

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON ETHICS 20/20**  
**PUBLIC HEARING SCHEDULE**

February 2, 2012  
9:00 a.m. – 12:00 p.m.  
Sheraton New Orleans Hotel  
Gallery Room, Lobby Level  
New Orleans, LA

**TIME**

**SPEAKER**

9:00 a.m. – 9:15 a.m.	Lawrence Fox
9:15 a.m. – 9:30 a.m.	Charles Mokriski, Proskauer LLP
9:30 a.m. – 9:45 a.m.	Vincent E. Doyle, III, New York State Bar Association
9:45 a.m. – 10:00 a.m.	Carl Pierce, Standing Committee on Delivery of Legal Services
10:00 a.m. – 10:15 a.m.	Jayne Reardon, Executive Director, Illinois Supreme Court Commission on Professionalism
10:15 a.m. – 10:30 a.m.	David Ries, Thorp Reed & Armstrong, LLP
10:30 a.m. – 10:45 a.m.	Ann Jacobs, Standing Committee on Lawyers Referral and Information Service

\* All comments received are available on the Ethics 20/20 website: [www.abanet.org/ethics2020](http://www.abanet.org/ethics2020)

Testimony of Vincent E. Doyle III  
President of New York State Bar Association to  
ABA Commission on Ethics 20/20  
February 2, 2012

Co-Chairs Gorelick and Traynor, and Members of the Commission, my name is Vincent E. Doyle, and I am the current president of the New York State Bar Association.

With over 77,000 members, it is the largest voluntary state bar association in the country. Founded in 1876, it is also one of the oldest such associations.

Some brief demographic information about our Association may be of relevant to the Commission in considering our comments. Of course, our membership includes lawyers throughout the great State of New York, from New York City in the south and east, to my home town of Buffalo in the west, to small towns along the Northern border with Canada, and everywhere in between. Though headquartered in New York State, our association has

members in each of the 50 states and in over 110 countries around the world. In fact, over 25% of the New York State Bar Association resides outside New York State. At the same time, our association is enriched by a large number of members – indeed, a majority of our overall membership – who are small firm or solo practitioners. We consider the membership of the New York State Bar Association to be representative of the modern legal profession.

I appreciate the opportunity to testify before you this morning. On behalf of the New York State Bar Association, I thank the Commission for its openness to input and comment. The State Bar Association has followed the Commission’s work closely. Our own Committee on Standards of Attorney Conduct (“COSAC”), ably chaired by attorney Joseph Neuhaus, has submitted numerous comments on various proposals from the Commission. We appreciate your courtesy in considering COSAC’s comments and input to date.

I would like to use my time before you this morning to discuss the amendments to Model Rule 5.4 that the Commission has offered in its discussion paper dated December 2, 2011. The proposed amendments would allow lawyers and law firms to share legal fees with nonlawyers who, provided certain conditions are met, could hold a financial interest in the practice. If adopted, this rule would permit nonlawyers to have a limited ownership interest in law firms under certain conditions.

There is a history to the issue of nonlawyer ownership that is important to the position of the New York State Bar Association. A little more than a decade ago, the question of nonlawyer ownership arose as the result of the recommendation of a prior ABA commission. Prompted by the stated intention of the “Big 5” accounting firms to “acquire” law firms in the United States – as they had done in Europe – the ABA created the ABA Commission on Multidisciplinary

Practice in 1998. That Commission eventually recommended amending the Model Rules to allow lawyers to share fees and join with nonlawyers in practice entities delivering both legal and nonlegal services as long as the attorneys maintained sufficient control and authority over their legal services. The recommendations of the MDP Commission, if adopted, would specifically have permitted nonlawyers to have ownership interests in law firms. This proposal, and all of the MDP proposals, generated vigorous debate within the ABA.

Given the importance of the issue and the controversy over what the proposal meant to the legal profession, Thomas O. Rice, then President of the New York State Bar Association, appointed a special committee of some of our most highly respected members to study the issue. The Special Committee was chaired by Robert MacCrate, the distinguished former President of both the ABA and the State Bar Association. Its Vice-Chair was Steven C. Krane, an expert on legal ethics of

the highest order. Steve would go on to serve as President of the State Bar, and to hold numerous leadership positions within the ABA as well. In a comprehensive report of several hundred pages, our Special Committee recommended against nonlawyer ownership. While it is nearly impossible to summarize the conclusion of such a lengthy and complex report, let me quote the concluding paragraph: “Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.”

