

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

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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 Rules 1.18, 7.2, and 7.3 of the *ABA Model Rules of Professional*
11 *Conduct* as follows (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 forming
16 a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to
17 consider forming a client-lawyer relationship with respect to a matter is a prospective
18 client.

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

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

30 (d) When the lawyer has received disqualifying information as defined in paragraph (c),
31 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 avoid
35 exposure to more disqualifying information than was reasonably necessary to
36 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 protection
49 under this Rule. A person who communicates information unilaterally to a lawyer,
50 without any reasonable expectation that the lawyer is willing to consider the possibility of
51 forming a client-lawyer relationship, is not a “prospective client” within the meaning of
52 paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of
53 disqualifying the lawyer is not a “prospective client.”

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

72 [34] It is often necessary for a prospective client to reveal information to the lawyer
73 during an initial consultation prior to the decision about formation of a client-lawyer
74 relationship. The lawyer often must learn such information to determine whether there is
75 a conflict of interest with an existing client and whether the matter is one that the lawyer
76 is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that
77 information, except as permitted by Rule 1.9, even if the client or lawyer decides not to
78 proceed with the representation. The duty exists regardless of how brief the initial
79 conference may be.

80 [45] In order to avoid acquiring disqualifying information from a prospective client, a
81 lawyer considering whether or not to undertake a new matter should limit ~~the initial~~
82 ~~interview~~ initial communications to only such information as reasonably appears
83 necessary for that purpose. Where the information indicates that a conflict of interest or
84 other reason for non-representation exists, the lawyer should so inform the prospective
85 client or decline the representation. If the prospective client wishes to retain the lawyer,
86 and if consent is possible under Rule 1.7, then consent from all affected present or former
87 clients must be obtained before accepting the representation.

88 [56] A lawyer may condition ~~conversations~~ communications with a prospective client on

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

94 [67] Even in the absence of an agreement, under paragraph (c), the lawyer is not
95 prohibited from representing a client with interests adverse to those of the prospective
96 client in the same or a substantially related matter unless the lawyer has received from the
97 prospective client information that could be significantly harmful if used in the matter.

98 [78] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as
99 provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the
100 lawyer obtains the informed consent, confirmed in writing, of both the prospective and
101 affected clients. In the alternative, imputation may be avoided if the conditions of
102 paragraph (d)(2) are met and all disqualified lawyers are timely screened and written
103 notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for
104 screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from
105 receiving a salary or partnership share established by prior independent agreement, but
106 that lawyer may not receive compensation directly related to the matter in which the
107 lawyer is disqualified.

108 [89] Notice, including a general description of the subject matter about which the lawyer
109 was consulted, and of the screening procedures employed, generally should be given as
110 soon as practicable after the need for screening becomes apparent.

111 [910] For the duty of competence of a lawyer who gives assistance on the merits of a
112 matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective
113 client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.

114
115 FURTHER RESOLVED: That the American Bar Association amends Model Rule 7.2 of
116 the ABA Model Rules of Professional Conduct as follows (insertions underlined,
117 deletions ~~struck through~~):

118
119 **Rule 7.2 Advertising**

120
121 (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services
122 through written, recorded or electronic communication, including public media.

123
124 (b) A lawyer shall not give anything of value to a person for recommending the lawyer’s
125 services except that a lawyer may

126
127 (1) pay the reasonable costs of advertisements or communications permitted by
128 this Rule;

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

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

- 133 (4) refer clients to another lawyer or a nonlawyer professional pursuant to an
134 agreement not otherwise prohibited under these Rules that provides for the other
135 person to refer clients or customers to the lawyer, if
136 (i) the reciprocal referral agreement is not exclusive, and
137 (ii) the client is informed of the existence and nature of the agreement.
138 (c) Any communication made pursuant to this Rule shall include the name and office
139 address of at least one lawyer or law firm responsible for its content.

140

141 **COMMENT**

142

143 [1] To assist the public in learning about and obtaining legal services, lawyers should be
144 allowed to make known their services not only through reputation but also through
145 organized information campaigns in the form of advertising. Advertising involves an
146 active quest for clients, contrary to the tradition that a lawyer should not seek clientele.
147 However, the public's need to know about legal services can be fulfilled in part through
148 advertising. This need is particularly acute in the case of persons of moderate means who
149 have not made extensive use of legal services. The interest in expanding public
150 information about legal services ought to prevail over tradition. Nevertheless, advertising
151 by lawyers entails the risk of practices that are misleading or overreaching.

152 [2] This Rule permits public dissemination of information concerning a lawyer's name or
153 firm name, address, email address, website, and telephone number; the kinds of services
154 the lawyer will undertake; the basis on which the lawyer's fees are determined, including
155 prices for specific services and payment and credit arrangements; a lawyer's foreign
156 language ability; names of references and, with their consent, names of clients regularly
157 represented; and other information that might invite the attention of those seeking legal
158 assistance.

