

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

4
5 **American Bar Association**
6 **Commission on Ethics 20/20**
7 **Resolution**
8

9 **RESOLVED:** That the American Bar Association adopts the proposed
10 amendments to Rule 1.18 of the *ABA Model Rules of Professional Conduct* as follows
11 (insertions underlined, deletions ~~struck through~~):

12
13 **Rule 1.18 Duties to Prospective Client**
14

15 (a) A person who ~~discusses~~ communicates with a lawyer about the possibility of
16 forming a client-lawyer relationship and has a reasonable expectation that the
17 lawyer is willing to consider forming a client-lawyer relationship with respect to a
18 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 interests
24 materially adverse to those of a prospective client in the same or a substantially
25 related matter if the lawyer received information from the prospective client that
26 could be significantly harmful to that person in the matter, except as provided in
27 paragraph (d). If a lawyer is disqualified from representation under this paragraph,
28 no lawyer in a firm with which that lawyer is associated may knowingly undertake
29 or continue representation in such a matter, except as provided in paragraph (d).

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

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

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

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

39 (ii) written notice is promptly given to the prospective client.
40

41 **COMMENT**

42 [1] Prospective clients, like clients, may disclose information to a lawyer, place
43 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A
44 lawyer's ~~discussions~~ communications with a prospective client usually are limited in time

45 and depth and leave both the prospective client and the lawyer free (and sometimes
46 required) to proceed no further. Hence, prospective clients should receive some but not
47 all of the protection afforded clients.

48 [2] Not all persons who communicate information to a lawyer are entitled to
49 protection under this Rule. A person who communicates information unilaterally to a
50 lawyer, without any reasonable expectation that the lawyer is willing to consider the
51 possibility of forming a client-lawyer relationship, is not a “prospective client” within
52 the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for
53 the purpose of disqualifying the lawyer is not a “prospective client.”

54 [3] A person becomes a prospective client when that person communicates with a
55 lawyer under circumstances where the person has a reasonable expectation that the
56 lawyer is willing to consider forming a client-lawyer relationship. The reasonableness of
57 the person’s expectations may depend on a number of factors, including whether the
58 lawyer encouraged or solicited inquiries about a proposed representation; whether the
59 lawyer previously represented or declined to represent the person; whether the person,
60 prior to communicating with the lawyer, encountered any warnings or cautionary
61 statements that were intended to limit, condition, waive or disclaim the lawyer’s
62 obligations; whether those warnings or cautionary statements were clear and reasonably
63 understandable; and whether the lawyer acted or communicated in a manner that was
64 contrary to the warnings or cautionary statements. For example, if a lawyer’s website
65 encourages a website visitor to submit a personal inquiry about a proposed representation
66 and the website fails to include any cautionary language, the person submitting the
67 information could become a prospective client. In contrast, if a lawyer’s website does not
68 expressly encourage or solicit inquiries about a proposed representation and merely offers
69 general information about legal topics or information about the lawyer or the lawyer’s
70 firm, such as the lawyer’s contact information, experience, and areas of practice, this
71 information alone is typically insufficient to create a reasonable expectation that the
72 lawyer is willing to consider forming a client-lawyer relationship.

73 [34] It is often necessary for a prospective client to reveal information to the
74 lawyer during an initial consultation prior to the decision about formation of a client-
75 lawyer relationship. The lawyer often must learn such information to determine whether
76 there is a conflict of interest with an existing client and whether the matter is one that the
77 lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing
78 that information, except as permitted by Rule 1.9, even if the client or lawyer decides not
79 to proceed with the representation. The duty exists regardless of how brief the initial
80 conference may be.

81 [45] In order to avoid acquiring disqualifying information from a prospective
82 client, a lawyer considering whether or not to undertake a new matter should limit ~~the~~
83 ~~initial interview~~ initial communications to only such information as reasonably appears
84 necessary for that purpose. Where the information indicates that a conflict of interest or
85 other reason for non-representation exists, the lawyer should so inform the prospective
86 client or decline the representation. If the prospective client wishes to retain the lawyer,
87 and if consent is possible under Rule 1.7, then consent from all affected present or former
88 clients must be obtained before accepting the representation.

