

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE

Opinion 2010-6
(June 2010)

The inquirer seeks guidance as to the propriety under the Pennsylvania Rules of Professional Conduct (the “Rules”) of interacting with prospective clients on blogs and via other electronic media. The inquirer asks if a lawyer may participate in a “blog” in which prospective clients are discussing a legal problem they are having with a particular product or service by announcing that the inquirer is an attorney and inviting the bloggers to respond to the lawyer if they have an interest in discussing the matter further. If so, the inquirer asks whether or not it would be appropriate to simply provide contact information or other information, such as jurisdictions in which one is licensed. If responding is improper, the inquirer asks if the result would be different if the complaining bloggers were actually discussing the possibility of some affirmative type of litigation. Finally, the inquirer asks if it is permissible to simply invite the complaining bloggers to go to his firm’s blog which might address the issue further.

This inquiry poses questions raised by the ongoing development of different kinds of social interactive media and the propriety of using those to solicit clients. Rule 7.3, **Direct Contact with Prospective Clients**, applies and provides as follows:

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. **The term “solicit” includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.** (Emphasis added.)

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
- (3) the communication involves coercion, duress, or harassment.

The purpose behind this Rule is to prohibit what is referred to as “direct solicitation” because of the concern about an inherent potential for abuse where a non-lawyer is engaged by a trained advocate in a direct, interpersonal encounter and, potentially feeling overwhelmed and not able to fully evaluate all the available alternatives before immediately retaining the offending lawyer, feels pressured to engage the lawyer. Specifically, comment [1] to the Rule states as follows:

[1] There is a potential for abuse inherent in direct solicitation, including in-person, telephone or real-time electronic communication, by a lawyer of prospective clients known to need legal services. These forms of contact subject the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. The 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.

Also relevant is Rule 7.2, dealing with Advertising, which provides in part that:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content.

The provisions of this Rule which require that a copy of the advertisement or written communication be retained for two years is referenced in a comment to Rule 7.3, in which the requirement to retain a copy of the communication is explained in the context of Rule 7.3’s prohibition on direct solicitation.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to 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 prospective client 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 from those that are false and misleading.

Until January 1, 2005, Rule 7.3 did not include the phrase, or any reference to, “real-time electronic communication.” That phrase was added to the Pennsylvania Rule on January 1, 2005. It was incorporated in the ABA Model Rules in 2002 on the recommendation of the ABA’s Ethics 2000 Commission. The notion behind the adoption of the words “real-time electronic communication” plainly was to ensure the rule would apply to what were then referred to as “chat rooms,” website communication forums where one might interact on a real-time basis with other persons having access to the same website. It was also clear, however, that “real-time electric communications” did not refer to e-mail.¹

The question of whether or not Rule 7.3 barred electronic communication arose before this body before. We opined in late 2004 -- applying the then current, now **former** Rule 7.3 -- that participation in chat rooms was not barred by 7.3(a), reasoning that the kind of risk inherent in direct communication via telephone or personal interaction was not present in the social medium of a chat room. See, **Philadelphia Bar Association Formal Opinion 2004-5**. It seemed clear at the time, however, that the opinion would not survive the amendment to the Rule.

The current structure and interpretation of the Rule 7.3 is also affected to some degree by constitutional limitations on exercise of commercial speech. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Supreme Court held that the first amendment to the United States Constitution prohibited a ban on a lawyer engaging in commercial speech by sending targeted, direct mail solicitations to prospective clients. The opinion distinguished between overbearing solicitation of an interpersonal nature that might be conducted in person from targeted, direct mail solicitations, as follows:

“In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as ‘a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.’...Second,

¹ The foregoing observations as to the intent behind adding the words are drawn from the “Reporter’s Explanation of Changes” explaining the change when made by the ABA, which provided as follows:

Paragraph (a): Extend prohibition to “real-time electronic contact.” The Commission, in accord with the ABA Commission on Responsibility in Client Development, **is recommending that lawyer solicitation by real-time electronic communication (e.g., an Internet chat-room) be prohibited**. Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact. (Emphasis added.)

