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Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards

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LAWYER COMMUNICATIONS ON THE INTERNET: BEGINNING THE MILLENNIUM WITH DISPARATE STANDARDS

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Abstract: Lawyer communications on the Internet constituting commercial speech are subject to state ethics rules governing lawyer advertising and communication. Because each state operates as a separate entity with its own rules that govern the lawyers of its jurisdiction, the profession is faced with disparate standards on a jurisdictional basis. Of the forty-three states that have adopted the Model Rules of Professional Conduct, four-fifths have standards on lawyer communications that vary from those in the Model Rules. Not only is there variation in the rules themselves, but differences exist in the specific applicability and interpretation of these rules to components of electronic communications. As technology evolves, new features continue to surface that present the profession with questions relating to the propriety of their use. When a lawyer communicates on the Internet, it is unclear which jurisdiction's rules are applicable and to what standard the conduct of lawyers will be held. Technological changes have helped to render state-by-state regulation of lawyer communications both ineffective and obsolete. To enable lawyers to properly conduct themselves in the practice of law and most effectively represent clients, lawyer communications should be regulated by national standards rather than by individual state rules.

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I. INTRODUCTION

Lawyers regularly communicate on the Internet, a global medium of communications that links people and entities via computer.[1] Lawyers

1. *See Internet*, 12 Laws. Man. on Prof. Conduct (ABA/BNA) No. 169, at 81:553 (Sept. 18, 1996). Designed as part of a government project to formulate a defense system immune from attack,

use the Internet to display and retrieve information on the World Wide Web,[2] where visitors use browsers to access information from around the world.[3] Information is sent and received through listservs,[4] where lawyers may post material for view in network newsgroups,[5] use e-mail for exchanging information with designated entities,[6] or engage in conference areas and chat groups where participants express themselves simultaneously through their keyboards.[7] Although the Internet has been in existence since the early 1960s,[8] the advent of widespread Internet use by lawyers is relatively new.[9] As recently as November, 1994, only five

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the Internet was created in a "piecemeal fashion, and with the intent of using many pathways to transfer information." Lucy Schlauch Leonard, *The High-Tech Legal Practice: Attorney-Client Communications and the Internet*, 69 U. Colo. L. Rev. 851, 854–55 (1998).

2. The World Wide Web links information on Internet-linked computers "by setting common information storage formats (HTML) and a common language for the exchange of Web documents (HTTP)." ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996). "[T]he Web can display HTML documents containing text, images, sound, animation and moving video . . . [which] can include links to other types of information or resources." *Id.* at 836. The U.S. Supreme Court stated the following about the World Wide Web:

> The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address—"rather like a telephone number." Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites.

Reno v. ACLU, 521 U.S. 844, 852 (1997) (footnotes omitted).

3. *See Internet, supra* note 1, at 81:553.

4. A "listserv" is an "on-line discussion group that has a server through which messages can be posted by members of that particular listserv. Messages can be sent privately by e-mail or posted to the entire group. A discussion topic or 'thread' develops and members of the group can reply to each other's posts." James M. McCauley, *Cyberlawyers: Impact of the Internet on Law Practice and Legal Ethics* (on file with author). Listservs exist for essentially every legal area. *See id.*

5. A "newsgroup" is a type of bulletin board service in which users can exchange information. *See Internet, supra* note 1, at 81:553. A "bulletin board service" is a network where electronic messages may be posted, browsed, or delivered to e-mail boxes. *See id.* There are more than 10,000 newsgroups on the Internet. *See* McCauley, *supra* note 4.

6. "E-mail," or electronic mail, is an electronic message sent between computers through a private or local-area network, "not routed though a central control point," that "can take many and varying paths to the recipients." *See Reno*, 929 F. Supp. at 834.

7. *See id.*

8. *See infra* notes 242–49.

9. *See* William E. Hornsby, Jr., *The Ethical Boundaries of Selling Legal Services in Cyberspace*, (visited Jan. 15, 1998) <http://www.computerbar.org/netethic/abawill.htm>.

law firms had home pages[10] on the World Wide Web.[11] Within seven months time, this number increased to five hundred.[12] Surveys of large and small law firms by the American Bar Association (ABA) in 1997 indicated that, of the firms responding, home pages were on-line for over half of the large firms and almost two-thirds of the small firms.[13] Indications are that this number is more than eighty percent and rising.[14]

As law firms increase their presence on the Internet, some lawyers have begun to advertise there for the first time.[15] This shift is partially because "[t]he World Wide Web dramatically alters the economics of attorney advertising while expanding its reach."[16] All lawyers communicating on the Internet face questions relating to permissible practices and the applicability of legal ethics rules. While the rules on lawyer communications apply to all exchanges by lawyers, the rules governing advertising and solicitation apply only to commercial speech.[17] The a-jurisdictional uniqueness of the Internet calls into question whether traditional legal ethics rules should apply to the Internet. Assuming such rules are applicable, disparate standards implemented by the states make it difficult, if not impossible, for lawyers to comply with the rules of multiple jurisdictions.

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10. A "Web page" is a computer file in the HTML format with text and graphics that can be obtained over the Internet. A "Web site" is a set of computer files in the same format, organized around a central "home page." *See supra* note 2.

11. *See* Elizabeth Wasserman, *Lawyers File Few Objections to Advertising on the Net*, San Jose Mercury News, July 17, 1995, at 1A.

12. *See id.* at 10A.

13. A 1997 ABA survey of large law firms indicated that 51% of responding firms had home pages and 60% of those without home pages had plans to develop them. *See* Melinda M. Hansen, *Lawyers, Firms Vie for Visibility by Creative Use of Home Pages on Web*, 14 Laws. Man. on Prof. Conduct (ABA/BNA) Current Reports, at 237 (May 27, 1998). An ABA companion study of small firms indicated that 64% of those responding used the Internet, up from 38% the previous year. *See id.* A 1997 National Law Journal survey of large firms reported 64% of those responding had sites on the Internet. *See id.* A survey titled "Internet Lawyer-Microsoft Corporation of Internet and Online User Trends in the Legal Profession," released in January, 1997, found that 600,000 lawyers use of the Internet. *See id.*

14. *See* Adam Katz-Stone, *Law Firms Wade Further into Advertising Waters*, Washington Bus. J., Apr. 20, 1998, at 35.

15. *See* Janet Stidman Eveleth, *Advertising on the Internet*, Md. B.J., May/June 1998, at 18, 20. It has been suggested that "most state lawyers are violating the rules with their online listings." Steven France, *The Long Arm of Legal Ethics*, A.B.A. J., Oct. 1999, at 19.

16. Mark Hankins, *Ambulance Chasers on the Internet: Regulation of Attorney Web Pages*, (on file with author).

17. *See infra* note 46.

Part II of this Article begins by covering the development of rules relating to lawyer advertising and solicitation from an historical context. Part III then focuses on individual state rules addressing lawyer communications and how various jurisdictions are interpreting their rules within the context of the Internet. Part IV addresses specific components of the Internet being utilized by lawyers, the efficacy of their use, as well as the issue of choice of laws and rule applicability. This Article concludes that a national standard on lawyer communication is necessary to provide direction for lawyers and information for the public that can be clearly evaluated and understood.

II. DEVELOPMENT OF RULES RELATING TO ADVERTISING AND SOLICITATION

Principles of etiquette and good taste, along with the existence of readily available business, tempered solicitation by lawyers during the profession's formative period.[18] In the English Inns of Court[19] and colonial America,[20] lawyers were few in number and formed a closely knit group.[21] Many lawyers regarded the profession[22] as a public

18. *See* Louise L. Hill, *Solicitation by Lawyers, Piercing the First Amendment Veil*, 42 Me. L. Rev. 369, 378 (1990); John H. Wilbur, *Advertising, Solicitation and Legal Ethics*, 7 Vand. L. Rev. 677, 678 (1954).

