Association of Professional Responsibility Lawyers

Regulation of Lawyer Advertising Committee
Supplemental Report April 26, 2016

Introduction and Summary

The Committee's initial report, dated June 22, 2015, addressed concerns about overly restrictive and inconsistent state regulation of lawyer advertising, particularly in relation to today's diverse and innovative forms of electronic media advertising. The Committee recommended changes in the advertising rules to achieve greater rationality and uniformity in regulatory enforcement of lawyer advertising and marketing by proposing a new Rule 7.1 in place of ABA Model Rules 7.1, 7.2, 7.4 and 7.5 and by the use of non-disciplinary means to address most complaints about lawyer advertising. The Committee reserved for later consideration issues related to the regulation of direct solicitation of clients and communications transmitted in a manner that involves intrusion, coercion, duress and harassment (Model Rule 7.3). The Committee also deferred consideration of reciprocal referrals (Rule 7.2(b)(4)) and the effect of certain forms of lawyer advertising on the regulation of lawyer referral services.

The Committee has now considered the solicitation rules and has concluded that the legitimate regulatory objectives of preventing overreaching and coercion by lawyers who use in-person solicitation and targeted communications with the primary motivation of pecuniary gain can best be achieved by combining provisions of Model Rules 7.2 and 7.3 in a single rule. The Committee's proposed revisions of Model Rules 7.2 and 7.3 in the form of new Rule 7.2 is set forth in Attachment A.

The Committee's revised rule both defines solicitation and distinguishes solicitations that are prohibited from those that are permitted with appropriate protections.

Overview of the Legal and Constitutional Principles that Support Revising the Current Regulation of In-Person Solicitation, Targeted Communications, and Paying for Referrals

In developing proposed Rule 7.2 and this supplemental report, the Committee analyzed Supreme Court precedent, which identifies specific factors to consider when regulators seek to prohibit or restrict a lawyer's direct solicitation of a potential client.[1] The Committee concluded

[1] *The Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re Primus*, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also The Fla. Bar v. Herrick*, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); *"Commercial Speech Doctrine,"* THE FLORIDA BAR,

that most of the current restrictions on solicitation in the attorney advertising rules as well as the underlying public policy at play are based primarily upon lawyers approaching prospective clients in a face-to-face encounter without regard to today's digital world of electronic communications.

In fact, the ABA historically expressed concern about in-person solicitation assuming a lawyer may overwhelm a potential client and that, given the verbal nature of the exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. However, that rationale does not apply to electronic communications, such as text messaging and posting on social media and in chat rooms, where there are verbatim logs or records of the communications that preserve the lawyer-prospective client exchange, and where the consumer can simply delete/ignore the exchange.

The Supreme Court has upheld restrictions on lawyer solicitation based upon the rationale that lawyers are better trained and skilled than other professionals in persuasion and oral advocacy.[2] For example, in *Ohralik v. Ohio State Bar Ass'n*,[3] the Court upheld a blanket prohibition against in-person solicitation of legal business for pecuniary gain. The state's interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides the lawyer's interest in communication. Moreover, the Supreme Court noted that since in-person solicitation for pecuniary gain is basically impossible to regulate, a prophylactic ban is constitutional.

Once again, that rationale may be justified when applied to traditional face-to-face solicitation and live telephone conversations, but loses ground when applied to today's prerecorded telephonic messages and other electronic communications. Individuals may easily ignore a message that a lawyer sends via a chat room, text message or instant message without feeling awkward or impolite in doing so, as they might in a face-to-face encounter or a live telephone conversation. Modern telephone communication also allows a person who sees an unfamiliar number on his caller ID to easily ignore, block or not answer the incoming call. In fact, the tremendous growth of unsolicited business calls have created an environment in which people routinely ignore unfamiliar numbers and, at their convenience, screen their voicemail messages deciding whether to respond to the caller or delete the message. As a result, the risk of duress, coercion, over-persuasion or undue influence is far less with many forms of electronic communications than with live (face-to-face) communications and therefore the case for restricting solicitation by electronic communication is much weaker. Recall that the facts in *Ohralik* involved face-to-face contact between the lawyer and the prospective client.