Upon receipt of the MacCrate Committee’s report, the State Bar House of Delegates adopted a resolution at its June,

2000 meeting providing that: “Nonlawyer investment in entities practicing law should continue to be prohibited.”

Based on this resolution, the New York State Bar Association joined with several other state bar associations to lead the effort within the American Bar Association to oppose the MDP proposals, including the proposal to allow nonlawyer ownership. In the end, these proposals were voted down by the ABA House of Delegates.

The New York State Bar Resolution of June 2000 was not our Association’s last opportunity to review the issue of nonlawyer ownership under Model Rule 5.4, or the issue of alternative law practice structures in general. In 2002, the Association began a project to review its then current Code of Professional Responsibility, and to consider converting to a version of the ABA Model Rules of Professional Conduct. That effort, led again by our beloved, and much-missed Steve Krane, lasted seven years and resulted in the adoption in 2009 of the

New York Rules of Professional Conduct. During the course of that time, the State Bar extensively debated each of the rules, including Rule 5.4. After lengthy deliberation, the State Bar chose to make minor changes to Rule 5.4, but it consciously did not make any change to the prohibition against nonlawyer ownership.

In 2010, then President Stephen P. Younger appointed a Task Force on the Future of the Legal Profession. The Task Force -- comprised of a diverse range of legal practitioners, including managing partners, law school deans and general counsel -- was tasked with examination of the ways in which the changing economy, increasing globalization and ever-advancing technologies would affect the future of the legal profession. Among other charges, the Task Force was specifically asked to consider whether alternative law firm structures would help the profession adapt to changing times. The Report and Recommendations of the Task Force, adopted

by the State Bar's House of Delegates, did not include any recommendation to change the prohibition against nonlawyer ownership of law firms.

I must also add that as a result of my service over the past two years as President-Elect, and now President of the State Bar, I have travelled across the state meeting and speaking with scores of attorneys about our singular profession. I have had countless conversations – formal and informal, in large groups and one-on-one – with attorneys of every specialty, demographic and economic situation. I have spoken with these lawyers about the state of the legal profession, and what can be done to preserve, protect and improve the profession. Not once in any of these conversations did any lawyer suggest to me that nonlawyer ownership was what the legal profession really needed.

As a result of this history, the position of the New York State Bar Association at the time of this testimony remains in

opposition to nonlawyer ownership of law firms. Nevertheless, we recognize that Ethics 20/20 has given considerable thought to this topic and that its current proposal is in some respects different and more restricted than the last proposal that was defeated. In addition, more than ten years have passed since the ABA last considered this issue and those years have changed the legal profession in some ways.

Clearly, the current discussion paper is a thoughtful effort to look at nonlawyer ownership in a different context. It is worthy of serious consideration. Consequently, the New York State Bar Association has decided to appoint a new task force to re-examine the issue in light of your paper. It will be chaired by Stephen Younger, a partner at Patterson Belknap Webb & Tyler, and a past president of the State Bar Association who is currently one of the State Bar's delegates to the ABA. Like Bob MacCrate, Steve has long enjoyed the respect of his colleagues as an articulate and knowledgeable

voice of the profession. The Task Force members include practitioners, academics, legal ethicists, retired jurists and other attorneys representing a wide range of the legal profession.

I have asked the Task Force to thoroughly consider the Commission's discussion paper and report back to our Association. I have asked the Task Force to respect the tremendous amount of time, effort and thought that this Commission has obviously given this matter. And I have asked the members of the Task Force to put aside any existing opinions they may have, so they may approach the topic as objectively as possible.

In the interest of full disclosure, however, I will share one other request I have made of the Task Force. One of the reasons that the Special Committee chaired by Bob MacCrate recommended opposing MDP was its conclusion that MDP would endanger the core values of the legal profession – among

them loyalty, independence and confidentiality. I believe passionately in these core values. And I believe that each and every bar association should dedicate itself to preserving these values. I do not accept suggestions that respect for these core values is an archaic notion, or that our profession's efforts to protect these values is misplaced. So I have asked the Task Force to evaluate whether the proposed changes will advance the core values of the profession. For me, this evaluation will be critical to our eventual view of their merits.

This leads me to the matter of the procedural posture in which the New York State Bar Association finds itself. As I noted, the official position of the Association, as approved by our House of Delegates, is that nonlawyer ownership of firms should not be permitted. If the Task Force again recommends this position, the matter will not have to return to our House of Delegates: the report would simply reaffirm that position. On the other hand, if the Task Force proposes any change in the

Association's position, the question would again be presented to our House of Delegate for consideration, debate and possible action.