19. The Inns of Court had powers of education, discipline, and government within the legal profession in England. *See* Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 88–89 (1953). The Benchers and Readers, who lectured at the Inns, were the most prestigious of the members. *See id.* at 89. The next grade of membership was the Barristers, who could plead and argue cases, followed by Inner Barristers, who were younger members not yet authorized to represent clients in the courts. *See id.* By the twentieth century, the Inns of Court had ceased to be great educational or disciplinary bodies; their primary function became the examination of students for admission before the courts as Barristers. *See* Edward S. Roscoe, *The Growth of English Law* 219–20 (1911).

20. It was customary for some young men desiring to be members of the legal profession to study law in England at the Inns of Court. *See* Francis R. Aumann, *The Changing American Legal System: Some Selected Phases* 32 (1969). Of the four great Inns of Court—Gray's Inn, Lincoln's Inn, Inner Temple, and Middle Temple—the members of the Middle Temple are said to have taken a leading part in the birth of the American nation. *See* Cornelius Comegys, *A Summer Sojourn Among the Inns of Court* 98, 125 (Dennise 1969) (1922).

21. *See* Hill, *supra* note 18, at 377; Paul H. Francis & Jennifer J. Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 Willamette L.J. 221, 223–24 (1977).

22. As the legal profession in England evolved during the thirteenth and fourteenth centuries, the law came to be regarded as a learned profession, along with medicine and theology. *See* Hill, *supra* note 18, at 376; Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 7 (1976).

service,[23] refusing to compete for clients because doing so would destroy their intimacy and reduce them to the status of tradesmen.[24]

However, hostility developed toward the professions during the nineteenth century in America,[25] with particular animosity directed toward those who practiced law.[26] In response to popular sentiment that special privileges were accorded members of the legal profession,[27] many states enacted legislation that reduced or eliminated previously established qualifications for the practice of law.[28] Following the Civil War, the bar in the United States was essentially open and large groups of lawyers competed for business insufficient to accommodate their numbers.[29] To stop the rampant commercialism of the as-yet unregulated bar, leaders among lawyers began to re-establish standards of character, education, and training within the profession.[30]

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23. The pursuit of a public service is considered a general characteristic of the professions. *See* Henry Drinker, *Legal Ethics* 5 (1953); Pound, *supra* note 19, at 5. Dean Roscoe Pound described a profession as "a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood . . . . Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose." Pound, *supra* note 19, at 5. It was not characteristic for members of the legal profession to be wholly dependent on their profession for their livelihood. *See* Hill, *supra* note 18, at 376.

24. *See* Francis & Johnson, *supra* note 21, at 224. Drinker stated that a primary characteristic that distinguishes the legal profession from business is a "duty of public service, of which the emolument is a by-product, and in which one may attain the highest eminence without making much money." Drinker, *supra* note 23, at 5.

25. *See* Drinker, *supra* note 23, at 19.

26. *See* Lawrence M. Friedman, *A History of American Law* 95 (2d ed. 1985); Don J. Young & Louise L. Hill, *Professionalism: The Necessity for Internal Control*, 61 Temp. L. Rev. 205, 207 (1988).

27. *See* Drinker, *supra* note 23, at 19; Marshall Beil, *Controlling Lawyers by Bar Associations and Courts*, 5 Harv. C.R.-C.L. L. Rev. 301, 303 (1970); Young & Hill, *supra* note 26, at 207; Philip J. Wickser, *Bar Associations*, 15 Cornell L.Q. 390, 393 (1930).

28. *See* Drinker, *supra* note 23, at 19; Beil, *supra* note 27, at 303–04; Friedman, *supra* note 26, at 318; *see also* Ind. Const. art. 7, § 21 (1852) (repealed 1932) ("Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."); N.H. Rev. Stat. Ann. ch. 177, § 2 (1842) ("Any citizen of the age of twenty-one years, of good moral character, on application to the superior court, shall be admitted to practice as an attorney.").

29. *See generally* Drinker, *supra* note 23, at 20; Friedman, *supra* note 26, at 633–34; John A. Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, in *The New High Priests: Lawyers in Post-Civil War America* 75, 77–78 (Gerard W. Gawalt ed., 1984).

30. *See* Drinker, *supra* note 23, at 20. As a means to re-establish standards for the profession, lawyers sought the reorganization of bar associations throughout the country. *See id.* The Alabama State Bar Association formulated and adopted the first formal Code of Ethics for the American legal profession in 1887. *See id.* at 23. This Code condemned solicitation, but not advertising. As a general rule of guidance to the Alabama Bar, the Code of Ethics stated that "[n]ewspaper advertisements, circulars and business cards, tending professional services to the general public, are

A. *Condemnation of Advertising and Solicitation by the Canons of Professional Ethics and the Model Code of Professional Responsibility*

The American Bar Association (ABA) was organized in 1878[31] and promulgated standards for the legal profession in 1908 with the Canons of Professional Ethics (Canons).[32] The Canons, which were adopted in whole or in part throughout the United States, condemned lawyer advertising and solicitation.[33] Advertising is generally considered to be a group communication that informs the public that a lawyer is available to perform services.[34] Solicitation, on the other hand, is generally considered to be a personal appeal directed toward a prospective client.[35] Carving an exception for simple business cards, Canon 27 provided as follows:

> The publication or circulation of ordinary simple business cards being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.[36]

Over time, the Canons allowed for the publication of information about law firms in legal directories, as well as dignified "institutional advertising by state and local bar associations" designed to provide the public with information about available legal services.[37] However,

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proper; but special solicitation of particular individuals to become clients ought to be avoided." 118 Ala. XXIII–XXXIV (Rule 16) (1899).

31. The ABA was organized in August, 1878, at Saratoga, New York, a fashionable and well-known summer resort. *See* James W. Hurst, *The Growth of American Law: The Law Makers* 287 (1950). The lawyers associated with the ABA who formulated and implemented the Canons were primarily commercial lawyers who represented large clients, rather than smaller, less dignified practitioners. *See* Jerold S. Auerbach, *Unequal Justice* 41–42 (1976); Friedman, *supra* note 26, at 650–51. Membership in the ABA was selective: by 1900 just 1.3% of the country's lawyers were members; this grew to only 3% by 1910. *See* Hurst, *supra*, at 289.

32. *Canons of Professional Ethics* (1908); Drinker, *supra* note 23, at 23.

33. *See infra* note 36 and accompanying text.

34. *See* Judith Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 Hastings Const. L.Q. 487, 495 (1986).

35. *See id.*

36. *Canons of Professional Ethics* Canon 27 (1908).

37. *See* John B. Attanasio, *Lawyer Advertising in England and the United States*, 32 Am. J. Comp. L. 493, 503 (1984).

advertising and the solicitation of clients by lawyers and law firms remained a prohibited practice.[38]

During the 1960s, a consensus developed among the bar that the Canons were incomplete, unorganized, and failed to "recognize the distinction between the inspirational and proscriptive."[39] As a result, the ABA replaced the Canons in 1969 with the Model Code of Professional Responsibility (Model Code), to serve "both as an inspirational guide" and "as a basis for disciplinary action" when lawyers failed to meet minimum standards.[40] As had been the case with the Canons, almost all of the states adopted the Model Code, with minor modifications.[41]

The general condemnation of advertising and solicitation was carried over from the Canons to the Model Code.[42] The Model Code, as originally adopted, provided that "lawyer[s] shall not publicize [themselves] . . . through newspaper or magazine advertisements, radio or television announcements . . . or other means of commercial publicity."[43] Lawyers were also prohibited from recommending their employment to "non-lawyer[s] who ha[d] not sought [their] advice,"[44] or accepting employment resulting from "unsolicited advice to a [non-lawyers] that [they] should obtain counsel or take legal action."[45] Because lawyer advertising and solicitation were considered commercial speech,[46] these activities were thought to fall outside the protection given

38. *See id.*

39. Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark. L. Rev. 1, 5 (1970).