89 [56] A lawyer may condition ~~conversations~~ communications with a prospective
90 client on the person's informed consent that no information disclosed during the
91 ~~consultation~~ communications will prohibit the lawyer from representing a different client
92 in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement
93 expressly so provides, the prospective client may also consent to the lawyer's subsequent
94 use of information received from the prospective client.

95 [67] Even in the absence of an agreement, under paragraph (c), the lawyer is not
96 prohibited from representing a client with interests adverse to those of the prospective
97 client in the same or a substantially related matter unless the lawyer has received from the
98 prospective client information that could be significantly harmful if used in the matter.

99 [78] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers
100 as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the
101 lawyer obtains the informed consent, confirmed in writing, of both the prospective and
102 affected clients. In the alternative, imputation may be avoided if the conditions of
103 paragraph (d)(2) are met and all disqualified lawyers are timely screened and written
104 notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for
105 screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from
106 receiving a salary or partnership share established by prior independent agreement, but
107 that lawyer may not receive compensation directly related to the matter in which the
108 lawyer is disqualified.

109 [89] Notice, including a general description of the subject matter about which the
110 lawyer was consulted, and of the screening procedures employed, generally should be
111 given as soon as practicable after the need for screening becomes apparent.

112 [910] For the duty of competence of a lawyer who gives assistance on the merits
113 of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective
114 client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

115
116 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
117 **7.1 of the ABA Model Rules of Professional Conduct as follows (insertions**
118 **underlined, deletions ~~struck through~~):**

119
120 **Rule 7.1: Communications Concerning a Lawyer's Services**

121
122 **A lawyer shall not make a false or misleading communication about the lawyer or**
123 **the lawyer's services. A communication is false or misleading if it contains a**
124 **material misrepresentation of fact or law, or omits a fact necessary to make the**
125 **statement considered as a whole not materially misleading.**

126
127 **COMMENT**

128 [1] This Rule governs all communications about a lawyer's services, including
129 advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's
130 services, statements about them must be truthful.

131 [2] Truthful statements that are misleading are also prohibited by this Rule. A
132 truthful statement is misleading if it omits a fact necessary to make the lawyer's

133 communication considered as a whole not materially misleading. A truthful statement is
134 also misleading if there is a substantial likelihood that it will lead a reasonable person to
135 formulate a specific conclusion about the lawyer or the lawyer's services for which there
136 is no reasonable factual foundation.

137 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of
138 clients or former clients may be misleading if presented so as to lead a reasonable person
139 to form an unjustified expectation that the same results could be obtained for other clients
140 in similar matters without reference to the specific factual and legal circumstances of
141 each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or
142 fees with the services or fees of other lawyers may be misleading if presented with such
143 specificity as would lead a reasonable person to conclude that the comparison can be
144 substantiated. The inclusion of an appropriate disclaimer or qualifying language may
145 preclude a finding that a statement is likely to create unjustified expectations or otherwise
146 mislead the public. ~~a prospective client~~.

147 [4] See also Rule 8.4(e) for the prohibition against stating or implying an ability
148 to influence improperly a government agency or official or to achieve results by means
149 that violate the Rules of Professional Conduct or other law.

150

151 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
152 **7.2 of the ABA Model Rules of Professional Conduct as follows (insertions**
153 **underlined, deletions ~~struck through~~):**

154

155 **Rule 7.2 Advertising**

156

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

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

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

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

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

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

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

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

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

175 **COMMENT**

176 [1] To assist the public in learning about and obtaining legal services, lawyers should
177 be allowed to make known their services not only through reputation but also through
178 organized information campaigns in the form of advertising. Advertising involves an
179 active quest for clients, contrary to the tradition that a lawyer should not seek clientele.
180 However, the public's need to know about legal services can be fulfilled in part through
181 advertising. This need is particularly acute in the case of persons of moderate means who
182 have not made extensive use of legal services. The interest in expanding public
183 information about legal services ought to prevail over tradition. Nevertheless, advertising
184 by lawyers entails the risk of practices that are misleading or overreaching.

185 [2] This Rule permits public dissemination of information concerning a lawyer's
186 name or firm name, address, email address, website, and telephone number; the kinds of
187 services the lawyer will undertake; the basis on which the lawyer's fees are determined,
188 including prices for specific services and payment and credit arrangements; a lawyer's
189 foreign language ability; names of references and, with their consent, names of clients
190 regularly represented; and other information that might invite the attention of those
191 seeking legal assistance.

