

The Internet continues to reshape relationships in ways unimaginable. Currently it is common to have long-term and substantive business and personal relationships with people we never have met, or whom we will meet only after commencing online dialogue. For the legal profession this brings challenges. The entire foundation of the profession is based upon how those in the profession interact with those both in and outside the profession. Furthermore, the profession is arguably the most regulated and scrutinized profession in history, thus demanding that the legal professional master the nuances and also more formal requirements associated with these newer methods of interacting.

The American Bar Association (ABA) and Washington State Bar Association (WSBA) have no rules that specifically address how lawyers should conduct themselves online. Thus, we are left to extrapolate from the current rules and little commentary provided. Quite frankly, it is clear that legal regulators are playing catch-up in this area as they attempt to formulate guiding principles for a medium changing faster, in many instances, than rules can be created.

Currently, the rules most often focused on when addressing lawyers' ethical responsibilities in the digital age are as follows:

ABA Rule 7.1—Communications Concerning a Lawyer's Services

A lawyer shall not make 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.

(WSBA Rule 7.1 is identical.)

ABA Rule 7.2—Advertising (WSBA Rule 7.2 excludes the underlined portions below.

It also should be noted that WSBA Comment (3) to this rule states that, “[t]elevision is now one of the most powerful media for getting information to the public,” thus placing

the WSBA somewhere around the 1950's with regard to the real-time relevance of its guidance on this issue.)

(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 service 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.

ABA Rule 7.3—Direct Contact with Prospective Clients

(a) A lawyer shall not (~~WSBA—~~“directly or through a third person,”) 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.

(3) The WSBA adds this section (3)—“or has consented to the contact by requesting a referral from a not-for-profit lawyer referral service.”)

(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 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 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 paragraph (a)(1) or (a)(2). (The WSBA simply “reserves” (c), but has no text associated with it. The WSBA states there is no need because Rule 7.1 prohibits “false or misleading communications.”)

(d) Notwithstanding the prohibition 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 membership or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

ABA Rule 7.4—Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

(WSBA has a substantially different “(d)” and provides more specific guidance as it relates to Washington)

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the term “certified”, “specialist”, “expert”, or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

ABA Rule 7.5—Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office

of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

(WSBA Rule 7.5 is identical.)

ABA Rule 1.18—Duties To Prospective Client

(a) A person who discusses with a lawyer 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 a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. (~~WSBA—~~
“or except as provided in paragraph (e).”)

(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:

(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.

(The WSBA adds a section “e”.)

(e) A lawyer may condition conversation 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. The prospective client may also expressly consent to the lawyer’s subsequent use of information received from the prospective client.

ABA Formal Opinion 10-457

As indicated above, there is a dearth of real-time relevant guidance that has been provided, especially by the WSBA, concerning proper conduct by legal professionals in the digital age. To date, the ABA Standing Committee on Ethics and Professional Responsibility’s Formal Opinion 10-457 (Lawyer Websites) has been the most encompassing *completed* attempt to issue guidelines.

The Opinion points out that information posted online by a lawyer or firm about themselves should be updated regularly so as not to materially misrepresent. Specific information that identifies a current or former client may be included, with the consent of the client, as required by Rules 1.6 (current clients) and 1.9 (former clients).

Lawyers may offer legal information online if it does not mislead. It should include qualifying statements that preclude unjustified expectations regarding, for

example, representation or the applicability of the legal information to the particular facts and needs of the reader.

Opinion 10-457 points out that when distinguishing between legal information and legal advice, context and content are useful barometers. The Opinion puts forth the example that when lawyers are speaking to groups or using a hypothetical example, they are typically viewed as giving legal information. However, a response to a fact-specific legal question concerning a particular person's circumstances may be looked at as providing legal advice and implicate attorney-client or prospective client issues. It is recommended that legal professionals state the information is general in nature and not a substitute for personal legal advice. This may be especially relevant for web-site visitors who may not understand they are not receiving the gospel as it relates to them personally.

The issue of when an attorney-client relationship is formed can also be more difficult to define in the digital age. Comment (2) to ABA Rule 1.18 acknowledges that not all initial communications from persons who wish to be prospective clients qualify as "discussions" within the meaning of Rule 1.18. The Opinion highlights that when a website visitor responds to a lawyer website that specifically requests or invites submissions concerning possible formation of attorney-client relationship, a Rule 1.18 "discussion" is often the result. However, if a website visitor submits unsolicited information, it is the lawyer's response that will determine the contours of the formed-relationship. An unclear website message or absence of a clearly visible and understandable disclaimer may lead a website visitor to expect initial communications to be a first step in a discussion. The Opinion states that disclaimers or statements can be written so as to avoid a misunderstanding that (1) an attorney-client relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party.

Proposed Changes to ABA Rules 1.18, 7.2, and 7.3

On June 29, 2011, the ABA Commission on Ethics 20/20 published for comments proposed changes to Rules 1.18, 7.2, and 7.3 that take into account the changing landscape for lawyers in the digital age. The proposed changes are as follows:

ABA Rule 1.18—Duties to Prospective Client

- (a) A person who ~~discusses~~ communicates with a lawyer about the possibility of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider 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:

- (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 participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

A proposed new Comment (3) would be as follows:

When a person initiates an electronic communication with a lawyer, such as through email or a website, the reasonableness of the person's expectations that the lawyer is willing to consider forming a client-lawyer relationship may depend on a number of factors, including whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautionary statements. For example, if a lawyer's website encourages a website visitor to submit a personal inquiry about a proposed representation and the website fails to include any cautionary language, the person submitting the information could become a prospective client. In contrast, if a website offers only information about the lawyer or the lawyer's firm, including the lawyer's contact information, this information alone is typically insufficient to create a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.

ABA 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 service plan or a not-for-profit or qualified lawyer referral service. (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.

The rule would remain the same. Proposed changes are to the comments.

Comments (1), (3), (5), and (6) would change:

Comment (1)

To assist the public in obtaining and learning about 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.

Comment (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 solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

Comment (5)

Lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities or 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 pop-up 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 person does not recommend the lawyer and any payment is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (professional independence of the lawyer). See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers. ~~who prepare marketing materials for them.~~

Comment (6)

A lawyer may pay the usual charges of, and share fees with, 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 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 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 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 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 refer prospective clients to lawyers who own, operate or are employed by the referral service).

ABA Rule 7.3—Direct Contact with Potential ~~Prospective~~ Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment from a potential ~~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.

(b) A lawyer shall not solicit professional employment from a potential ~~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 potential ~~prospective~~ client 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 a potential ~~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.

There are several proposed changes to the Comments including a brand new Comment (1) and changes to formerly Comments (1), (2), (3), (4), (5), and (6).

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific potential client 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.

[+2] 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 a potential prospective client known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject the potential client ~~lawyer~~ to the private importuning of the trained advocate in a direct interpersonal encounter. The potential 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~~ delivered through autodialing, or transmitted by email or other electronic means that do not involve real-time contact.

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 potential ~~prospective~~ client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the potential client'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 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 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 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 potential ~~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 potential ~~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.