40. *Model Code of Professional Responsibility* Preliminary Draft, at 1 (1969). The Model Code is composed of three parts: (1) Canons—concise statements setting forth the basic duties of lawyers, (2) Ethical Considerations—statements of activity and conduct to which practitioners should aspire, and (3) Disciplinary Rules—statements setting forth minimum standards of conduct that must be met. *Id.*

41. *See* Louise L. Hill, *Lawyer Advertising* 45 (1993); *see generally* Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (David Luban ed., 1989).

42. *See supra* note 36 and accompanying text.

43. *Model Code of Professional Responsibility* DR 2-101(B) (1969).

44. *Model Code of Professional Responsibility* DR 2-103(A) (1969).

45. *Model Code of Professional Responsibility* DR 2-104(A) (1969).

46. Commercial speech is "speech of any form that advertises a product or service for profit or for business purpose." John E. Nowak et al., *Constitutional Law* 923 (2d ed. 1983). *But cf.* Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205, 234 (1976) (arguing that commercial speech definition should be narrow to "assure that the reduction in First Amendment protection afforded commercial advertising does not endanger important interests"); Karl R. Swartz, Note, 32 Kan. L. Rev. 679, 685 (1984) (noting that

by the U.S. Constitution.[47] The Model Code permitted limited advertising only after the U.S. Supreme Court's recognition that commercial speech is entitled to some First Amendment protection.

B. Commercial Speech is Entitled to Partial First Amendment Protection

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[48] decided in 1976, was the first U.S. Supreme Court decision to declare that commercial speech is entitled to partial First Amendment protection because of its informational value to individual consumers and the general public.[49] Addressing the issues of commercial speech and the regulation of professionals, the Court invalidated a Virginia statute that forbade licensed pharmacists from advertising

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question of "what is commercial speech?" never definitively answered by U.S. Supreme Court and is defined differently in different decisions).

47. The idea that commercial speech is not entitled to First Amendment protection arose in the U.S. Supreme Court decision of *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The Court intimated that the commercial motivation of the advertiser, rather than the content of the speech, rendered commercial speech undeserving of protection under the First Amendment. *See id.* at 54. The Court acknowledged that states and municipalities "may not unduly burden or proscribe" the freedom of "communicating information and disseminating opinion," but stated that "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54; *cf.* Clyde D. Stoltenberg & Douglas Whitman, *Direct Mail Advertising by Lawyers*, 45 U. Pitt. L. Rev. 381, 385 (1984) (arguing that *Chrestensen* did not entirely eliminate protection for commercial speech; no authority exists for legislative curbing of even "purely commercial advertising" in absence of competing public interest). Despite this exclusion of commercial speech from First Amendment protection, the Court continued to address cases dealing with potential, limited constitutional protection of some forms of commercial speech. In these later cases, however, the content of the speech, rather than the motivation behind the speech, began to assume a greater role in the analysis. In determining if speech was commercial, the Court distinguished purely commercial advertisements that merely proposed a business transaction from advertisements that expressed an editorial position on matters of social or political concern. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that advertisement of civil-rights organization that communicated information vital to public interest worthy of constitutional protection), *with* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384–85 (1973) (holding that although "speech is not rendered commercial by the mere fact that it relates to an advertisement," help-wanted advertisements divided into sex-designated columns are unprotected commercial speech, even though under media supervision). The fact that speech appeared as a paid advertisement did not necessarily render it commercial or constitutionally unprotected. *See* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (invalidating on First Amendment grounds statute making it misdemeanor to encourage procurement of abortions by advertisement).

48. 425 U.S. 748 (1976).

49. *See id.* at 754–65.

prescription-drug prices.[50] The Court determined that the consuming public's First Amendment interest in the free flow of truthful information about a lawful commercial activity outweighed the state's asserted interest in maintaining professionalism among licensed pharmacists.[51] The Court held that a state may not ban the "dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[52] While protected from complete prohibition by the First Amendment, the Court noted that commercial speech may be subject to certain forms of regulation.[53] Examples given of permissible commercial speech regulation were: (1) reasonable regulation of time, place, and manner of speech; (2) prohibition of advertising that is false or mis-leading; and (3) prohibition of advertisements that propose transactions that are themselves illegal.[54]

One year after granting commercial advertising First Amendment protection in *Virginia Pharmacy*, the U.S. Supreme Court extended similar protection to an attorney advertisement in *Bates v. State Bar of Arizona*.[55] In *Bates*, in contravention of state ethics rules,[56] two attorneys placed an advertisement in a newspaper listing fees for routine legal

50. *See id.* at 773. The Court had to determine whether the communication "I will sell you the X prescription drug at the Y price," which lacked any editorial position on a social or political issue, lay outside the protection of the First Amendment. *Id.* at 761. With respect to this commercial information, the Court noted that particular consumers' interests in such commercial information "may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate." *Id.* at 763.

51. *See id.* at 770. The Court observed that an advertising ban did not ensure professionalism. The actual effect of the ban was to keep the state's consuming public ignorant of certain costs. *See id.* at 769.

52. *Id.* at 773.

53. *See id.* at 770. The Court noted that the state is "free to require whatever professional standards it wishes of its pharmacists .... But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*

54. *See id.* at 771–72. These types of regulations are available with noncommercial speech as well. Time, place, and manner restrictions are permissible if they are not based on the content of the message, satisfy a significant governmental interest, and permit other alternative forms of speech. *See id.*

55. 433 U.S. 350 (1977).

56. The lawyers in *Bates* were sanctioned for violating DR 2-101(B) of the Arizona Code of Professional Responsibility (codified at Rule of Sup. Ct. of Ariz. 17A). *See id.* at 355–56. The applicable rule in Arizona in 1976, *see* Ariz. Rev. Stat. § 26 (Supp. 1976), was substantially similar to the disciplinary rule promulgated in the ABA's Model Code in 1969. *See supra* note 43 and accompanying text.

services.[57] As in *Virginia Pharmacy*, the *Bates* Court applied a balancing test to determine the constitutionality of the rule prohibiting lawyer advertising.[58] The Court weighed the public's need for and right to accurate information concerning the cost and availability of legal services against the state's arguments for the maintenance of legal professionalism.[59] Finding "the postulated connection between advertising and the erosion of true professionalism to be severely strained,"[60] the Court determined that public access to the legal system outweighed the state's interest, thereby prohibiting a "blanket suppression" of lawyer advertising.[61]

C. *Advertising Is Permitted Following* Bates *But Solicitation Continues to Be Condemned*

After *Bates*, the "focus of debate over lawyer advertising shifted from whether advertising should be permitted to how it should be regulated."[62] The ABA drafted and approved two proposed disciplinary rules

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57. *Bates*, 433 U.S. at 354.

58. *Id.* at 368–79. The speaker's expressional interests are not balanced against the general social need to regulate speech; rather, what is weighed is "the interest of the public in hearing the speech against the interest of that very same public in not hearing it." Jonathan Weinberg, *Constitutional Protection of Commercial Speech*, 82 Colum. L. Rev. 720, 746 (1982).