192 [3] Questions of effectiveness and taste in advertising are matters of speculation and
193 subjective judgment. Some jurisdictions have had extensive prohibitions against
194 television and other forms of advertising, against advertising going beyond specified facts
195 about a lawyer, or against "undignified" advertising. Television, the Internet, and other
196 forms of electronic communication are ~~is now one of~~ among the most powerful media for
197 getting information to the public, particularly persons of low and moderate income;
198 prohibiting television, Internet, and other forms of electronic advertising, therefore,
199 would impede the flow of information about legal services to many sectors of the public.
200 Limiting the information that may be advertised has a similar effect and assumes that the
201 bar can accurately forecast the kind of information that the public would regard as
202 relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of~~
203 ~~information about legal services, and lawful communication by electronic mail is~~
204 ~~permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against the a solicitation of
205 ~~a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that~~
206 ~~is not initiated by the prospective client.~~

207 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such
208 as notice to members of a class in class action litigation.

209 **Paying Others to Recommend a Lawyer**

210 [5] Lawyers are not permitted to pay others for ~~channeling professional work~~
211 recommending the lawyer's services. A communication contains a recommendation if it
212 endorses or vouches for a lawyer's credentials, abilities, competence, character, or other
213 professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising
214 and communications permitted by this Rule, including the costs of print directory listings,
215 on-line directory listings, newspaper ads, television and radio airtime, domain-name
216 registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group
217 advertising. A lawyer may compensate employees, agents and vendors who are engaged
218 to provide marketing or client development services, such as publicists, public-relations

219 personnel, business-development staff and website designers. Moreover, a lawyer may
220 pay others for generating client leads, such as Internet-based client leads, as long as the
221 lead generator affirmatively states that it does not recommend the lawyer, any payment to
222 the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional
223 independence of the lawyer), and the lead generator’s communications are consistent
224 with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule
225 7.1, the lawyer must ensure that the lead generator discloses that the lawyer has paid a fee
226 in exchange for the lead and that the lead generator does not state or imply that it has
227 analyzed a person’s legal problems when determining which lawyer should receive the
228 referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the
229 conduct of nonlawyers, ~~who prepare marketing materials for them.~~

230 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit
231 or qualified lawyer referral service. A legal service plan is a prepaid or group legal
232 service plan or a similar delivery system that assists people who seek ~~prospective clients~~
233 to secure legal representation. A lawyer referral service, on the other hand, is any
234 organization that holds itself out to the public as a lawyer referral service. Such referral
235 services are understood by laypersons to be consumer-oriented organizations that provide
236 unbiased referrals to lawyers with appropriate experience in the subject matter of the
237 representation and afford other client protections, such as complaint procedures or
238 malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay
239 the usual charges of a not-for-profit or qualified lawyer referral service. A qualified
240 lawyer referral service is one that is approved by an appropriate regulatory authority as
241 affording adequate protections for the public. ~~prospective clients.~~ See, e.g., the American
242 Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and
243 Model Lawyer Referral and Information Service Quality Assurance Act (requiring that
244 organizations that are identified as lawyer referral services (i) permit the participation of
245 all lawyers who are licensed and eligible to practice in the jurisdiction and who meet
246 reasonable objective eligibility requirements as may be established by the referral service
247 for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer
248 to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client
249 satisfaction and address client complaints; and (iv) do not make referrals ~~prospective~~
250 ~~clients~~ to lawyers who own, operate or are employed by the referral service).

251 [7] A lawyer who accepts assignments or referrals from a legal service plan or
252 referrals from a lawyer referral service must act reasonably to assure that the activities of
253 the plan or service are compatible with the lawyer’s professional obligations. See Rule
254 5.3. Legal service plans and lawyer referral services may communicate with prospective
255 clients, but such communication must be in conformity with these Rules. Thus,
256 advertising must not be false or misleading, as would be the case if the communications
257 of a group advertising program or a group legal services plan would mislead laypersons
258 ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state
259 agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time
260 contacts that would violate Rule 7.3.

