Comment [1] would explain that a lawyer's communications constitute a solicitation when the lawyer offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific person. The phrase "reasonably understood to be offering to provide" is intended to ensure that lawyers are governed by the Model Rule even if their communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose. For example, if a lawyer approaches people at their homes and describes various legal services, the lawyer's communications constitute a "solicitation" even if the lawyer does not formally offer to provide those services, as long as a reasonable person would interpret the lawyer's communications as an offer to provide those services.

The second sentence is designed to clarify that a response to a request for information and an advertisement that is not directed to specific people are not "solicitations." For example, the sentence makes clear that advertisements that are automatically generated in response to an Internet search are not solicitations. Because those advertisements are generated in response to Internet-based research, they are more analogous to a lawyer's response to a request for information (which is not a solicitation) than an unsolicited and targeted letter to a person who is known to be in need of a particular legal service (which is a solicitation). These examples are

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<sup>10</sup> Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer's services).



intended to clarify when a lawyer's activities constitute a solicitation and are thus governed by Model Rule 7.3.

The Commission concluded that additional elaboration on this point also would be useful in renumbered Comment [3]. In particular, technology has enabled various kinds of online interactions between lawyers and the public. The clarifying language makes clear that lawyers do not violate paragraph (a) if they are responding to a request for information, which can occur in many settings, including online.

The Commission's research also revealed that "autodialing" (or "robo-calling") is now unlawful in many situations. *See, e.g.*, 47 U.S.C. 227(b). As a result, the Commission proposes to delete the reference to "autodialing" in renumbered Comment [3] and to remind lawyers that other law often governs a lawyer's conduct in this area.

Finally, the Commission's proposal addresses a matter of terminology. With the creation of Model Rule 1.18 in 2002, the phrase "prospective client" refers to a specific person who has actually shared information with a lawyer. Model Rule 7.3 clearly intends to cover contacts with all possible future clients, not just those who have had some contact with lawyers and have become "prospective clients" under Model Rule 1.18. (See the description of Model Rule 1.18 earlier in this Report.) Thus, the Commission proposes to re-title the Model Rule 7.3 "Solicitation of Clients" so that the title more clearly and accurately reflects the Rule's purpose.

## **V. Conclusion**

Technology has enabled lawyers to communicate about themselves and their services more easily and efficiently, and it has enabled the public to learn necessary information about lawyers, their credentials, and the particular legal services those lawyers provide as well as the cost of those services. Lawyers, however, need to ensure that these communications satisfy existing ethical obligations. The Commission's proposals are designed to give lawyers more guidance regarding these obligations in the context of various new client development tools. The Commission respectfully requests that the House of Delegates adopt the amendments to the Model Rules of Professional Conduct set forth in the Resolutions accompanying this Report.