59. *See Bates*, 433 U.S. at 368–79. In support of the rule prohibiting lawyer advertising, the state presented a six-point analysis urging the validity of the regulation. The state argued that: (1) advertising would undermine the attorney's sense of dignity and self-worth, thereby degrading the legal profession; (2) because attorneys' services are so highly individualized, price advertisement would inherently mislead the consumer by ignoring the particular attorney's skills and by failing to tailor the information to a particular client's needs; (3) advertising would stir up litigious tendencies among the public; (4) high advertising costs would be passed on to consumers through increased fees and discourage young attorneys from setting up practice; (5) advertising would discourage quality service because attorneys would likely provide standard services to clients, regardless of actual need; and (6) a general restriction against advertising lends itself to tighter enforcement than a less restrictive alternative. *See id.*

60. *Id.* at 368. In discussing the public's need for information regarding the availability and terms of legal services, the Court noted the following: (1) the public has a right to make informed, intelligent choices concerning legal counsel; (2) lack of advertising encourages the public to avoid the legal profession out of fear of exorbitant fees or an inability to locate a competent attorney; and (3) advertising may help to reduce prices, making legal services fully available, particularly for "the not-quite-poor and the unknowledgeable." *Id.* at 370, 376–77.

61. *Id.* at 379, 383. The only constitutional issue addressed was whether a state can prevent an attorney from publishing a "truthful advertisement concerning the availability and terms of routine legal services." *Id.* at 384.

62. David W. Parr, *Direct-Mail Solicitation by Attorneys:* Bates *to* R.M.J., 33 Syracuse L. Rev. 1041, 1051 (1982).

governing the regulation of advertising.[63] One proposed rule construed *Bates* liberally, forbidding only "false, fraudulent, misleading or deceptive" advertising; in contrast, the second model reflected a narrow reading of *Bates*, listing numerous restrictions on the time, place, and manner of lawyer advertising.[64] The latter proposed rule, referred to as the "regulatory" model, was ultimately adopted by the ABA.[65] Known as the "laundry-list" approach, the Model Code was amended to allow advertising by explicitly designating twenty-five categories of information a lawyer could include in a publication regarding the lawyer's services.[66]

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63. *See* ABA, *Board of Governors Report* 177B (1977).

64. *Id.* at 5, 11–30.

65. *See Model Code of Professional Responsibility* DR 2-101, 2-102 (1980). The ABA House of Delegates recommended that both of the proposed rules be sent to the individual states for consideration. *See* John R. Welch, Bates, Ohralik, Primus—*The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 Baylor L. Rev. 585, 603 (1978). While the ABA acted expeditiously in revamping its model disciplinary rule on advertising, the individual jurisdictions' reaction to *Bates* was hesitant and a number of states were slow to formulate new advertising standards. *See* Geoffrey C. Hazard et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1086 (1983).

66. *See Model Code of Professional Responsibility* DR 2-101. That section was amended as follows:

DR 2-101 Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;

Although it granted partial First Amendment protection to lawyer advertising, the *Bates* Court specifically reserved the question of the permissible regulatory scope of in-person client solicitation by lawyers.[67] However, not long after *Bates*, the Court addressed the matter of in-person solicitation of clients by lawyers in the companion cases *In re Primus*[68] and *Ohralik v. Ohio State Bar Association*.[69]

In *Primus*, a cooperating lawyer with the American Civil Liberties Union (ACLU) addressed women who had been sterilized as a condition of continued receipt of government benefits, advising them of their legal rights and suggesting that a lawsuit was possible.[70] Lawyer Edna Primus was disciplined for later sending a letter to one of these women, advising

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(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Membership in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Model Code of Professional Responsibility DR 2-101 (1980).

67. Bates v. State Bar, 433 U.S. 350, 366 (1977).

68. 436 U.S. 412 (1978).

69. 436 U.S. 447 (1978).

70. *In re* Primus, 436 U.S. at 414–16.

her that the ACLU would provide free legal representation should she sue the doctor who performed her sterilization surgery.[71] Upon review, the U.S. Supreme Court struck down the application of designated disciplinary rules, granting full First Amendment protection to the lawyer's speech.[72] The Court reasoned that Primus's actions constituted an expression of her political beliefs and the ACLU's legitimate objectives.[73] While recognizing that the state generally had the power to regulate the legal profession,[74] the Court held that the solicitation deserved the broad protection granted to political expression by the First Amendment, instead of the more limited protection afforded commercial speech.[75]

In contrast with *Primus*, the lawyer disciplined in *Ohralik* solicited two eighteen-year-old automobile-accident victims on a face-to-face basis, offering his services for a contingency fee.[76] Shortly after the accident, lawyer Albert Ohralik visited one of the victims in the hospital and the other at her home.[77] He defended his actions by saying that in-

71. *See id.* The Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina disciplined attorney Edna Primus for soliciting a client on behalf of the ACLU and for soliciting a client after having provided unsolicited legal advice in violation of DR 2-103(D)(5)(a) and (c), and DR 2-104(A)(5) of the disciplinary rules of the Supreme Court of South Carolina. *See Primus*, 436 U.S. at 416, 418–21.

72. The Court held that the application of the South Carolina disciplinary rules violated the First and Fourteenth Amendments. *See id.* at 439.

73. *See id.* at 422, 431, 439. Relying primarily on *NAACP v. Button*, 371 U.S. 415 (1963), the Court viewed Primus's speech as political rather than commercial. *See id.* at 431–32. In *Button*, the Court characterized activities by NAACP attorneys, in which they arranged community meetings to discuss school desegregation and offered to represent attendees in legal proceedings to achieve desegregation, as "modes of expression and association protected by the First and Fourteenth Amendments." *NAACP*, 371 U.S. at 420–21, 428. The Court held that solicitation of prospective desegregation litigants was included within the right to associate for the advancement of political goals and ideas, and thus could not be prohibited by the state "under its power to regulate the legal profession." *Id.* at 428–30.

74. *See Primus*, 436 U.S. at 432. The state claimed that the disciplinary action against Primus was "part of a regulatory program aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils . . . in solicitation." *Id.* While not denying the power of the state to take measures to guard against such matters, the Court reiterated that "'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.'" *Id.* at 426 (quoting United Mine Workers of America v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967).

75. *See id.* at 431, 434, 437–38.

76. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449–51 (1978).

77. *See id.* at 450–51. The Court found the facts to be a "striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." *Id.* at

person solicitation constituted commercial speech and therefore was protected by the First Amendment.[78] In rejecting this argument, the Court distinguished the advertisement in *Bates* from in-person solicitation, noting the latter "may exert pressure [on the accident victim] and often demands an immediate response," leaving the victim little "opportunity for comparison or reflection."[79] The Court noted that the lawyer's conduct in *Ohralik* was primarily to advance his own pecuniary interests, rather than to vindicate the legal rights of others, or exercise political expression or associational freedom.[80] Given the state's compelling interest in preventing the potential for overreaching inherent in solicitation, the rule restricting a lawyer's in-person solicitation of employment was rationally justified.[81] The message to the legal

468. The Court's condemnation of Ohralik's conduct in its synthesis of the case illustrates the extreme nature of his acts:

> He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the facts of his agreement with Carol, to induce Wanda to say "O.K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

Id. at 467.

78. *See id.* at 455. Ohralik argued that such solicitation may provide an individual with "information about his or her legal rights and remedies," thereby promoting informed decision making. *Id.* at 458. The Court rejected this justification, noting that the applicable disciplinary rules neither prohibit a lawyer from communicating such information to individuals nor from recommending that they obtain counsel. *See id.* What is prohibited is "using the information as bait" to obtain a client for a fee and accepting employment as a result of the unsolicited advice given. *Id.* Ohralik was disciplined under DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility. *See id.* at 453 & n.9. The applicable rules in Ohio were identical to those promulgated by the ABA in 1969. *See supra* notes 43–44 and accompanying text.