We recognize that the Reporter’s Explanations are not part of the Rule and are not binding on the ABA, let alone the Pennsylvania Supreme Court, but nevertheless consider it worth noting in attempting to make sense of what the rule means in practice.

'unique...difficulties,'...would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.'...Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter -- and targeted, direct-mail solicitation generally -- 'poses much less risk of overreaching or undue influence' than does in-person solicitation...Neither mode of written communication involves 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'...Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the 'reader of an advertisement...can effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'...A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation 'conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.'...Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case, or could implicitly suggest that the recipient's legal problem is more dire than it really is....Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice....

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech....The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency,...giving the State ample opportunity to supervise mailings and penalize actual abuses. The 'regulatory difficulties' that are 'unique' to in-person lawyer solicitation,... -- solicitation that is 'not visible or otherwise open to public scrutiny' and for which it is 'difficult or impossible to obtain reliable proof of what actually took place,'... -- do not apply to written solicitations." *486 U.S. at 475-76* (citations omitted).

Shapero was decided in 1988, generations ago in the development of electronic modes of communication. There are now many more methods of communication available that lend themselves to solicitation. Among the different modes of interaction are the following:

E-mail is electronic communication which appears instantly the moment it is sent in the inbox of the recipient. The recipient, of course, need not be sitting at his or her desk at the time it is sent, and indeed it might be days, weeks or months, before it is even looked at. Furthermore, even assuming that the recipient is sitting at his or her desktop when the e-mail comes in, he or she can exercise a choice of whether or not to open it; once opened, whether or not to read it carefully; and once read, to either respond at the moment, or later, or never.

Blogging is a different mode of interaction. It occurs on a “website” at which “posts” are selectively placed for reading by the person who maintains the blog. There is a host that maintains the content of the blog and decides what is “posted” on the blog. That might be done by posting content sent to the host by a blog reader or from any other source. Depending upon the attentiveness of the host, it is possible that something sent by a lawyer to the blog host, with a suggestion that it be posted, could be received by the host and posted in “real-time,” and that if other blog readers were watching the blog when it was posted, then that blog reader could immediately respond and effectively have a real-time communication with the lawyer. However, as with e-mail, which can also be “real-time,” the participant watching a blog controls the response. He or she can read it, or not, and, after having read it, decide to respond, or not, and when.

Chat rooms are electronic forums where individuals generally participate simultaneously with each other having a kind of typed out “conversation” in real-time. An electronic chat room, however, where the individuals participate by typing in their messages and having them appear on a screen, requires each individual to affirmatively type out a message and then hit the send button thereby exercising the choice to either respond or not. Like simultaneous e-mail and blogs, it offers protection not present in a personal interaction in real-time because a participant is separated with an electronic “wall” and has the ability to simply leave the chat room at any time, solely within the participant’s discretion. By definition, there is no in-person or telephonic presence of any other individuals participating in the chat.

In this respect, each of these kinds of electronic communication is different from in-person direct communication and telephone calls. In the latter kinds of in-person communications with an overbearing lawyer, the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate. In the former, however, as the Supreme Court found even in the case of individually targeted direct mail solicitations, a recipient can readily and summarily decline to participate in the communication. Moreover, each of these kinds of social interactions enables the lawyer using it to make and retain a copy of the communication, as required by Rule 7.2.

The Committee believes that the rationale of the prohibition on direct solicitation, both as explained in the Rule itself and the accompanying comments, and by the Supreme Court's opinion in *Shapiro*, lead to the conclusion that usage of these kinds of social media for solicitation purposes is acceptable under Rule 7.3. All of these kinds of social interactions are characterized by an ability on the part of the prospective client to "turn off" the soliciting lawyer and respond or not as he or she sees fit, and an ability to keep a record of its contents.