The Commission has asked that comments be submitted by February 29, 2012. Based on the steps that our State Bar Association needs to take to consider this matter anew, it will be impossible for us to offer any comment other than our continued opposition by that date. The Task Force I appointed is hard at work, but it needs time to give the subject the thought and consideration it deserves. I don't think that I am revealing confidential information if I tell you that there are differences of opinion. We want to do this right, and we hope that the Commission will allow us the time necessary to develop our position.

In short, I request that the Commission give all of the constituents of the ABA, including the New York State Bar Association, the time we need to submit meaningful comments.

As I said, we take this seriously, and we will invest a good deal of effort considering the important issues raised. I ask only that this effort not be wasted because of timing issues.

In addition, I would like to place on the record our understanding that any final Commission proposals regarding Rule 5.4 – whether they are identical to those put forth in the discussion paper or not – will not be placed before the ABA House of Delegates for action any earlier than February 2013. We have been given this timetable by several different sources within the ABA and we are relying upon that timetable in setting deadlines for our Task Force and Association to generate our position. I have communicated with other interested state bar associations and they also are relying on this timetable in terms of their own processes to consider the issue. We certainly would object to any attempt to accelerate this timetable for consideration of these very important issues.

I appreciate the opportunity to testify, and to explain how the New York State Bar Association is responding to the important issues the Commission has raised in its latest paper. Thank you.

Ethics 20/20 Commission

February 2, 2012

Testimony of Jayne Reardon, Executive Director

Illinois Supreme Court Commission on Professionalism

Good morning. I appreciate the opportunity to speak here today and am privileged to add my perspective to the great work and leadership of this Commission.

By way of my professional background, I have been a lawyer in Illinois for nearly 30 years. I started my career as a trial lawyer, then worked for the Illinois attorney regulatory agency, the ARDC, for over a decade, and most recently, I have worked for a relatively new commission established by the Illinois Supreme Court, the Commission on Professionalism.

The Illinois Supreme Court Commission on Professionalism promotes programs and initiatives to improve the integrity, civility and professionalism of lawyers and judges across the state. There are over 88,000 registered lawyers in Illinois and over 900 state court judges.

At the Commission on Professionalism, we are very much in favor of the proposals generated by the Ethics 20/20 Commission. The proposals acknowledge that we have new ways of communicating and practicing not defined by physical location. In my personal opinion, in order to be effective going forward, it is essential that seasoned lawyers be encouraged and younger lawyers be educated, so we all may ethically embrace and integrate technology into the practice.

In my work and travels around the state, I often hear lawyers say that once this current economic recession is over, things "will go back" to the way they have been for the last 20, 30 or more years. Many lawyers around the state do not understand the basics of the Internet and do not appreciate that the economic challenges many lawyers face have been wrought by technology. There is still a general attitude expressed anecdotally and informally, that if we as individual practitioners and as a profession can just hunker down and weather this storm, it will pass and all will be fine again.

This attitude is misguided. There is no going back; there is no storm that will pass. As you know, the data shows that the demand for legal services had begun to slow well before the current economic recession hit. There is change and more change.

I fear that unless our lawyers begin immediately to understand and adjust to the cataclysmic effects of technology and its cousin globalization, we may cease to be relevant as professionals to the great detriment of our society. We must fight against our natural inclination and our training as lawyers to revere precedent and to minimize risks in order to embrace the opportunities that technology offers to level the playing field for those in the profession, to improve access to justice and to better promote the ideals of democracy.

At the Commission on Professionalism, we are able to communicate this message through various initiatives, including encouraging the development of quality professional responsibility continuing legal education programs. As you may know, before any course or activity may qualify for professional responsibility CLE in Illinois, it must substantively be approved by our Commission. We assist providers in the development of professional responsibility CLE and the Commission strongly encourages programs supporting the positive opportunities presented by technology and the over-arching importance of innovation and creativity in our profession.

Unfortunately, these types of programs are sometimes seen by providers and lawyers as less important, "soft" and not directly related to the practice of law.

Accordingly, although I fully support the various proposals and resolutions of this Commission, I am most enthusiastic about the proposed amendment to comment 6 of Rule 1.1 that would explicitly state that maintaining competence requires a lawyer to keep abreast of changes in the practice of law "including the benefits and risks associated with technology."