79. *Id.* at 457. The Court explained that unlike solicitation, advertising provides information to the public and leaves individuals "free to act upon it or not." *Id.* The Court added that "[t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking [sic]; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual." *Id.*

80. *See id.* at 458.

81. *See id.* at 464–67. Commentators have noted that the Court abandons the analytical framework developed in commercial-speech cases when it considers non-advertising forms of

profession was that lawyers are permitted to advertise, but commercial, non-political solicitation is prohibited.[82]

D. Central Hudson *Test for Regulation of Commercial Speech*

In 1980, the U.S. Supreme Court rendered a decision that helped clarify the degree of constitutional protection to which commercial speech is entitled. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[83] a case not involving lawyer advertising, the Court advanced a four-part test to evaluate an order banning promotional advertising that might stimulate the use of electricity.[84] The four-part test formulated by the Court required that: (1) the speech must not concern an unlawful activity or be misleading, (2) the restriction on commercial speech must serve a substantial governmental interest, (3) the regulation must directly advance the asserted governmental interest, and (4) the regulation must be "no more extensive than is necessary to serve that interest."[85] The Court struck down the order, finding that the Public Service Commission satisfied the first three prongs of the test,[86] but

promotion by professionals. Specifically, it does not discuss benefits and applies a less-rigorous test to measure the importance of costs. *See, e.g.*, Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45, 57 (1985).

82. *See* Hill, *supra* note 18, at 398.

83. 447 U.S. 557 (1980).

84. *See id.* at 558–60. The New York Public Service Commission originally promulgated the order during the energy shortage of the early 1970s, concerned it would not have sufficient fuel reserves to meet consumer demands for the 1973–74 winter. *See id.* at 559.

85. *Id.* at 566. The fourth prong of the *Central Hudson* test came to be known as the "least restrictive means" analysis, whereby a state had to show a commercial-speech restriction was the least-restrictive means available to further its interests in order for the restriction to withstand First Amendment scrutiny. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 644, 651 n.14 (1985) (assuming validity of "least restrictive means" analysis in dicta). In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Court stated that some standard short of a least restrictive means is required for a commercial-speech restriction to be valid. *Id.* at 477; *see also infra* notes 104–11 and accompanying text.

86. There was no claim that the utility company's advertisements were misleading, deceptive, or related to unlawful activity. *See Central Hudson*, 477 U.S. at 566. The Court found the Commission's interests in energy conservation, and in fair, efficient utility rates to be substantial. *See id.* at 568–69. While the Court determined that the state's argument concerning the effect of advertising on utility rates was "at most tenuous" and "highly speculative," it did find that the bans on the advertisements directly advanced energy conservation. *Id.* at 569.

failed to satisfy the fourth prong because it did not show that a more limited speech regulation would not protect the governmental interest.[87]

In the 1982 case of *In re R.M.J.*,[88] the U.S. Supreme Court implemented the four-part *Central Hudson* standard and found that a rule limiting lawyer advertising to ten delineated categories of information violated the First Amendment.[89] Applying the *Central Hudson* standard, the Court found impermissible a rule prohibiting mailings to persons outside of specifically delineated classifications of individuals.[90] The *R.M.J.* Court was unable to find "that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception."[91]

The Court used the *Central Hudson* "least restrictive means" standard to evaluate rules relating to the commercial speech of lawyers twice more during the 1980s.[92] As a result, courts tended to invalidate jurisdictional rules that prohibited designated categories of speech, but courts tended to uphold rules that required disclosure of information.[93]

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87. *See id.* at 571. The rule failed under the least restrictive means test because all advertising was restricted without any showing that a more limited restriction would not adequately further the interest in energy conservation. *See id.* at 569–71. For example, the ban might conceivably prevent the utility from advertising "products and services that use energy efficiently." *Id.* at 570.

88. 455 U.S. 191 (1982).

89. *See id.* at 206–07. The lawyer in question was privately reprimanded for violating Missouri's version of DR 2-101(B) that allowed lawyers to "'publish . . . in newspapers, periodicals and the yellow pages of telephone directories'" the following: "'name; address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for [ten] specified routine services.'" *Id.* at 194 (quoting Mo. Rev. Stat., Sup. Ct. R. 4, DR 2-101(B) (1978)). An addendum to the rule prescribed how an attorney could list areas of practice in an advertisement. *See id.* at 194–95 & 195 n.6 (quoting Mo. Rev. Stat., Sup. Ct. R. 4, Addendum III (1977)). The lawyer included information in advertisements other than that explicitly permitted by rule. *See id.* at 196–97.

90. *See id.* at 206–07. The lawyer was charged with violating Missouri's version of DR 2-102(A)(2) which prohibited a lawyer from mailing a "'brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters'" to anyone other than "'lawyers, clients, former clients, personal friends, and relatives.'" *Id.* at 196 (quoting Mo. Rev. Stat., Sup. Ct. R. 4, DR 2-102(A)(2)). The lawyer mailed a letter announcing the opening of his new office to individuals with whom he had no personal or professional ties. *See id.*

91. *Id.* at 207.

92. *See infra* notes 104–11.

93. *See infra* notes 104–11.

E. Model Rules of Professional Conduct Permit Advertising But Prohibit Solicitation

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct (Model Rules).[94] The movement that led to the Model Code's replacement began in the 1970s, when members of the bar contended that the tripartite structure of the Model Code was confusing.[95] In addition to this, the Model Code was criticized as being irrelevant, ambiguous, and contradictory.[96]

With the promulgation of the Model Rules in 1983, the sphere of acceptable lawyer advertising was expanded in response to case law, though solicitation of clients continued to be prohibited. The Model Rules addressed lawyer communications generally in Rule 7.1, which provided that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[97] The Model Rules then specifically addressed advertising in Rule 7.2, which allowed lawyers to advertise through public media, provided they complied with designated record-keeping requirements.[98] Maintaining the condemna-

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94. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* xxvii (Prentice Hall L. & Bus.) (Supp. 1988). The late Robert J. Kutak, former chair of the Commission on Evaluation of Professional Standards, took the position that the Model Rules define the law of lawyering and seek to guide the conscientious lawyer to balance competing duties in the professionally responsible representation of clients. *See* Robert J. Kutak, *The Law of Lawyering*, 22 Washburn L.J. 413, 418 (1983).

95. *See* Hazard & Hodes, *supra* note 94, at xxxv.

96. *See* Robert J. Kutak, *Model Rules: Law For Lawyers or Ethics For the Profession*, 38 Rec. A.B. City N.Y. 140, 142–43 (1983); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702 (1977); *see also* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211, 212 (1982).

97. *Model Rules of Professional Conduct* Rule 7.1 (1983). Model Rule 7.1 characterized a communication as false or misleading if it:

> (a) contains a material representation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Model Rules of Professional Conduct Rule 7.1.

98. *Model Rules of Professional Conduct* Rule 7.2 (1983). Model Rule 7.2 provided:

> Rule 7.2 Advertising

tion of solicitation, Model Rule 7.3 echoed language from *Ohralik*, and used the substantial motive of a "lawyer's pecuniary gain" to delineate impermissible conduct.[99] The 1983 version of Model Rule 7.3 permitted general mailings but not targeted mailings, the latter being considered nearer to solicitation than advertising.[100]

F. Compelled Disclosure and Direct-Mail Solicitation Permitted

In 1985, the U.S. Supreme Court, in *Zauderer v. Office of Disciplinary Counsel*,[101] again found two prohibitions on lawyers' speech impermissible: (1) prohibitions on the solicitation of legal business through advertisements containing advice and information regarding specific legal problems, and (2) prohibitions against the use of illustrations in advertising.[102] The *Zauderer* Court determined that the

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(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor [advertising], radio or television, or through written communication not involving solicitation as defined in 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.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Id.

