

ABA DEVELOPS GUIDANCE ON WEB-BASED MARKETING

AUGUST 15, 2011

Lawyers are increasingly using the internet to market their services. Most law firms maintain a website that not only advertises the firm (and publishes information such as this advisory) but, in many cases, enables the recipient of the advertising to contact the law firm for further information. In some instances, lawyers may not realize they may be engaging in online marketing when, for example, they make statements related to their employment on social networking sites or online services like Twitter. Questions about concerning whether and how the current Rules of Professional Conduct apply to these internet-based communications.

In a recent report analyzing these issues, the ABA Commission on Ethics 20/20 (“the Commission”) concluded that, for now, no new restrictions are necessary. See ABA Commission on Ethics 20/20 Initial Draft Proposal -- Technology and Advertising (June 29, 2011) (“Draft Proposal”).¹ The Commission, however, proposed several clarifying amendments to the text and comments of Model Rules of Professional Conduct 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients).² These proposals, and the Commission’s understanding of the current ethical rules that prompted them, are likely to be influential authority for this developing area of the law of professional responsibility. New Hampshire has adopted each of the impacted ethical rules (with modifications), though, as discussed below, the proposals concerning Model Rule 7.3 are likely irrelevant in New Hampshire. Nevertheless, the Committee’s recommendations as to Model Rules 1.18 and 7.2 likely give important guidance to New Hampshire lawyers engaging in web-based marketing.

I. Rule 1.18

New Hampshire Rule of Professional Conduct 1.18, like its model counterpart, addresses a lawyer’s ethical duties to “prospective clients.”

¹ Available at

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2011062-9ethics202technologyclientdevelopmentinitialresolutionsandreport.authcheckdam.pdf

² These proposals are open for comment through August 31, 2011. After receiving comments, the Committee will submit final versions of its proposals to the ABA House of Delegates at the August 2012 ABA Annual Meeting.

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Once a prospective client relationship is formed, the lawyer acquires certain duties of confidentiality and loyalty which limit the lawyer's ability to use information and to represent interests materially adverse to the prospective client. See N.H. R. Prof. Conduct 1.18(b) & (c). An area of continuing concern to lawyers using web-based marketing is whether the "prospective client" relationship is formed when a person unilaterally directs information toward a lawyer by, for example, sending an e-mail or submitting an inquiry through the firm's website.

The Committee's proposed modifications to the model rule would, among other things, make clear that communications between a lawyer and a person seeking legal services do not form a "prospective client" relationship unless there is "a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship." Draft Proposal, Rule 1.18(a). A new comment includes a list of non-exhaustive factors informing whether a person has such a reasonable expectation: "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." Draft Proposal, Rule 1.18, comment 3. The new comment also contains two illustrations of situations where the content of a law firm's website succeed and fail in disclaiming prospective client relationships.

Through these clarifications, the Committee intended to codify principles set forth in a recently released formal opinion which, in part, discussed ways in which lawyers can efficaciously limit prospective client relationships in the context of the website advertising. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).³ Though the proposed modifications to Rule 1.18 do not draw bright lines, they confirm that lawyers have the ability to disclaim "prospective client" relationships by ensuring that individuals encounter clear and understandable disclaimers before initiating a communication, and by ensuring that policies and procedures are in place that track those contemplated in the newly proposed comment.

II. Rule 7.2

New Hampshire Rule of Professional Conduct 7.2, a slightly modified version of Model Rule 7.2, is one of several ethical rules addressing advertising. Rule 7.2, in relevant part, prohibits a lawyer from giving "anything of value to a person for recommending the lawyer's services." N.H. R. Prof. Conduct 7.2(b). The rule permits lawyers to "pay the reasonable costs of advertisements or communications" otherwise permitted under the ethical rules. Id. 7.2(b)(1). Notwithstanding this exception, there is confusion regarding whether emerging uses of the

³available at

http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf

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internet to generate business are impermissibly “recommending” the lawyer’s services. For instance, lawyers are increasingly paying for client leads from online referral sources such as Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell’s Lawyers.com. Additionally, lawyers are finding innovative uses of social networking sites, such as offering a prize to everyone who posts a photograph of themselves wearing the firm’s t-shirt.

In order to explain how Rule 7.2 applies to these situations, the Committee recommended new text within an existing comment to Model Rule 7.2 clarifying that a “communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities or qualities.” Draft Proposal, Rule 7.2 comment 5. The new text also states that the “a lawyer may pay others for generating client leads . . . as long as the person does not recommend the lawyer” and the payment complies with other ethical rules. Draft Proposal, Rule 7.2 comment 5. The Committee concluded that, given other ethical prohibitions, such as those prohibiting false or misleading advertising, lawyers may use these new internet-based tools, provided they do not “recommend” the lawyer’s services, as set forth in the proposed definition of that term.

Given its similarity to Model Rule 7.2, the construction and application of New Hampshire Rule of Professional Conduct 7.2 to internet-based referrals will likely be guided by the current proposed clarifications. To the extent lawyers use online sources for referrals, they should reevaluate whether these uses involve impermissible “recommendations” in light of the proposed modifications to Model Rule 7.2.

III. Rule 7.3

Model Rule 7.3 governs direct contact with prospective clients. The Model Rule turns largely on the concept of “solicitation.” The Committee’s proposed changes to the Model Rule include, in relevant part, a new comment expressing defining a “solicitation” as a targeted communication, as opposed to a communication directed toward the general public. See Draft Proposal, Rule 7.3 comment 1. These proposed modifications are not likely to be influential in New Hampshire. New Hampshire’s version of Rule 7.3 does not employ the concept of “solicitation.” Instead, with carve outs for lawyers, family members, and potential commercial clients “not known to be in need of legal services”, it broadly prohibits real-time contact “for the purpose of obtaining professional employment.” N.H. R. Prof. Conduct 7.3(a). The newly proposed definition of “solicitation,” therefore, will likely not be incorporated into New Hampshire law at this time.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.