This simple proposed language makes clear that education about technology is essential to our competency as lawyers. This amendment will go a long way to counter the not uncommon attitude I alluded to earlier that lawyers may avoid educating themselves about technology because technology is an optional, peripheral exercise for the young or those who like to play with a new shiny toy. This proposal advises all lawyers that we need to understand technology in order to ethically advise our clients and to deliver quality legal services.

Defining competence in this way will help us in our mission at the Commission on Professionalism. We will more effectively be able to encourage providers to develop educational courses consistent with the spirit and the work of the Ethics 20/20 Commission in equipping lawyers to be meaningful players in our 21st century society. Over 700 hundred providers offer professional responsibility CLE in Illinois and the majority are from outside our state. Every lawyer in our state is required to take six hours of professional responsibility CLE in each two year reporting period. Therefore, we have a significant opportunity to influence lawyers' thinking toward their profession through professional responsibility CLE.

On a related note, we need to challenge CLE providers, including the American Bar Association, to refrain from the development and marketing of CLE courses that emphasize only the dangers, pitfalls and quagmires that technology presents. I suspect you've seen these sensational tag-lines in your email in-boxes as often as I have. The goal is to get attorneys to sign up for the course. But this is not a message of leadership and, instead, may encourage lawyers to play it safe, to refrain from learning about or using social media in any way, shape or form, thereby sealing their fate of fading into the night of irrelevancy.

We need lawyers to be enlightened and reinvigorated about the opportunities and promise that technology brings to our profession. The proposed amendments of the Ethics 20/20 Commission do just that.

I commend you for your work and thank you for the opportunity to appear here today.

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January 14, 2012

**COMMENTS ON  
ABA Commission on Ethics 20/20 Revised Proposal – Technology and Confidentiality  
September 19, 2011**

I am a partner in the Pittsburgh, PA office of Thorp Reed & Armstrong, LLP and an active member of the ABA, including the Law Practice Management Section's new Ethics Committee and the Section of Science and Technology Law's Information Security Committee. I am a co-author of *Locked Down: Information Security for Lawyers* that is scheduled for publication by the ABA Law Practice Management Section in March, 2012. I previously submitted Comments (dated July 21, 2011) to the Commission's Initial Draft Proposals – Technology and Confidentiality, May 2, 2011. A copy of my biography is attached to my earlier Comments. The views expressed in these comments are my own and I am not presenting them on behalf of my firm or the groups with which I am affiliated.

The Revised Proposal addresses some of my earlier comments and I thank the Commission for consideration of them. There are two areas that are not included in the Revised Proposal and I suggest that the Commission add them to the revised Comments to Model Rule 1.6. I have drafted suggested language, which is in bold in the version at the end of these comments.

1. Administrative, Technical and Physical Safeguards

My earlier comments included the following:

- Security requires administrative, technical, and physical safeguards. This is a key concept in security that is often overlooked. A short statement to this effect in the Comment would help attorneys to understand the scope of the obligation.

I suggest that this be addressed to the Comment to Rule 1.6. I think that many lawyers incorrectly view safeguards as being limited to keeping the doors locked or as a technology function that can be left to an IT consultant. This is a universally accepted principle in information security and is required by most of the information security laws like HIPAA and Gramm-Leach-Bliley.

2. Continuing Duty

My earlier comments included the following:

- The Comment should remind attorneys that there is a continuing duty to review safeguards as technology, risks, and security measures develop.
  - State Bar of Arizona, Opinion No. 09-04 (December, 2009): “Confidentiality; Maintaining Client Files; Electronic Storage; Internet” (“As technology advances over time, a periodic review of the reasonability of security precautions may be necessary”).
  - State Bar of California, Formal Opinion No. 2010-179 (“Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps”).
- It is generally accepted that information security is a continuing process that includes people, policies and procedures, and technology. ...

I think that it is important to remind attorneys of this continuing obligation. “Set it and forget it” security will not work.

Thank you for your consideration.