99. *See supra* notes 79–80 and accompanying text. Model Rule 7.3 provided as follows:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Model Rules of Professional Conduct Rule 7.3 (1983).

100. *Model Rules of Professional Conduct* Rule 7.3 (1983); *see also* Hill, *supra* note 41, at 52.

101. 471 U.S. 626 (1985).

102. *Id.* at 632–33, 655–56. A lawyer ran two newspaper advertisements. One informed readers that he would represent individuals charged with drunk-driving and would refund his legal fee if the client was convicted on a drunk driving charge. *See id.* at 629–30. The second ad displayed a drawing of an intrauterine device, accompanied by the heading "DID YOU USE THIS IUD?" and

state failed to meet its burden of showing that the ban on advertising directly advanced substantial state interests through the least restrictive means available.[103] However, although it found that an attorney may not be disciplined for the solicitation of legal business through print advertising containing truthful, non-deceptive information and advice about the legal rights of potential clients,[104] the *Zauderer* Court upheld a rule that required advertisements to explain the method by which contingency fees would be computed.[105] The Court reasoned that because

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informed readers his firm would represent women injured by their use of the Dalkon Shield Intrauterine Device. *See id.* at 630–31.

The lawyer was charged with violating Ohio Disciplinary Rule DR 2-101(A) because the first advertisement was "false, fraudulent, misleading, and deceptive to the public" by offering unethical representation on a contingency-fee basis in a criminal case. *Zauderer*, 471 U.S. at 631 (citing Ohio Disciplinary Rule DR 2-101(A)). Upon review, a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found the advertisement deceptive for another reason: a client might be convicted of a lesser offense than drunk driving and still be liable for fees, a message not stated in the advertisement. *See id.* at 634.

Regarding the second advertisement, the lawyer was charged with violating Ohio Disciplinary Rules 2-101(B), 2-103(A) and 2-104(A). *See id.* at 632–33. The lawyer allegedly violated DR 2-101(B) because the advertisement contained an illustration, was not dignified, and contained information that fell outside the twenty designated informational categories to which attorney advertisements were limited. *See id.* at 632. Also, the advertisement failed to comply with DR 2-101(B)(15), which provided that any contingent fee advertisement disclose "whether percentages are computed before or after deduction of court costs and expenses." *Id.* at 633. Disciplinary Rule 2-103(A) prevents solicitation of employment of a person who did not seek legal advice. *See id.* at 633. Disciplinary Rule 2-104(A) prevents a lawyer from accepting employment that results from such unsolicited advice. *See id.* The Ohio disciplinary rules at issue were similar to the disciplinary rules promulgated in the Model Code; however, certain designated informational categories differed in DR 2-101(B). *Compare Zauderer*, 471 U.S. at 632–33 n.4, *with Model Code of Professional Responsibility* DR 2-101(B), *supra* note 66 (Ohio rule somewhat more restrictive than comparable rule in *Model Code of Professional Responsibility*).

103. *See* 471 U.S. at 644, 648–49. The Court also rejected the premise that the use of the Dal-kon Shield illustration was tantamount to an undignified advertisement. *See id.* at 647. As to requiring that advertisements be dignified, the Court stated the following:

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.

Id. at 647–48. This discussion has been referred to as the "death of dignity" since it contributed to the decision to eliminate the requirement that lawyer advertisements be dignified. Hill, *supra* note 18, at 403 n.189.

104. *See* 471 U.S. at 647. Within the context of examining commercial speech restrictions, the U.S. Supreme Court continually has focused on the dissemination of truthful information to consumers. *See* McChesney, *supra* note 81, at 99.

105. 471 U.S. at 653. The Court recognized that in some situations a compulsion to speak may be equally violable of the First Amendment as a prohibition against speech. However, as long as

the informational value to consumers is the primary justification for protecting commercial speech, compelled disclosure can be less rigorously scrutinized than flat prohibitions on the dissemination of information.[106]

In the 1988 case of *Shapero v. Kentucky Bar Ass'n*,[107] the U.S. Supreme Court focused on the prohibition against targeted, direct-mail solicitations and rejected the state's contention that an absolute ban on such conduct was permissible because of the serious potential for abuse inherent in all direct solicitation by lawyers.[108] Noting that a targeted direct-mailing "poses much less risk of overreaching or undue influence" than in-person solicitation,[109] the Court determined that less restrictive means existed for regulating its potential abuses.[110] Lacking in direct-mail solicitation was "'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.'"[111]

In response to the *Shapero* decision, the Model Rules were amended to permit targeted mailings. While maintaining the prohibition of in-person and live telephone contact with prospective clients, Model Rule 7.3 was changed to reflect the view that direct-mail solicitation is

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disclosure requirements are reasonably related to a state's interest in preventing deception of the consumer, the lawyer's rights receive adequate protection. *See id.* at 650–51.

106. *See id.* The validation of this Ohio Disciplinary Rule marked the U.S. Supreme Court's first affirmation of a bar's disciplinary action against a lawyer for violating its advertising rules since *Bates*. *See* Maute, *supra* note 34, at 503.

107. 486 U.S. 466 (1988).

108. *See id.* at 473–75. The lawyer prepared a letter to send to potential clients known to be defendants in foreclosure suits, offering to give such individuals "FREE information" on how they could keep their homes. *Id.* at 469. The applicable rule in Kentucky at the time was Supreme Court of Kentucky Rule 3.135(5)(b)(i), providing that:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Shapero, 486 U.S. at 470 n.2. Convinced that the principles set forth in *Zauderer* compelled the deletion of this rule, the Supreme Court of Kentucky replaced Rule 3.135(5)(b)(i) with Model Rule 7.3, which also prohibited targeted, direct-mail solicitation. *See id.* at 470–71.

109. *Id.* at 475 (citing *Zauderer*, 471 U.S. at 642) (internal quotations omitted). The Court went on to note that "[u]nlike the potential client with the badgering advocate breathing down his neck," the recipient of a targeted letter can simply throw it away. *Id.* at 475–76.

110. *See id.* at 476.

111. *Id.* at 475 (quoting *Zauderer*, 471 U.S. at 642).

comparable to general mailings.[112] Model Rule 7.2 on "Advertising" was also amended to reflect the changes incorporated into Model Rule 7.3.[113]

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112. Model Rule 7.3 on "Direct Contact with Prospective Clients" was amended to provide the following:

(a) A lawyer shall not by in-person or live telephone contact solicit 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.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone 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 or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication . . . .

Model Rules of Professional Conduct Rule 7.3 (1983) (amended 1989).

113. Model Rule 7.2 was amended to read as follows:

(a) Subject to the requirements of rule 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(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.

(c) 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 not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Model Rules of Professional Conduct Rule 7.2 (1983) (amended 1990). Model Rule 7.2 was amended in 1989 and 1990. The 1989 amendments were in response to the *Shapero* decision and subsequent amendments to Model Rule 7.3. *See* Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 338 (1997). The amendment in 1990 was in response to the addition of Model Rule 1.17 regarding the sale of a law practice. *See id.*

G. Central Hudson *Test Clarified*

One year after *Shapero*, the U.S. Supreme Court considered a commercial-speech case that did not involve lawyer advertising, *Board of Trustees v. Fox.*[114] Reviewing the constitutionality of a university regulation that prohibited private commercial enterprises from operating in facilities furnished by the university,[115] the Court sought to modify the least-restrictive-means analysis formulated in *Central Hudson.*[116] In essence, the Court asserted that in evaluating restrictions on commercial speech, the last prong of the *Central Hudson* test could be satisfied by a fit between the state interest and the regulation that is "reasonable," "in proportion to the interest served," or "narrowly tailored to achieve the desired objective."[117] Thus, the *Fox* Court gave the standard that had been used to evaluate the constitutionality of lawyer advertising cases in the 1980s a "more flexible meaning."[118]

In 1990, the Court upheld a lawyer's right to state truthfully that he was certified as a civil-trial specialist by the National Board of Trial Advocacy in *Peel v. Attorney Registration and Disciplinary Commission.*[119] Although the lawyer's state did not recognize

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114. 492 U.S. 469 (1989).