159 [3] Questions of effectiveness and taste in advertising are matters of speculation and
160 subjective judgment. Some jurisdictions have had extensive prohibitions against
161 television and other forms of advertising, against advertising going beyond specified facts
162 about a lawyer, or against "undignified" advertising. Television, the Internet, and other
163 forms of electronic communication are is now one of among the most powerful media for
164 getting information to the public, particularly persons of low and moderate income;
165 prohibiting television, Internet, and other forms of electronic advertising, therefore,
166 would impede the flow of information about legal services to many sectors of the public.
167 Limiting the information that may be advertised has a similar effect and assumes that the
168 bar can accurately forecast the kind of information that the public would regard as
169 relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of~~
170 ~~information about legal services, and lawful communication by electronic mail is~~
171 ~~permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against the solicitation of a
172 prospective client through a real-time electronic exchange that is not initiated by the
173 prospective client.

174 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as
175 notice to members of a class in class action litigation.

176 Paying Others to Recommend a Lawyer

177 [5] Lawyers are not permitted to pay others for ~~channeling professional work~~
178 recommending the lawyer’s services. A communication contains a recommendation if it
179 endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other
180 professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising
181 and communications permitted by this Rule, including the costs of print directory listings,
182 on-line directory listings, newspaper ads, television and radio airtime, domain-name
183 registrations, sponsorship fees, banner ads, Internet-based pop-up advertisements, and
184 group advertising. A lawyer may compensate employees, agents and vendors who are
185 engaged to provide marketing or client development services, such as publicists, public-
186 relations personnel, business-development staff and website designers. Moreover, a
187 lawyer may pay others for generating client leads, such as Internet-based client leads, as
188 long as the lead generator does not recommend the lawyer, any payment to the lead
189 generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional
190 independence of the lawyer), and the lead generator’s communications to potential clients
191 are consistent with Rule 7.1 (communications concerning a lawyer’s services). To
192 comply with Rule 7.1, the lawyer must ensure that the lead generator discloses that the
193 lawyer has paid a fee in exchange for the lead and that the lead generator does not state or
194 imply that it has analyzed the potential client’s legal problems when determining which
195 lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law
196 firms with respect to the conduct of nonlawyers, ~~who prepare marketing materials for~~
197 ~~them.~~

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

219 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals

220 from a lawyer referral service must act reasonably to assure that the activities of the plan
221 or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal
222 service plans and lawyer referral services may communicate with prospective clients, but
223 such communication must be in conformity with these Rules. Thus, advertising must not
224 be false or misleading, as would be the case if the communications of a group advertising
225 program or a group legal services plan would mislead prospective clients to think that it
226 was a lawyer referral service sponsored by a state agency or bar association. Nor could
227 the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

228 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
229 professional, in return for the undertaking of that person to refer clients or customers to
230 the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's
231 professional judgment as to making referrals or as to providing substantive legal services.
232 See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives
233 referrals from a lawyer or nonlawyer professional must not pay anything solely for the
234 referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
235 clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral
236 agreement is not exclusive and the client is informed of the referral agreement. Conflicts
237 of interest created by such agreements are governed by Rule 1.7. Reciprocal referral
238 agreements should not be of indefinite duration and should be reviewed periodically to
239 determine whether they comply with these Rules. This Rule does not restrict referrals or
240 divisions of revenues or net income among lawyers within firms comprised of multiple
241 entities.

242

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

246

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

248

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

252

(1) is a lawyer; or

253

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

254

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

257

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

259

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

260

261 (c) Every written, recorded or electronic communication from a lawyer soliciting
262 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

263 outside envelope, if any, and at the beginning and ending of any recorded or electronic
264 communication, unless the recipient of the communication is a person specified in
265 paragraphs (a)(1) or (a)(2).

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

271

272 **COMMENT**

273

274 [1] A solicitation is a targeted communication initiated by the lawyer that is directed to a
275 specific potential client and that offers to provide, or can reasonably be understood as
276 offering to provide, legal services. In contrast, a lawyer’s communication typically does
277 not constitute a solicitation if it is directed to the general public, such as through a
278 billboard, an Internet banner advertisement, a website or a television commercial, or if it
279 is in response to a request for information or is automatically generated in response to
280 Internet searches.

281 [2] There is a potential for abuse when a solicitation involves inherent in direct in-
282 person, live telephone or real-time electronic contact by a lawyer with a potential
283 prospective client known to need legal services. These forms of contact between a lawyer
284 and a prospective client subject the potential client lawyer to the private importuning
285 of the trained advocate in a direct interpersonal encounter. The potential prospective
286 client, who may already feel overwhelmed by the circumstances giving rise to the need
287 for legal services, may find it difficult fully to evaluate all available alternatives with
288 reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and
289 insistence upon being retained immediately. The situation is fraught with the possibility
290 of undue influence, intimidation, and over-reaching.