261 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
262 professional, in return for the undertaking of that person to refer clients or customers to

263 the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's
264 professional judgment as to making referrals or as to providing substantive legal services.
265 See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives
266 referrals from a lawyer or nonlawyer professional must not pay anything solely for the
267 referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
268 clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral
269 agreement is not exclusive and the client is informed of the referral agreement. Conflicts
270 of interest created by such agreements are governed by Rule 1.7. Reciprocal referral
271 agreements should not be of indefinite duration and should be reviewed periodically to
272 determine whether they comply with these Rules. This Rule does not restrict referrals or
273 divisions of revenues or net income among lawyers within firms comprised of multiple
274 entities.

275

276 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
277 **7.3 of the ABA Model Rules of Professional Conduct as follows (insertions**
278 **underlined, deletions ~~struck through~~):**

279

280 **Rule 7.3 Direct Contact With Potential Prospective Clients**

281

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

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

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

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

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

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

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

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

305 **COMMENT**

306 [1] A solicitation is a targeted communication initiated by the lawyer that is
307 directed to a specific person and that offers to provide, or can reasonably be understood
308 as offering to provide, legal services. In contrast, a lawyer’s communication typically
309 does not constitute a solicitation if it is directed to the general public, such as through a
310 billboard, an Internet banner advertisement, a website or a television commercial, or if it
311 is in response to a request for information or is automatically generated in response to
312 Internet searches.

313 [+2] There is a potential for abuse when a solicitation involves inherent in direct
314 in-person, live telephone or real-time electronic contact by a lawyer with someone a
315 prospective client known to need legal services. These forms of contact between a lawyer
316 and a prospective client subject the layperson to the private importuning of the trained
317 advocate in a direct interpersonal encounter. The layperson prospective client, who may
318 already feel overwhelmed by the circumstances giving rise to the need for legal services,
319 may find it difficult fully to evaluate all available alternatives with reasoned judgment
320 and appropriate self-interest in the face of the lawyer’s presence and insistence upon
321 being retained immediately. The situation is fraught with the possibility of undue
322 influence, intimidation, and over-reaching.

323 [23] This potential for abuse inherent in direct in-person, live telephone or real-
324 time electronic solicitation of prospective clients justifies its prohibition, particularly
325 since lawyers have advertising and written and recorded communication permitted under
326 Rule 7.2 offer alternative means of conveying necessary information to those who may be
327 in need of legal services. Advertising and written and recorded In particular,
328 communications, can which may be be mailed or autodialed or transmitted by email or
329 other electronic means that do not involve real-time contact and do not violate other law
330 governing solicitations. These forms of communications and solicitations make it
331 possible for the public a prospective client to be informed about the need for legal
332 services, and about the qualifications of available lawyers and law firms, without
333 subjecting the a layperson-prospective client to direct in-person, telephone or real-time
334 electronic persuasion that may overwhelm the layperson’s client’s judgment.

335 [34] The use of general advertising and written, recorded or electronic
336 communications to transmit information from lawyer to the public prospective client,
337 rather than direct in-person, live telephone or real-time electronic contact, will help to
338 assure that the information flows cleanly as well as freely. The contents of advertisements
339 and-communications permitted under Rule 7.2 can be permanently recorded so that they
340 cannot be disputed and may be shared with others who know the lawyer. This potential
341 for informal review is itself likely to help guard against statements and claims that might
342 constitute false and misleading communications, in violation of Rule 7.1. The contents of
343 direct-in-person, live telephone or real-time electronic conversations between a lawyer
344 and a prospective client contact can be disputed and may not be subject to third-party
345 scrutiny. Consequently, they are much more likely to approach (and occasionally cross)
346 the dividing line between accurate representations and those that are false and
347 misleading.

348 [45] There is far less likelihood that a lawyer would engage in abusive practices

349 against ~~an individual who is~~ a former client, or with whom the lawyer has close personal
350 or family relationship, or in situations in which the lawyer is motivated by considerations
351 other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the
352 person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the
353 requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is
354 not intended to prohibit a lawyer from participating in constitutionally protected activities
355 of public or charitable legal-service organizations or bona fide political, social, civic,
356 fraternal, employee or trade organizations whose purposes include providing or
357 recommending legal services to its members or beneficiaries.

358 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation
359 which contains information which is false or misleading within the meaning of Rule 7.1,
360 which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or
361 which involves contact with ~~a prospective client~~ someone who has made known to the
362 lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is
363 prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as
364 permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate
365 with the recipient of the communication ~~prospective client~~ may violate the provisions of
366 Rule 7.3(b).