As the Supreme Court noted in *Edenfield v. Fane*,[4] striking down a ban on in-person solicitation by CPAs:

> "[T]he constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases

https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[2] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978)(finding a greater potential for overreaching when a lawyer, professionally trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person).

[3] 436 U.S. 447, 454 (1978).

[4] 507 U.S. 761 (1993).

have made this clear, explaining that *Ohralik's* holding was narrow and depended upon certain "unique features of in-person solicitation by lawyers" that were present in the circumstances of that case.

Ohralik was a challenge to the application of Ohio's ban on attorney solicitation and held only that a State Bar 'constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.' While *Ohralik* discusses the generic hazards of personal solicitation, the opinion made clear that a preventative rule was justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'"[5]

Therefore, when considering other means of solicitation, for example, through chat rooms, social media, text messaging, instant messaging, etc., regulation of those contacts is justified only if the solicitation occurs under circumstances that are "inherently conducive to overreaching or other forms of misconduct."

The ABA Model Rules currently include a prohibition against what is referred to as "real-time electronic contact" as a form of "in-person" solicitation. See ABA MR 7.3(a).This Committee believes that the term "real-time electronic contact" as a moniker to describe "in person" solicitation ignores the required examination of the precise circumstances under which a solicitation occurs. Many forms of social media and electronic communication (i.e., texting, instant messaging, posting on social media) are more akin to a targeted written communication rather than a face-to-face communication because the person contacted has an opportunity to reflect or research before responding or not respond at all. In other words, "real-time electronic contacts" with a potential client are not face-to-face encounters but are more like targeted mailings, which are constitutionally protected. There is no need for discipline unless they are inherently conducive to overreaching or other forms of misconduct. The requirements under paragraphs (c) and (d) of the proposed rule in addition to the requirements of Rule 7.1 serve as adequate protection and an absolute ban is no longer warranted.

For instance, a chat room is a cyber construct. It is not a room and no one chats. It is a "place" on the Internet where people can visit and write whatever they want, just like a listserv or Facebook Messenger. Anyone can leave the chat room; or, they can "lurk" without posting. No one is "trapped" in an Internet "chat room" with an aggressive lawyer like the hospitalized accident victim in *Ohralik*. Everything posted in a chat room is in writing and there is a record of what is said. The point is not whether chat rooms may be described as "real time" communication, but rather that the contacts that occur in an Internet chat room simply are not "in person" communications. Thus, there is no justification for a prophylactic ban on lawyer solicitation in an Internet chat room or other "real-time" electronic forums.[6] Those communications are subject to the general prohibition of false or misleading speech.

"Face time," "Skype" and other forms of VOIP[7] video conferencing, are just telephone conversations. The Committee's proposed rule bans live telephone calls (with individuals other than those excepted in Rule 7.2(a)), and so it would also ban solicitation via "Face time" or

[5] 507 U.S. at 774. (Citations omitted).

[6] See Philadelphia Bar Ass'n Ethics Op. 2010-6; Florida Advisory Opn. 1-00-1 (Revised).

[7] VOIP is "Voice over the Internet Protocol."

"Skype" because the communication is just a live telephone call with the ability to show yourself to the other person (if he consents).

Though described by the ABA rules as "real-time electronic contacts," if the means of solicitation is more akin to targeted letters or written communications, state regulators cannot impose a prophylactic ban. *Shapero v. Kentucky Bar Ass'n*[8], held that the state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. In *Shapero*, the Court focused on the method of communication and found targeted letters to be comparable to the print advertising used in *Zauderer*,[9] which can easily be ignored or discarded. The same reasoning applies to social media, texting and other forms of electronic solicitation.

