

When chat is not chat....according to the ethics rules

There's been a lot of confusion about when an attorney's actions in social media rise to the level of prohibited "solicitation" under Rule 7.3. In June of 2010 the Philadelphia Bar Association Professional Guidance Committee addressed this question when it reviewed the propriety of using different types of social media to solicit clients and issued a pretty surprising decision. Apparently, chat is not "real time electronic communication" in Philadelphia. For what it's worth, I agree. [\[See Opinion 2010-6 here\]](#)

Pennsylvania Rule 7.3 sets forth the generally accepted rule that a lawyer may not solicit employment through in-person, by telephone or by real time electronic communication from a prospective client unless there is a family, close personal or prior professional relationship with the prospective client. Everyone I've ever spoken to has always assumed that "real time electronic communication" means "chat." In fact, the opinion acknowledges that "the ABA Reporter's Explanation states that "real time electronic communication" refers to chat rooms." However, the Philadelphia Bar disagrees with the Reporter's Explanation and doesn't interpret the words the same way.

The Bar acknowledges that, "social attitudes and...rules of internet etiquette are changing." The Bar believes that one of the ways things are changing is that users today understand that, "they need not respond instantaneously to electronic overtures and that everyone realizes that...chat room comments can be readily ignored, or not, as the recipient wishes."

Thus, the Bar states that even though the ABA intended Rule 7.3(a) to characterize chat room communications as prohibited "solicitation," they don't think the rule should be applied that way because the, "risks which might be inherent in an individualized, overbearing communication are not sufficiently present to bar the use of such methods of social interaction for any solicitation purposes."

In other words, people today know that they don't have to respond to chat messages-- they can simply shut down the chat session and move away from the conversation. As a result, the Philadelphia Bar refused to ban chat-based solicitation outright and instead stated that, "real-time electronic communication" is limited to electronic modes of communication used in a way in which it would be socially awkward or difficult for a recipient of a lawyer's overtures to not respond in real time."

The opinion mentioned that it's possible to violate the rule in a chat room if, for instance, a lawyer sends a chat message that demands an instantaneous response. They also stated that voice over IP would likely be a type of "real time communication" that would be problematic.

So what does this mean? Under the Philadelphia rule, if you're talking by chat to a prospective client you're not considered to be engaging in improper "solicitation" simply by virtue of having the chat conversation. Rather, you cross the line to prohibited behavior, and violate 7.3, when you require that the prospective client respond immediately. The trigger seems to be acting in an overbearing manner and compelling an instantaneous response from the prospective client.

[An interesting note: Technically, the opinion refers to "chat rooms." I'm not aware of many people frequenting chat "rooms" anymore-- most people use the chat function on Facebook. Nonetheless, I think the underlying rationale of the opinion applies to both.]

If you're in Pennsylvania, the analysis probably stops there, but if you're in a state that has adopted the ABA model code, there still seems to be a hole in the rules....

Even if your model code state agrees with Philadelphia that “chat” is not “real time electronic communication,” it seems logical that would still be considered a form of “electronic communication.” In that case, subsection 7.3(c) says that solicitation by electronic communications must include the words, “Advertising Material” at the beginning and ending of every electronic communication. Obviously the drafters were thinking about e-mails when they wrote this rule, but how the heck are we supposed to comply with that requirement in chat? This is yet another example of how the rules are struggling to fit the current practice.

While I'm not dumb enough to offer “advice” to any lawyers about how to behave, I will tell you how I'm going to deal with the situation in my practice. If I solicit prospective clients through chat, I'm going to make sure that I throw in the word “Advertising Material” at least once in the conversation. I realize that it won't comply with black-letter rule, but at least I could claim that I was attempting to comply with the spirit of a rule that unfortunately still does not fit perfectly into the world of social media.