291 [3] This potential for abuse inherent in direct in-person, live telephone or real-time
292 electronic solicitation of prospective clients justifies its prohibition, particularly since
293 lawyers have advertising and written and recorded communication permitted under Rule
294 7.2 offer alternative means of conveying necessary information to those who may be in
295 need of legal services. Advertising and written and recorded In particular,
296 communications; can which may be be mailed or autodialed or transmitted by email or
297 other electronic means that do not involve real-time contact and do not violate other law
298 governing solicitations. These forms of communications and solicitations make it
299 possible for the public a prospective client to be informed about the need for legal
300 services, and about the qualifications of available lawyers and law firms, without
301 subjecting the potential prospective client to direct in-person, telephone or real-time
302 electronic persuasion that may overwhelm the potential client's judgment.

303 [4] The use of general advertising and written, recorded or electronic communications to
304 transmit information from lawyer to potential client prospective client, rather than direct
305 in-person, live telephone or real-time electronic contact, will help to assure that the
306 information flows cleanly as well as freely. The contents of advertisements and

307 communications permitted under Rule 7.2 can be permanently recorded so that they
308 cannot be disputed and may be shared with others who know the lawyer. This potential
309 for informal review is itself likely to help guard against statements and claims that might
310 constitute false and misleading communications, in violation of Rule 7.1. The contents of
311 direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer~~
312 ~~and a prospective client~~ contact can be disputed and may not be subject to third-party
313 scrutiny. Consequently, they are much more likely to approach (and occasionally cross)
314 the dividing line between accurate representations and those that are false and
315 misleading.

316 [45] There is far less likelihood that a lawyer would engage in abusive practices against
317 ~~an individual who is~~ a former client, or with whom the lawyer has close personal or
318 family relationship, or in situations in which the lawyer is motivated by considerations
319 other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the
320 person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the
321 requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is
322 not intended to prohibit a lawyer from participating in constitutionally protected activities
323 of public or charitable legal-service organizations or bona fide political, social, civic,
324 fraternal, employee or trade organizations whose purposes include providing or
325 recommending legal services to its members or beneficiaries.

326 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation which
327 contains information which is false or misleading within the meaning of Rule 7.1, which
328 involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which
329 involves contact with a prospective client who has made known to the lawyer a desire not
330 to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited.
331 Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by
332 Rule 7.2 the lawyer receives no response, any further effort to communicate with the
333 potential prospective client may violate the provisions of Rule 7.3(b).

334 [67] This Rule is not intended to prohibit a lawyer from contacting representatives of
335 organizations or groups that may be interested in establishing a group or prepaid legal
336 plan for their members, insureds, beneficiaries or other third parties for the purpose of
337 informing such entities of the availability of and details concerning the plan or
338 arrangement which the lawyer or lawyer's firm is willing to offer. This form of
339 communication is not directed to people who are seeking legal services for themselves, a
340 ~~prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary
341 capacity seeking a supplier of legal services for others who may, if they choose, become
342 potential prospective clients of the lawyer. Under these circumstances, the activity which
343 the lawyer undertakes in communicating with such representatives and the type of
344 information transmitted to the individual are functionally similar to and serve the same
345 purpose as advertising permitted under Rule 7.2.

346 [78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising
347 Material" does not apply to communications sent in response to requests of potential
348 clients or their spokespersons or sponsors. General announcements by lawyers, including
349 changes in personnel or office location, do not constitute communications soliciting
350 professional employment from a client known to be in need of legal services within the

351 meaning of this Rule.
352 [89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which
353 uses personal contact to solicit members for its group or prepaid legal service plan,
354 provided that the personal contact is not undertaken by any lawyer who would be a
355 provider of legal services through the plan. The organization must not be owned by or
356 directed (whether as manager or otherwise) by any lawyer or law firm that participates in
357 the plan. For example, paragraph (d) would not permit a lawyer to create an organization
358 controlled directly or indirectly by the lawyer and use the organization for the in-person
359 or telephone solicitation of legal employment of the lawyer through memberships in the
360 plan or otherwise. The communication permitted by these organizations also must not be
361 directed to a person known to need legal services in a particular matter, but is to be
362 designed to inform potential plan members generally of another means of affordable legal
363 services. Lawyers who participate in a legal service plan must reasonably assure that the
364 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

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.”

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.

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 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 has identified 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.

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 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. The Commission concluded that this new Comment 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.

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

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

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 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)

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).

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.” This new and clearer definition would enable lawyers to identify more clearly the circumstances under which their payments for lead generation services, such as a “pay-per-click” and “pay-per-lead” services, are permissible.

The proposed Comment language also makes clear that, even if a lead generation service does not “recommend” the lawyer, 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 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

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.

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 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)

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

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.

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.