## **Acting Competently to Preserve Confidentiality**

[16] Paragraph (c) requires a ~~A~~ lawyer ~~must to~~ act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision or monitoring. See Rules 1.1, 5.1 and 5.3. **Lawyers should employ reasonable administrative, technical and physical safeguards.** Factors to be considered in determining the reasonableness of the lawyer's efforts include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). **A lawyer should periodically review necessary safeguards as technology, risks and available security measures change over time.** A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

**AMERICAN BAR ASSOCIATION**

**Standing Committee on  
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RE: ABA Commission on Ethics 20/20

Dear Ms. Gorelick and Mr. Traynor:

The ABA Standing Committee on Lawyer Referral and Information Service ("LRIS Committee") again thanks the ABA Commission on Ethics 20/20 for the opportunity to comment on certain recently proposed changes to the comments in Rule 7.2. The Committee's comments below are in direct response to the January 19, 2012, comments submitted to the Commission by the ABA Standing Committee on the Delivery of Legal Services ("Delivery Committee"), which advocates for the abolition of Rule 7.2(b). We submit the following comments to supplement the live testimony we will deliver to the Commission on February 2 at the ABA Midyear Meeting.

When the LRIS Committee last addressed the Commission on the topic of Rule 7.2 at the 2011 ABA Annual Meeting, we explained that while technology may change the manner in which lawyers conduct their business, it does not inherently change the substance of a lawyer's work or the lawyer's ethical obligations. In Toronto, we described how lawyer internet advertising, though it may take a different form on a computer screen, is really the same kind of advertising we have seen for over a century in the yellow pages. Thus we recommended to the Commission that the Model Rules of Professional Conduct should continue to address the activity (advertising) and did not need to be altered simply because the medium (the internet) has changed.

Regarding the Delivery Committee's proposal, we submit that the same principle applies: Technology may change how lawyers do things, but it does not inherently change what lawyers do (or should do). This time, however, we are discussing the radical proposal made to eliminate rule 7.2(b), and profoundly modify rules 7.1 and 7.3. The LRIS Committee strongly opposes these proposals.

### Rule 7.2: No Kickbacks

Rule 7.2 plays an essential role in attorney ethics: It protects the public against kickbacks *and* “ambulance chasing.” Although the concepts are intertwined, they both are abhorrent to the legal profession, and the prohibition on these activities is rooted in a lengthy history. Understanding this history is important to understanding why the elimination of 7.2(b) undermines over a century of jurisprudence in the area of kickbacks and ambulance chasing.

Nearly 100 years ago, in 1916, New York’s Supreme Court was asked whether an arrangement whereby an employee of a railroad company who called a lawyer every time there was a crash on the tracks (and was paid for that information), thereby allowing the attorney to rush to the injured person and be retained as counsel, was ethical. The employee was employed in the telegraph office for the railroad and therefore had immediate access to that information. This arrangement was both a kickback (to the railroad employee) and ambulance chasing (by the attorney who rushed to the scene).

As to the kickback, the court found that the services were:

[d]iscreditable, disgraceful, unprofessional and destructive of the honor of the profession, was, irrespective of any statute, guilty of professional misconduct and of conduct prejudicial to the administration of justice.<sup>1</sup>

As to the “ambulance chasing,” the court held:

The courts have said that ‘ambulance chasing’ ‘has brought deserved discredit upon those engaged in it’; that it is a practice ‘disgraceful for a member of the legal profession,’ . . . ‘that has been commented upon at meetings of lawyers and in judicial decisions as well as by the general public’; that it is ‘also a practice which is unprofessional and destructive of the honor of the profession and of the confidence of the community in the integrity and the honor of its members.’<sup>2</sup>

Similarly, in 1927, the Wisconsin Supreme Court noted:

That those who may be injured – often maimed or crushed – many times also lacking insufficient experience and foresight – must be adequately protected from the struggling swarm of “chasers” and “adjusters” vieing (sic) and competing with one another in their relentless race for selfish advantage, and to overreach and impose upon the helpless.<sup>3</sup>

Nor are such activities limited to the early 1900s. In 1992, the Supreme Court of New York found that an arrangement whereby a woman who ran a chat room focused on a particular issue funneled cases to the law firm in exchange for payment was improper.<sup>4</sup> In that case, the court noted the harms caused by solicitation (ambulance chasing)

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<sup>1</sup> *In re Newell*, 174 A.D. 94, 98 (1916)

<sup>2</sup> *Id.* at 97.

<sup>3</sup> Ambulance Chasing Panacea: Being a discussion of the Milwaukee Circuit Court’s Investigation of Legal Abuses, Marquette Law Review, p.202 (January, 1928)

<sup>4</sup> *Matter of Rapport*, 186 A.D.2d 344 (1992).

