2010-2011

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Berkeley, CA 94705

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CENTER FOR PROFESSIONAL RESPONSIBILITY
Jeanne P. Gray, Director

Ellyn S. Rosen, Commission Counsel
(312) 988-5311

Marcia Kladder, Policy & Program Director
(312) 988-5326

Natalia Vera, Senior Paralegal
(312) 988-5328

Kimley Grant, Regulation Paralegal
(312) 988-5319

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654-7598
Phone: (312) 988-5311
Fax: (312) 988-5280
Website: www.abanet.org/ethics2020

To: **ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals**

From: **Jamie S. Gorelick and Michael Traynor, Co-Chairs**
ABA Commission on Ethics 20/20

Re: **For Comment: Initial Draft Proposals on Lawyers' Use of Technology and Client Development**

Date: **June 29, 2011**

The Commission is pleased to release its initial proposals relating to lawyers' use of technology-based client development tools. As the accompanying report explains, the Commission concluded that no new restrictions are necessary in this area, but that lawyers would benefit from more guidance on how to use new client development tools in a manner that is consistent with the profession's core values. To that end, the Commission is proposing amendments to Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) that would clarify how lawyers can use new technology to disseminate important information about legal services and develop clients.

In developing these proposals, the Commission benefitted from the input of participants from various ABA and outside entities, as well as from many people who commented on the September 10, 2010 "Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools." The Commission reviewed and considered all submissions, and those submissions have informed the content of the Commission's proposals. The Commission is grateful to those who provided comments to date and encourages continued feedback on the Commission's efforts.

The Commission plans to release proposals with regard to other issues on its agenda no later than September 2011. The Commission will submit to the ABA House of Delegates final versions of all of the Commission's proposals in May 2012, for the House of Delegates' deliberation at the August 2012 ABA Annual Meeting. In the meantime, the Commission seeks and welcomes feedback on its proposals and reports to date.

Comments in response to the Initial Draft Proposals on Lawyers' Use of Technology and Client Development are due August 31, 2011. Comments may be submitted to Senior Research Paralegal, Natalia Vera at natalia.vera@americanbar.org.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

American Bar Association
Commission on Ethics 20/20
Resolution

RESOLVED: That the American Bar Association adopts the proposed amendments to Rules 1.18, 7.2, and 7.3 of the *ABA Model Rules of Professional Conduct* as follows (insertions <u>underlined</u>, deletions ~~struck through~~):

Rule 1.18 Duties to Prospective Client

(a) A person who ~~discusses~~ <u>communicates</u> with a lawyer <u>about</u> the possibility of forming a client-lawyer relationship <u>and has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship</u> with respect to a matter is a prospective client.

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

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

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

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

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

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

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

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ <u>communications</u> with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes

required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to consider the possibility of forming a client-lawyer relationship, is not a ''prospective client'' within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the primary purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not a "prospective client."

[3] When a person initiates an electronic communication with a lawyer, such as through email or a website, the reasonableness of the person's expectations that the lawyer is willing to consider forming a client-lawyer relationship may depend on a number of factors, including whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautionary statements. For example, if a lawyer's website encourages a website visitor to submit a personal inquiry about a proposed representation and the website fails to include any cautionary language, the person submitting the information could become a prospective client. In contrast, if a website offers only information about the lawyer or the lawyer's firm, including the lawyer's contact information, this information alone is typically insufficient to create a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.

[~~3~~4] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[~~4~~5] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ initial communications to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[~~5~~6] A lawyer may condition ~~conversations~~ communications with a prospective client on the person's informed consent that no information disclosed during the ~~consultation~~ communications will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly

so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[~~6~~7] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[~~7~~8] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[~~8~~9] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[~~9~~10] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

FURTHER RESOLVED: That the American Bar Association amends Model Rule 7.2 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 7.2 Advertising

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

(b) A lawyer shall not give 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 services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
> (3) pay for a law practice in accordance with Rule 1.17; and

(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.

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

COMMENT

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

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address 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.

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

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities or qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based pop-up advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the person does not recommend the lawyer and any payment is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (professional independence of the lawyer). See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers. ~~who prepare marketing materials for them.~~

[6] A lawyer may pay the usual charges of, and share fees with, 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 prospective clients 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. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could

the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[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. See Rules 2.1 and 5.4(c). 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. Conflicts of interest created by such agreements 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.

FURTHER RESOLVED: That the American Bar Association amends Model Rule 7.3 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 7.3 Direct Contact With Potential ~~Prospective~~ Clients

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

(1) is a lawyer; or

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

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

(1) the potential ~~prospective~~ client has made known to the lawyer a desire not to be solicited by the lawyer; or

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

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential ~~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, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), 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 in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

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

[~~1~~2] There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with a potential ~~prospective~~ client known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject the potential client ~~layperson~~ to the private importuning of the trained advocate in a direct interpersonal encounter. The potential ~~prospective~~ client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[~~2~~3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have ~~advertising and written and recorded communication permitted under Rule 7.2~~ ~~offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications~~,~~ can ~~which may be~~ be mailed, ~~or~~ delivered through autodialing~~ed~~, or transmitted by email or other electronic means that do not involve real-time contact. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential ~~prospective~~ client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the potential client's judgment.