115. The specific purported violation of the school's regulation was a type of "Tupperware" home products party held in a dormitory room. *See id.* at 472.

116. In evaluating the university's restriction on commercial speech, the Court relegated certain portions of their language in *Central Hudson* to dicta, stating:

> There are undoubtedly formulations in some of our cases that support this view—for example, the statement in *Central Hudson* itself that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." We have indeed assumed in dicta the validity of the "least-restrictive means" approach.

Id. at 476.

117. *Id.* at 480. The Court stated that in evaluating restrictions on commercial speech, its decisions require the following:

> [A] "fit" between the legislature's ends and the means chosen to accomplish those ends,"... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," ... that employs not necessarily the least restrictive means but... a means narrowly tailored to achieve the desired objective.

Id. (citations omitted).

118. *Id.* at 477. The more flexible meaning for *Central Hudson* in *Fox* appeared to work in favor of the state. *See* Hill, *supra* note 18, at 407–09.

119. 496 U.S. 91, 111 (1990). The lawyer's letterhead contained the following information: "Certified Civil Trial Specialist," "By the National Board of Trial Advocacy," and "Licensed: Illinois, Missouri, Arizona." *Id.* at 96. The Court considered whether the statement in the letterhead

certification of specialties within the practice of law,[120] the Court in *Peel* held that the ban on disseminating this information was constitutionally invalid because it was "broader than reasonably necessary to prevent the perceived evil."[121] Applying a similar analysis in *Ibanez v. Florida Department of Business & Professional Regulation*[122] in 1994, the Court upheld the right of a lawyer to communicate his multiple credentials of certified public accountant and certified financial planner, as long as those credentials were truthful.[123]

In 1995, the U.S. Supreme Court employed the redefined *Central Hudson* test in *Florida Bar v. Went for It, Inc.*,[124] to uphold a Florida rule that prohibited lawyers from mailing solicitation letters to victims and their families for thirty days following an accident.[125] The Florida Bar's interests in protecting injured individuals from invasive conduct by lawyers and in preventing the erosion of confidence in the legal

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was misleading, and if not, whether the "potentially misleading character of such statements" created a state interest sufficiently substantial to justify a categorical ban on their use. *Id.* at 100.

120. Certification of specialties is addressed in Model Rule 7.4. *Model Rules of Professional Conduct* Rule 7.4 (1983) (amended 1994).

121. *Peel*, 496 U.S. at 107. The Court found the state's "concern about the possibility of deception [was] not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.* at 111. "Disclosure of information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys." *Id.*

122. 512 U.S. 136 (1994).

123. *Id.* at 148–49. The Court noted that unsupported assertions by the state would not justify the prohibition of lawyer advertising: "'Mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.* at 143 (quoting Edenfield v. Fane, 507 U.S. 761, 770–771 (1993)). In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court upheld the right of certified public accountants (CPAs) to solicit business in person, conduct which had been forbidden under CPA regulations. *Id.* at 763–64, 777.

124. 515 U.S. 618 (1995).

125. *See id.* at 635. After a two-year study of the effects of lawyer advertising on the public, the Florida Bar adopted Rule 4-7.4(b)(1) which provides:

> A lawyer shall not send, or knowingly permit to be sent . . . a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

Id. at 620 (quoting *Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(1)).

profession were substantial, according to the Court.[126] Further, in light of the statistical and anecdotal evidence presented by the Bar,[127] the Court found the requirement that the challenged regulation advance a substantial state interest was satisfied.[128] Finally, finding the Bar's regulation to be "narrow both in scope and duration," the Court determined that the relationship between the Bar's interests and the means chosen to serve them withstood scrutiny under the *Central Hudson* test.[129] After evaluating the Florida Bar rule under the "more flexible meaning" of *Central Hudson*, the Court upheld the thirty-day

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126. *See id.* at 625. Finding the interests posited by the Florida Bar "substantial," the Court stated the following:

> We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) . . . . Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." *See* Edenfield [v. Fane, 507 U.S. 761, 769 (1993)]. In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey v. Brown, 447 U.S. 455, 471 (1980) . . . . Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." Frisby v. Schultz, 487 U.S. 474, 484–85 (1988) . . . .

Went For It, 515 U.S. at 625.

127. A summary of a two-year study on lawyer advertising and solicitation, unrebutted by the respondents, was submitted by the Florida Bar to support its contention that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession." *Id.* at 626. Specifically, the Court noted the following:

> Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy . . . . A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry" . . . . Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail.

Id. at 627 (citations omitted). While not emphasized by the Court, the above-noted data suggests that the majority of individuals responding did not have negative reactions to this type of communication, the profession, or the judicial process. Also, some data suggests that lawyer advertising serves to elevate the image of the legal profession among the public. *See* Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. Legal Stud. 503, 504 (1998).

128. *See Went For It*, 515 U.S. at 628.

129. *Id.* at 635.

restriction.[130] The decision narrowed *Shapero* by suggesting that "direct mail to those who may be suffering trauma is more like in-person solicitation than print advertising."[131]

III. INDIVIDUAL STATE RULES AND THEIR INTERPRETATIONS WITHIN THE CONTEXT OF THE INTERNET

The law is a self-regulated profession,[132] and within this context, the several states operate as separate entities with their own rules governing the lawyers of their jurisdictions.[133] As a general practice, the individual states, with some modification, adopt and implement the ethics rules promulgated by the ABA.[134] However, when addressing the rules related to lawyer advertising and solicitation, modification of the Model Rule standards is the norm, not the exception.[135] Of the forty-three states that

130. *Id.*; *see also infra* note 151 and accompanying text.

131. *See* ABA Comm'n on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purpose of Discussion* 12 (July 1998) [hereinafter *White Paper*].

132. *See* Stephen Rubin, *The Legal Web of Professional Regulation*, in *Regulating the Professions* 29, 31–32 (Roger D. Blair & Stephen Rubin eds., 1980).

133. *See* Hill, *supra* note 41, at 44; Peter Krakaur, *Internet Advertising: States of Disarray?*, N.Y. L.J., Sept 15, 1997, at 54. In addition, some states have special statutes that govern the conduct of lawyers. *See* Hill, *supra* note 41, at 44–45.

134. *See generally* Nat'l Rep. Legal Ethics, *supra* note 41. The Model Rules, which use a format of rules and comments, today represent the primary standard by which the conduct of lawyers is measured. This notwithstanding, significant revision to the Model Rules can be expected because the Rules are currently under review by a special commission appointed by the ABA in 1997. The ABA, under the leadership of then president Jerome Shestack, appointed the Commission on Evaluation of the Rules of Professional Conduct, commonly referred to as "Ethics 2000," to undertake a review of the Model Rules. At the time of the writing of this article, Ethics 2000 had released drafts of proposed rule changes for public discussion on March 23, 1999, November 15, 1999, and February 21, 2000. *See* Center for Prof'l Resp., *Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct* (visited March 1, 2000) <http://www.abanet.org/cpr/ethics2k.html>.