The Supreme Court upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days after an accident or disaster. *Florida Bar v. Went For It, Inc*.[10] However, in reaching its holding the Court focused on the timing of the letters. The Court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. Moreover, other states have not followed Florida's rule.

Thus, having considered the indirect nature of electronic communication, the Committee recommends a rule that imposes a ban only on face-to-face and live telephone solicitations, but not "real time" electronic or video contacts with a potential client. Several state bar opinions have reached similar conclusions.[11]

In addition to limiting prohibited solicitation to face-to-face and live telephone, the Committee proposes an expansion of the exceptions to the ban on direct in-person solicitation to include persons who are sophisticated users of legal services and persons who are contacted pursuant to a court-ordered class action notification. As in the case of persons who are lawyers or with whom the lawyer has a close personal or family relationship, there is far less likelihood of undue influence, intimidation and overreaching when the person contacted is a sophisticated user of legal services.[12] Proposed Comment [4] describes a sophisticated user of legal services as a person who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. The exception under paragraph (b)(3) reflects existing case law. In each instance, the safeguards under paragraphs (c) and (d) as well as the requirements of Rule 7.1 serve as adequate protection and an absolute ban is no longer warranted in these situations.

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[8] 486 U.S. 466 (1988).

[9] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[10] 515 U.S. 618 (1995).

[11] Philadelphia Bar Ass'n Ethics Op. 2010-6 concludes that Rule 7.3 does not apply to solicitation by e-mail, social media, chat room or other electronic means where it would not be socially awkward for potential client to ignore a lawyer's overture as they can with targeted mailing; such contacts are not "real time" communications for purposes of the rule. North Carolina State Bar Op. 2011-08 advises that a lawyer's use of chat room support service does not violate Rule 7.3 as it does not subject the website visitor to undue influence or intimidation; the visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session. Florida also concurs as evidenced by its complete reversal of its original opinion that banned chat room solicitation and its acknowledgement of the evolution of digital communications. Florida Advisory Opinion A-00-1 (Revised) (Approved by the Board Review Committee on Professional Ethics on October 15, 2015) notes,"…written communications via a chat room, albeit in real time, does not involve the same pressure or opportunity for overreaching" as face to face solicitation).

[12] Other state bar rules have recognized this long-established exception. See Va. Rule 7.3, cmt.[2] at http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/rule7-3/

Proposed Rule 7.2

Proposed Rule 7.2 combines elements of current Model Rules 7.2 and 7.3 regarding solicitation of clients. Paragraph (a) provides a definition of "solicitation" that is derived from the first sentence in Comment [1] to Model Rule 7.3. The Committee believes it is important to define what constitutes a solicitation in the black letter of the rule rather than in a comment and that the definition apply to both direct in-person and targeted written contacts. The definition in paragraph (a) tracks Model Rule 7.3, Comment [1] except that it clarifies that a solicitation includes targeted communications initiated by "or on behalf of" a lawyer and limits solicitations to communications that offer to provide legal services "in a particular matter." The phrase "in a particular matter" is consistent with Model Rule 7.3(c) and paragraph (c) of this rule. The comments to the proposed rule make it clear that all in-person and targeted communications offering to provide legal services in regard to a particular matter must comply with Rule 7.1.

Paragraph (b) defines solicitations that are prohibited under the reasoning in *Ohralik v. Ohio State Bar Ass'n*.[13] Prohibited solicitations under paragraph (b) include employees and other agents of the lawyer. For the reasons described above, the Committee believes that a total ban on in-person contacts to solicit professional employment when a significant motive is the lawyer's pecuniary gain is justified only in the case of direct face-to-face and live telephone contacts and not in the case of real time electronic contact. Chat rooms and other forms of real time electronic communication are less fraught with the possibility of intimidation and coercion and are more properly addressed under paragraphs (c) and (d) of the proposed rule.