We do recognize that Rule 7.3 does specifically refer to "real-time electronic communication," and that the ABA Reporter's Explanation states that those words were intended to refer to "chat rooms." But we do not feel bound to apply them as the Reporter's Explanation may have intended. First, we think it significant that the writers of the revised Rule did not choose to refer specifically to "chat rooms" **in the Rule itself** or to any other mode of electronic communication, and thereby recognized that Rule would be applied, or not, to such modes of communication as they developed and their usages and susceptibility for abuse became more settled. They established in the Rule the principle that real-time electronic communications are covered by the Rule, but left to others the issue of what that means, given the technology of the day and the purposes behind the Rule.² Second, even assuming that the technological abilities of chat rooms are the same today as they were in 2000, we think it also relevant that the social attitudes and developing rules of internet etiquette are changing. It seems to us that with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes.

Thus, the Committee concludes that Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer's communication is directed have the ability, readily exercisable, to simply ignore the lawyer's overture, just like they could a piece of directed, targeted mail. Where that is the case **those 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. Under this view of Rule 7.3, "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 Committee also concludes that even on line chat rooms of the sort where discussion occurs by typed communications do not constitute real-time electronic media.

² That the rules governing professional conduct have not kept pace with technology is evidenced by the preliminary agenda promulgated by the ABA Commission on Ethics 20/20, the Commission charged by the ABA with a comprehensive review of the Model Rules and Codes that form the basis of most states' attorney regulation. In a letter dated November 19, 2009 from the Commission's Co-Chairs, outlining the Commission's preliminary agenda, it is stated that, "With respect to technology, the profession faces not merely the proliferation of personal computing, e-mail, 'smart-phone' technology, enhanced personal digital assistants, and the internet, but the likelihood that on the horizon is a potential new or second internet as well as technologies that cannot now be fully anticipated."

Applying this analysis to the questions posed by the inquirer, the Committee finds that it is appropriate for a lawyer who encounters persons “blogging” about complaints, indicating they might need legal assistance, to attempt to communicate with them via the blog or via any other electronic method, provided it is not real-time electronic communication in which the prospective clients are compelled to respond immediately. This would mean, for example, that the lawyer observing this discussion via a blog could submit a “post” to the blog or could send an e-mail if the posters to the blog have supplied their e-mails, and the lawyer could invite the bloggers to visit the lawyer’s firm’s website.

A few cautionary notes are necessary, however.

First, there might be some types of social media, not directly involved in this inquiry, that are so similar to an in-person communication or telephone call that use of them for solicitation is barred. For example, it is possible to conduct chat rooms over the internet in which the participants communicate in real-time by voice over IP. That could be, and likely is, real-time electronic communication.

Second, simply because use of e-mail blogs or chat rooms for solicitation is not categorically barred by Rule 7.3(a) does not mean it might not be utilized in an ethically inappropriate way, where the lawyer suggests by the content of his writing or other methods that the recipient should or must immediately respond. That is, we believe that if the recipient has the ability to not respond, it is not real-time electronic communication, but if the sender of the e-mail suggests in the content of what he sends that it is important or critical to the recipient’s interests that he or she immediately respond in real-time and then they do so, that could become a factor that would lead us to believe that the lawyer would be using a mechanism that is not necessarily a real-time electronic communication as one that is in fact a real-time electronic communication in the specific manner of its use.

Third, the contents of communications, whether sent by real-time electronic communication or otherwise, are of course subject to a whole array of important Rules of which the inquirer must be watchful. Those Rules include 7.1, 7.2 and 7.4 (regarding content of communications), 7.3(b) (limitations on solicitations), 4.2 (admonishment against communicating with persons already represented) and 1.7 (conflicts of interest).

Finally, the inquirer should retain for no less than two years the contents of any such communications, as required by Rule 7.2(b).

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.