Those evils have been variously described as stirring up litigation, inappropriate pressures on the solicited individual (including undue influence, intimidation, and overreaching), presentation of biased information to the potential client (including one-sided presentations and information clouded by the pecuniary self-interest of the solicitor), vexatious conduct, a demoralizing effect on the profession of law, and an unseemly rivalry among attorneys in seeking clients.<sup>5</sup>

The mechanism changed (telegraph vs. chat room) but the rule did not—such behavior is abhorrent to the legal profession. The dismissal of the import of protecting consumers from these activities by claiming that other rules cover this activity is at best naïve and at worst deliberately ignorant of the behaviors involved. We cannot allow the profession to return to the days where a police officer could be given \$500 in exchange for an early accident report, a mechanic slipped \$100 for every car wreck referral, or the ER nurse given \$2,500 if she refers a death case. Permitting such behavior would tarnish attorneys' reputation in the community beyond repair.

The elimination of nearly 100 years of jurisprudence carries additional risks. For example, the proposed elimination of Rule 7.2(b) would require the insertion, somewhere, of the permitted payment to qualified lawyer referral services. No such language is proposed, nor can LRIS comment on such a proposal absent an actual proposal. Merely stating it “needs to be changed somewhere” is insufficient. Indeed, the issue of payments to qualified lawyer referral services is a complicated one which has been considered at great length by the LRIS committee, and we have proposed no changes to the existing rule. We are surprised that at this late date the Delivery Committee would make this proposal and not consider the significant ripple effects that such a change might engender.

The reference by the Delivery Committee to the over \$1 million spent by “Total Attorneys” in an attempt to secure approval of their platform before various state's ethics boards is an odd one. Certainly we can agree that following ethical behavior frequently has costs. Those costs are nearly always a diminution of revenue due to having to follow the rules. The take-away from the sums expended should be a caution as to the size of the waters that may come through an opening of the floodgates.

Of additional concern, when the proposal to eliminate rule 7.2 is read in conjunction with the proposed changes to rule 7.3, it is clear that these proposals by the Delivery Committee reflect a radical change to current prohibitions on lawyer conduct grounded in over a century of jurisprudence.

#### Rules 7.3 and 7.1: No Ambulance Chasing

The Commission's proposed comment 1 to rule 7.3 explains that a solicitation is communication that is “directed to a specific potential client.” The phrase “directed to” is an important one. It effectively prohibits using intermediaries to achieve that which an attorney cannot do (directly solicit).

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<sup>5</sup> *Id.* at 346 (citations omitted).

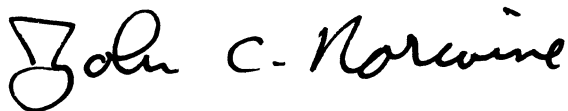
The proposed change to the definition of solicitation proposed by the Delivery Committee is a shocking one, in that it would limit solicitations to only those involving “direct contact with a potential client.” Thus it is easy to imagine many scenarios where attorneys could engage in currently-prohibited solicitation activities; for example, the proposed rule change would permit an attorney’s direct solicitation of a dead man’s children in order to convince the widow (who has the claim) to sign with the lawyer. Or it would (in conjunction with the proposed changes to 7.2) allow an attorney to offer a next-door neighbor \$1,000 to convince the dead man’s wife to sign with the attorney.

Dismissal of concerns regarding kickbacks and ambulance chasing cannot be made with a cursory reference to other rules.<sup>6</sup> These are essential issues which have plagued the industry and need to be addressed clearly, directly, and with strong language, not left to interpretation from other more general rules.

Similarly, the proposed change to rule 7.1 (adding the limitation “to a potential client” to the requirement of truthful communication) is truly a step backwards for both ethics and the perception of attorneys within our larger community. Why would we limit an attorney’s obligation to tell the truth only to a potential client? Recognizing the limitation of 8.4(c), there is still no answer for why such an important requirement should be limited to communications with only the potential client, leading to an interpretation that would *allow* false or misleading communications with people other than the potential client. This may be a curious position, but it is one that could be made given the recommendation of the Delivery Committee.

The LRIS Committee urges the Commission to carefully consider the Delivery Committee’s proposal in light of long-established jurisprudence on kickbacks and ambulance chasing, and the very real potential for the undermining of both the letter and the spirit of the solicitation prohibition. We look forward to discussing these matters further with you at the Midyear Meeting.

Sincerely,



John Norwine  
Committee Chairman



Ann Jacobs  
Committee Member

cc: Sheldon Warren  
Jane Nosbisch  
Jason Vail

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<sup>6</sup> DLS Committee letter at P.4.