The exceptions to the ban on direct in-person solicitation have been expanded to include persons who are sophisticated users of legal services and persons who are contacted pursuant to a court-ordered class action notification. Proposed Comment [4] describes a sophisticated user of legal services as a person who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. The exception under paragraph (b)(3) reflects existing case law.

Paragraph (c) carries forward the requirements of Model Rule 7.3(c) with minor revisions. The phrase "on or behalf of" a lawyer had been added for greater clarity and is consistent with the definition of solicitation in paragraph (a)

Paragraph (d) provides a more straightforward and clear statement of the protections in Model Rule 7.3(b). These protections apply to all in-person and targeted communications permitted under the rule. The headings to each paragraph provide additional clarity.

As noted above, the Committee recommends stream-lining the regulations regarding "solicitation" currently in Model Rules 7.2 and 7.3, while maintaining the legitimate policy objectives of both rules, by including solicitation of potential clients both by direct in-person, face-to-face or telephone communication and through paying someone else something of value for referring prospects in a single rule. Proposed Rule 7.2 combines the solicitation provisions of Model Rule 7.3 with the provision in Model Rule 7.2(b) of refraining from giving someone something of value for referring clients because both provisions involve the solicitation of prospective clients. Paragraph (e) carries forward Model Rule 7.3(d) without substantive change.

Paragraph (f) is substantially the same as Model Rule 7.2(b), which prohibits “giving anything of value” to anyone for referring clients to a lawyer, other than to employees and lawyers

[13] 436 U.S. 447 (1978).

who work in the same firm as the lawyer receiving the referral. Rule 7.2(f)(1) is changed to clarify that payments for online group directories/advertising platforms are just payments for advertising. Paying for referrals historically was a prohibited form of solicitation, allegedly because of the risk that a lawyer who pays someone for referrals would engage in unseemly "ambulance chasing" by engaging runners to lure potential clients. Thus, as Hazard, Hodes, & Jarvis, *Law of Lawyering* §60.05 (4th ed. 2015) notes: "Ordinarily, paying for a recommendation of a lawyer's services is a form of solicitation, and thus prohibited by Model Rule 7.3. Rule 7.2(b), however, provides several commonsense exceptions for a recommendation of services, but where the evils of direct contact solicitation are not present." The Committee has added the language about employees and lawyers in the same firm to address the reality that lawyers in the same firm routinely pay a portion of earned fees on a matter to the "originating" lawyer in the firm. The policy prohibiting giving anything of value for client referrals reflects the same public policy concerns as the Federal Trade Commission's restrictions on the use of endorsements and testimonials in advertising, which are premised on the recognition that marketing products and services based on compensated endorsers, without conspicuous disclosure of the details of their connections, is unfair and deceptive to consumers. *See* 16 C.F.R. Part 255.

The provision in Model Rule 7.2(b) pertaining to lawyer referral services has been carried forward without change to paragraph (f)(2) to permit, among other things, lawyers to pay charges for prepaid plans and not-for-profit or "qualified lawyer referral service." The language was modified in 2000 because, as the Reporter's Notes to the *ABA Ethics 2000 Commission Proposed Amendments to the Model Rules of Professional Conduct* explain:

> This change is intended to more closely conform the Model Rules to ABA policy with respect to lawyer referral services. It recognizes the need to protect prospective clients who have come to think of lawyer referral services as 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.

Comments to Proposed Rule 7.2

Comment [1] to proposed Rule 7.2 is derived from the second sentence in Comment [1] to Model Rule 7.3.

Comments [2] and [3] are Comments [2] and [4] of Model Rule 7.3. No substantive change is intended.

Comment [4] derives from Comment [5] to Model Rule 7.3 and adds a sentence describing who is a sophisticated user of legal services. Comment [5] carries over Comment [8] to Model Rule 7.3. Comments [6] and [7] are based on Comments [6] and [7] of Model Rule 7.3. Comment [8] derives from Comment [9] of Model Rule 7.3

Comments [9] – [11] are Comments [5], [6] and [8] from Model Rule 7.2.

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