367 [67] This Rule is not intended to prohibit a lawyer from contacting representatives
368 of organizations or groups that may be interested in establishing a group or prepaid legal
369 plan for their members, insureds, beneficiaries or other third parties for the purpose of
370 informing such entities of the availability of and details concerning the plan or
371 arrangement which the lawyer or lawyer's firm is willing to offer. This form of
372 communication is not directed to people who are seeking legal services for themselves. ~~a~~
373 ~~prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary
374 capacity seeking a supplier of legal services for others who may, if they choose, become
375 prospective clients of the lawyer. Under these circumstances, the activity which the
376 lawyer undertakes in communicating with such representatives and the type of
377 information transmitted to the individual are functionally similar to and serve the same
378 purpose as advertising permitted under Rule 7.2.

379 [78] The requirement in Rule 7.3(c) that certain communications be marked
380 "Advertising Material" does not apply to communications sent in response to requests of
381 potential clients or their spokespersons or sponsors. General announcements by lawyers,
382 including changes in personnel or office location, do not constitute communications
383 soliciting professional employment from a client known to be in need of legal services
384 within the meaning of this Rule.

385 [89] Paragraph (d) of this Rule permits a lawyer to participate with an
386 organization which uses personal contact to solicit members for its group or prepaid legal
387 service plan, provided that the personal contact is not undertaken by any lawyer who
388 would be a provider of legal services through the plan. The organization must not be
389 owned by or directed (whether as manager or otherwise) by any lawyer or law firm that
390 participates in the plan. For example, paragraph (d) would not permit a lawyer to create
391 an organization controlled directly or indirectly by the lawyer and use the organization
392 for the in-person or telephone solicitation of legal employment of the lawyer through

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393 memberships in the plan or otherwise. The communication permitted by these
394 organizations also must not be directed to a person known to need legal services in a
395 particular matter, but is to be designed to inform potential plan members generally of
396 another means of affordable legal services. Lawyers who participate in a legal service
397 plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2
398 and 7.3(b).

ABA COMMISSION ON ETHICS 20/20: REVISED DRAFT REPORT FOR
COMMENT TECHNOLOGY AND CLIENT DEVELOPMENT
FEBRUARY 21, 2012

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.

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 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 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) 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 in an increasingly technology driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

¹ In a separate informational report, the Commission will recommend the development of a White Paper to address the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that a White 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 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 could be more usefully addressed in a Formal Ethics Opinion.

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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.” 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 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.”

Finally, the Commission is proposing a technical change to a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove the reference to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comment to Model Rule 7.1 is 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 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 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,² and the Commission concluded that lawyers and the public 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

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

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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 that are relevant when determining whether someone has become a prospective client. The Commission concluded that this new Comment language will help to ensure that lawyers and the public better understand the potential consequences of communicating electronically and will give lawyers more guidance on how to avoid creating unintended client-lawyer relationships.

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 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.

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).

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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 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.

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).

A. The Commission's Proposal

The Commission proposes to retain the general 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." This new definition would enable lawyers to identify more clearly the circumstances under which a payment for lead generation services, such as a "pay-per-click" and "pay-per-lead" services, are permissible. At the same time, it would retain existing prohibitions on paying nonlawyers for a recommendation.

The proposed Comment language also makes clear that, even if a lead generation service does not "recommend" the lawyer in the manner described above, the lawyer must not make any payments to a lead generator if the payment would violate Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer). Moreover, the proposed Comment language emphasizes that a lawyer must ensure that the lead generator's communications to potential clients are consistent with Rule 7.1 (communications concerning a lawyer's services). In particular, the lawyer must ensure that the lead generator discloses that the lawyer has paid a fee in exchange for the lead. Moreover, the lead generator should not state or imply that the lead generator has analyzed the potential client's legal problems when determining which lawyer should receive the referral. These requirements are intended to prevent any misunderstanding as to the reason why the lead generator has identified a particular lawyer.

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).

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

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the client). The Commission learned that the District of Columbia has adopted a somewhat similar approach.⁵

This alternative approach 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.⁶

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.”

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

⁵D.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).

⁶ 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.

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the Rule.⁷ 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.

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.

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.

⁷ Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer’s services).

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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. 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.