[~~3~~4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public ~~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. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct–in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[~~4~~5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or with whom the lawyer has close personal or family 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 abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, 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 its members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the potential ~~prospective~~ client may violate the provisions of Rule 7.3(b).

[~~6~~7] This Rule is not intended to 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. ~~a prospective client~~. 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 potential ~~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.

[~~7~~8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[~~8~~9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be

directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b).

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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.

To develop appropriate recommendations in this area, the Commission researched and studied how lawyers use various forms of marketing-related technology and whether these forms of marketing have had any adverse effect on the public or clients. To this end, the Commission's Technology Working Group included participants from the Law Practice Management Section, Standing Committee on Delivery of Legal Services, Litigation Section, Standing Committee on Ethics and Professional Responsibility, and the Young Lawyers Division. They made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of marketing-related ethics issues and received numerous responses. The Commission also received and reviewed recent surveys on lawyers' use of technology; reviewed relevant marketing websites; studied litigation and disciplinary proceedings relating to Internet-based client leads; and reviewed information from the ABA Science and Technology Law Section, the Law Practice Management Section's E-Lawyering Task Force, and the Standing Committee on the Delivery of Legal Services. The Commission also heard testimony from providers of marketing-related technology as well as from lawyers who use those forms of technology.

As a result of these efforts, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that 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 Rules – specifically 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 to those Rules.[1]

[1] In a separate informational report, the Commission will recommend the development of a white paper to

First, the Commission is proposing amendments to Model Rule 1.18 (Duties to Prospective Clients) that would clarify when electronic communications give rise to a prospective client-lawyer relationship. In particular, the proposed amendments identify several precautions that lawyers should take to prevent the inadvertent creation of such a relationship 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 of an ambiguity regarding the prohibition against paying others for a "recommendation." The Commission proposes to clarify in a Comment that a recommendation exists only when someone endorses or vouches for a lawyer's credentials, abilities, or qualities. 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 does not recommend (according to the new definition) the lawyer's services and the payment is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (Professional Independence of a Lawyer).

Finally, the Commission is proposing amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) that would clarify when a lawyer's online communications constitute "solicitations" and are governed by the Rule. For example, a new Comment would clarify 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."

Each of these proposals is described in more detail below.

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 was to identify a lawyer's duties to prospective clients.

Critical to the application of Rule 1.18 is the definition of a "prospective client." The Commission concluded that the definition must be sufficiently flexible to address the

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address the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that such a paper would be desirable in light of recent court decisions holding that some states have imposed unconstitutional restrictions on lawyers' marketing-related communications. The white paper 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 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 white paper would also address these concerns. The Commission also will identify several topics that are not amenable to treatment in the Model Rules, but that might be more usefully addressed in the form of ethics opinions from the Standing Committee on Ethics and Professional Responsibility.

increasing volume of electronic communications that lawyers now receive from people who seek legal services. In a recently released Formal 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,[2] and the Commission concluded that lawyers would benefit from a codification of some elements of that Formal Opinion.

First, the Commission concluded that paragraph (a) of Model Rule 1.18 should be revised to include a more detailed definition of a "prospective client." In particular, the proposed new language defines a "prospective client" as someone who has "a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship." The Commission concluded that this language, which is similar to language that currently appears in Comment [2], more accurately characterizes the applicable standard and is more capable of application to electronic communications.

The proposed change of the word "discusses" to "communicates" in paragraph (a) has a similar purpose: it is intended to make clear that a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place. The word "communicates" makes this point more clearly than the word "discusses" in that "communicates" more accurately describes current methods of discourse and anticipates future methods of interaction between lawyers and potential clients. It also more effectively alerts lawyers to the possible concerns associated with electronic communications.

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 [5] and [6].

Comment [3] elaborates on the new definition by identifying a number of factors by which to assess whether someone has become a prospective client. Drawing on ABA Formal Opinion 10-457, the Comment identifies the following factors: "whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautionary statements." The Commission concluded that this new language will help to ensure that lawyers and the public understand the potential consequences of communicating electronically and give lawyers more guidance on how to avoid creating unintended client-lawyer relationships.

[2] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).

Finally, the Commission proposes to add a sentence at the end of Comment [2] that makes clear that a person is not owed any duties under 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."[3] In fact, some states have incorporated this concept into their own versions of Rule 1.18. *See, e.g.*, New York R. Prof. C. 1.18(e)(2). The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes "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 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.

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 companies a fee for each client lead that the company generates. The existing version of Rule 7.2 does not clearly resolve whether these payments constitute an impermissible fee to "recommend" the lawyer's services.[4]

These ambiguities also arise when lawyers use social networking sites to market their practices. For example, one firm recently distributed free t-shirts containing the law firm's name; the firm then offered a chance to win a prize to everyone who posted a

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[3] *See, e.g.*, Assoc. of the Bar of the City of New York, Formal Op. 2006-02; Va. State Bar Ethics Op. 1794 (2004).

