

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

- (a) the black letter and Comments to Model Rule 1.18 (Duties to Prospective Client);
- (b) the Comments to Model Rule 7.1 (Communications Concerning a Lawyer's Services);
- (c) the Comments to Model Rule 7.2 (Advertising);
- (d) the title, black letter, and Comments to Model Rule 7.3 (Direct Contact with Prospective Clients); and
- (e) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Rule 1.18: Duties to Prospective Client

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

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

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

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

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

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

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

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

Comment

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

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

...

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

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

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

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Rule 7.1 Communications Concerning a Lawyer's Services

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

COMMENT

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

...

Rule 7.2 Advertising

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

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

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

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

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

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

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

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

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

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Comment

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

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

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

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~l~~lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's

communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the- (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). -who prepare marketing materials for them.

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

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

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Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients

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

- (1) is a lawyer; or**
- (2) has a family, close personal, or prior professional relationship with the lawyer.**

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

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

REPORT

I. Introduction

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

As a result of its examination of these issues, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that Model Rule 7.1's prohibition against false and misleading communications is readily applicable to online advertising and other forms of electronic communications that are used to attract new clients. Thus, the Commission concluded that there is no need to develop new or different restrictions with regard to those communications. The Commission determined, however, that some Model Rules – specifically Model Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) – have unclear implications for new forms of marketing and that lawyers would benefit from several clarifying amendments.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) and its Comments that would clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments are designed to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

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

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

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generation,” including online lead generation, are permissible as long as the generator of the lead complies with certain requirements.

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

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

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

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

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

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

The Commission is also proposing new Comment language that would elaborate on the meaning of the word “consults” and give lawyers more guidance about how to avoid the creation of an inadvertent client-lawyer relationship. The Comment emphasizes that such a consultation

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

³ *Id.* at 4.

can occur, and a prospective client relationship can arise, if a lawyer specifically invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.

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

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

Finally, the Commission proposes to add a sentence at the end of Comment [2] to make clear that a person is not owed any duties under Model Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent. Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior, which is commonly referred to as "taint shopping."⁵ In fact, some states have incorporated this concept into their own versions of Model Rule 1.18.⁶ The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes this "taint shopping" possible.

III. Proposed Amendments to Model Rule 7.2 (Advertising)

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

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

⁴ *Id.*

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

⁶ N.Y. Rules of Prof'l Conduct R. 1.18(e)(2).

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payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

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

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

A. The Commission's Proposal

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

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

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

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

Second, in order to ensure that the public is not misled, the proposed Comment language reminds lawyers that they should not use a lead generator unless the lead generator’s communications are consistent with Model Rule 7.1, which prohibits false or misleading communications. To comply with this obligation, the Comment explains that a lawyer should not pay a lead generator if the lead generator states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.

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

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

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

B. Alternate Approaches Considered

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

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

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

⁹ 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.

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

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

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

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

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

The second sentence is designed to clarify that a response to a request for information and an advertisement that is not directed to specific people are not "solicitations." For example, the sentence makes clear that advertisements that are automatically generated in response to an Internet search are not solicitations. Because those advertisements are generated in response to Internet-based research, they are more analogous to a lawyer's response to a request for

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

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information (which is not a solicitation) than an unsolicited and targeted letter to a person who is known to be in need of a particular legal service (which is a solicitation). These examples are intended to clarify when a lawyer's activities constitute a solicitation and are thus governed by Model Rule 7.3.

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

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

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

V. Conclusion

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

Respectfully submitted,

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

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105b: Technology and Client Development

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). 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 the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new ethics issues relating to technology and client development. Resolution 105b would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these issues.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The

Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on

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Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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EXECUTIVE SUMMARY1. Summary of the Resolution(s)**Resolution 105b: Technology and Client Development**

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). 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 the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105b offers lawyers guidance regarding their ethical obligations when using new technology to market their services. The Resolution offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession

3. Please Explain How the Proposed Policy Position will address the issue

The Commission determined that, although no new restrictions on lawyer advertising are necessary, the existing Rules do not have clear implications for new forms of client development. Proposed Resolution 105b, if adopted, will provide lawyers with more guidance about how they can use new forms of marketing to disseminate information about themselves and their services, while protecting the public from false or misleading communications.

For example, the Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a "discussion" and does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word "discussion" with the word "consults" and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a "consultation" occurs under Rule 1.18.

The Resolution also updates several other Model Rules to reflect the changing nature of the technology that lawyers use for client development. Currently, Model Rule 7.2(b) of the Model Rules of Professional Conduct (Advertising) provides that a lawyer typically cannot provide anything of value to someone for recommending the lawyer's services. This prohibition has unclear implications

for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.

The Commission is also proposing amendments to Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients) to clarify when a lawyer’s online communications constitute “solicitations” and are thus governed by the Rule.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105b as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105b relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click [here](#)). Moreover, the Commission created and maintained a listserv for interested persons to

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keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.