[4] 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.*, State Bar of Ariz. Ethics Op. 00-10 (2000); Va. State Bar Ethics Op. 1712 (1998); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988).

photo of themselves on Facebook that showed them wearing the firm's t-shirt. The firm arguably gave people something "of value" (the shirt and the opportunity to win a prize) for "recommending the lawyer's services" and thus might be viewed as running afoul of the existing version of Rule 7.2.

To determine how to treat new forms of marketing, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to other people to develop clients in a manner that the lawyer was not permitted to employ. For example, the Rule prohibits a lawyer to pay "runners" to engage in in-person solicitation.

The legitimate concerns associated with the use of "runners," however, are not apparent when lawyers use pay-per-lead services or other Internet-based marketing tools, such as those referenced above. In particular, those services typically do not use methods that run afoul of existing rules of professional conduct. For example, these services do not usually use in-person solicitation or employ false or misleading communications. If they did, lawyers could be disciplined for using those services. Accordingly, the Commission concluded that it should propose clarifying language regarding Rule 7.2's scope in this regard.

A. The Commission's Proposal

The Commission proposes to retain the prohibition against paying others for recommending the lawyer's services, but to clarify what that prohibition means. In particular, the Commission proposes to add new language to Comment [5] that defines the term "recommending" so that it is clear that lawyers can take advantage of new forms of lead generation, such as a "pay-per-click" and "pay-per-lead" services available on the Internet, as long as the marketing method does not involve conduct that is inconsistent with the lawyer's professional obligations (e.g., misleading communications, impermissible fee sharing, in person solicitation, etc.). The new definition also would have clearer implications for other forms of Internet-based marketing methods. For example, the "free t-shirt" promotion mentioned above would likely be permissible because the individuals wearing the t-shirts could not reasonably be understood as a "recommendation" (i.e., it is not reasonably understood as an endorsement of the law firm's credentials, abilities, or qualities).

Finally, the Commission's research revealed that Rule 7.2(b)(2) has generally been interpreted to permit lawyers to share fees with not-for-profit or qualified lawyer referral services.[5] *See also* Rule 5.4(a)(4). For this reason, the proposed amendment to Comment [6] adds a phrase to make clear that a division of legal fees is, in fact, permissible in this limited context.

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[5] Survey of Public Service Lawyer Referral Regarding Percentage Fees, American Bar Association Standing Committee on Lawyer Referral and Information Service, http://qa.americanbar.org/content/dam/aba/migrated/legalservices/lris/clearinghouse/state.authcheckdam.pdf (last updated October 2004).

B. Alternative Approaches Considered

The Commission considered alternative approaches to amending Rule 7.2 and paid particular attention to one that would have had more significant implications than the approach that the Commission is proposing. In particular, the Commission considered eliminating Rule 7.2(b)'s prohibition against paying nonlawyers for recommendations. Such a change would enable lawyers to pay for such recommendations as long as the nonlawyers' methods are consistent with the lawyer's own ethical obligations. For example, a lawyer under this alternative approach would be permitted to pay a for-profit referral service for recommending the lawyer, but only if the service does not employ any methods that the lawyer could not employ (e.g., it does not use misleading communications or engage in in-person solicitations) and only if any fee paid to the service is consistent with Rule 1.5(e) (i.e., the payment is for the recommendation and not a portion of the fee that the lawyer earned) and Rule 5.4 (the recommender does not have the ability to control the way in which the lawyer represents the client). The Commission learned that the District of Columbia has adopted a somewhat similar approach.[6]

Advocates for this alternate approach believe that it would retain 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 to potential clients the lawyers who are particularly well-suited to provide the specific services that the potential clients are 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 potential clients with appropriate lawyers more effectively and efficiently than not-for-profit models and thus make legal services more accessible and affordable.[7]

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 would develop undue influence over the channeling 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 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."

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[6] D.C. Rules of Prof'l Conduct 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 Ethics Op. 342 (2007).

[7] 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.

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

Rule 7.3 regulates a lawyer's direct contacts with potential clients. Paragraph (a) prohibits most kinds of in-person, live telephone, and real-time electronic solicitations, but the 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 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.[8] 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 potential clients 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 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 potential client." The phrase "reasonably understood to be offering to provide" is intended to ensure that lawyers are governed by the 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 potential clients 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 responses to requests for information and advertisements that are 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 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 potential client who is known to be in need of a particular legal service (which is a solicitation). These examples are intended to clarify when a lawyer's activities constitute a solicitation and are thus governed by Rule 7.3.

[8] Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer's services).

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 potential clients. 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.

Finally, the Commission's proposal addresses a matter of terminology. With the creation of Rule 1.18 in 2002, the phrase "prospective client" refers to a potential client who has actually shared information with a lawyer. 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 Rule 1.18. (See the description of Model Rule 1.18 earlier in this Report.) Accordingly, the Commission proposes to replace the word "prospective" with the word "potential" throughout Rule 7.3 and its Comments.

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.