135. *See* Hazard & Hodes, *supra* note 94, § AP4:102, at 1259; H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73, 90 (1997) (noting that states customized rules acting on invitation of ABA Special Committee on Implementation of Model Rules); Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. Legal Prof. 17 (1993) (noting that states that had recently adopted Model Code were hesitant to again adopt new rules); *White Paper*, *supra* note 131, at 6 (noting that timing of Model Rules, constitutional hurdles of provisions, and general dissatisfaction with content contributed to significant state differences in area of lawyer communications).

have adopted the Model Rules,[136] only nine have provisions on lawyer communications which are identical to those in the Model Rules.[137]

A. State Rules on Lawyer Communications Vary

Approximately eighty percent of the states that have adopted the Model Rules have provisions on lawyer communications that vary from Model Rules 7.1–7.3.[138] The provisions on communication that differ from the Model Rules commonly concern standards relating to contingent-fee disclosures and the emotional vulnerability of prospective clients. Twenty-three states have regulatory provisions requiring the lawyer to disclose a client's liability for costs and how the lawyer's fee is to be computed in relation to those costs.[139] Twenty-four states have a rule precluding retention of a client when the lawyer "knows or reasonably should know" the mental or emotional state of the individual makes it unlikely reasonable judgment in employing a lawyer would be exercised.[140] Differences in state rules are also manifested in filing and

136. *See Vermont Adopts New Ethics Code Based Largely on ABA Model Rules*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) No. 22, at 561 (Nov. 24, 1999).

137. Only nine states have provisions on advertising and solicitation that track those in the Model Rules. *See Alaska Rules of Prof. Conduct* Rules 7.1–7.3 (1999); *Del. Law. Rules of Prof. Conduct* Rules 7.1–7.3 (1999); *Haw. Rules of Prof. Conduct* Rules 7.1–7.3 (1999); *Idaho Rules of Prof. Conduct* Rules 7.1–7.3 (2000); *N.H. Rules of Prof. Conduct* Rules 7.1–7.3 (2000); *Utah Rules of Prof. Conduct* Rules 7.1–7.3 (1999); *Wash. Rules of Prof. Conduct* Rules 7.1–7.3 (1999); *W. Va. Rules of Prof. Conduct* Rules 7.1–7.3 (2000); *Wyo. Rules of Prof. Conduct* Rules 7.1–7.3 (1999).

138. *See* ABA Comm'n on Resp. in Client Dev., *Links to State Ethics Rules Governing Lawyer Adver., Solicit. and Mktg.*, (visited June 6, 2000) <http://www.abanet.org/adrules/home.html>; *see also* William E. Hornsby, Jr., *Marketing and Legal Ethics: The Boundaries of Promoting Legal Services* 162–71 (2000).

139. Twenty-three states have provisions relating to contingent-fee disclosures. *See Ariz. Rules of Prof. Conduct* ER 7.1(e)(1) (2000); *Cal. Rules of Prof. Conduct* Rule 1-400, Standard 14 (1999); *Conn. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Colo. Rules of Prof. Conduct* Rule 7.1(d) (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.2(c)(4) (2000); *Ga. Code of Prof. Resp.* Standard 5(B) (2000); *Iowa Code of Prof. Resp.* DR 2-101(D)(3) (2000); *Ky. Rules of Prof. Conduct* Rule 7.04 (2000); *La. Rules of Prof. Conduct* Rule 7.1(a)(viii)(A) (1999); *Md. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Minn. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Miss. Rules of Prof. Conduct* Rule 1.5(c) (2000); *Mo. Rules of Prof. Conduct* Rule 4-1.5(c) (2000); *Nev. Rules of Prof. Conduct* Rule 198(8) (1999); *N.J. Rules of Prof. Conduct* Rule 7.1(a)(4) (1999); *N.M. Rules of Prof. Conduct* Rule 16-702(E)(3) (2000); *N.Y. Code of Prof. Resp.* DR 2-101(*l*) (1999); *Ohio Code of Prof. Resp.* DR 2-101(E)(1)(c) (2000); *Okla. Rules of Prof. Conduct* Rule 7.2(g) (2000); *Pa. Rules of Prof. Conduct* Rule 7.2(h) (2000); *R.I. Rules of Prof. Conduct* Rule 7.2(e) (2000); *S.D. Rules of Prof. Conduct* Rule 7.2(g)(1) (1999); *Tex. Disciplinary Rules of Prof. Conduct* Rule 7.04(h) (1999).

140. Twenty-four states have provisions relating to the emotional vulnerability of prospective clients. *See Ala. Rules of Prof. Conduct* Rule 7.3(b)(1)(vi) (2000); *Ariz. Rules of Prof. Conduct* ER 7.3(d)(4) (2000); *Cal. Rules of Prof. Conduct* Rule 1-400, Standard 3 (1999); *Conn. Rules of Prof.*

screening requirements. Fourteen states require that prior to or concurrent with dissemination, advertisements be filed with,[141] or screened by,[142] designated bar or court entities.

In some jurisdictions the matter of endorsements and dramatizations in lawyer advertising is specifically addressed. States have prohibited the use of testimonials, endorsements,[143] and dramatizations,[144] or have permitted their use only with disclosures.[145] Some states incorporate safe-

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Conduct Rule 7.3(b)(1) (2000); *D.C. Rules of Prof. Conduct* Rule 7.1(b)(3) (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(1)(F) (2000); *Ga. Code of Prof. Resp.* Standard 6(D)(5) (1999); *Ill. Rules of Prof. Conduct* Rule 7.3(b)(1) (2000); *Ind. Rules of Prof. Conduct* Rule 7.1(c)(6) (1999); *La. Rules of Prof. Conduct* Rule 7.1(a)(viii)(A) (1999); *Me. Code of Prof. Resp.* Rule 3.9(b)(6) (2000); *Md. Rules of Prof. Conduct* Rule 7.3(b)(1) (2000); *Mass. Rules of Prof. Conduct* Rule 2-103(B)(1) (1999); *Mo. Rules of Prof. Conduct* Rule 7.3(c)(1) (1999); *Mont. Rules of Prof. Conduct* Rule 7.3(a) (2000); *Neb. Code of Prof. Resp.* DR 2-104(B)(1) (1999); *N.M. Rules of Prof. Conduct* Rule 16-701(C)(3) (2000); *N.Y. Code of Prof. Resp.* DR 2-103(a)(2)(iv) (1999); *N.D. Rules of Prof. Conduct* Rule 7.1(b)(3) (1999); *Or. Code of Prof. Resp.* DR 2-101(D)(1) (1999); *Pa. Rules of Prof. Conduct* Rule 7.3(b)(1) (2000); *R.I. Rules of Prof. Conduct* Rule 7.3(b)(2)(e) (2000); *Va. Rules of Prof. Conduct* Rule 7.3(a)(2) (2000); *Wis. Rules of Prof. Conduct* Rule 7.3(d)(1) (1999). This language is largely the result of language used in a proposed draft for Model Rule 7.3 that the ABA rejected. *See* Hill, *supra* note 41, at 110. Following the appointment of a special commission by the ABA in 1977 to examine the Model Code, a number of proposed drafts of the new Model Rules were formulated and circulated by the ABA Commission on Evaluation of Professional Standards. *See id.* The original language of Model Rule 7.3, as proposed by the Commission (referred to as the "Kutak Commission" because of its chairman, Robert J. Kutak), contained language relating to the physical, mental, or emotional state of a client. *See id.* The ABA subsequently rejected this language, but it was adopted by a number of states as they reviewed and implemented versions of the Model Rules. *See id.*

141. Twelve states have advertisement-filing requirements. *See Ala. Rules of Prof. Conduct* ER 7.2 (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(2)(C) (2000); *Ind. Rules of Prof. Conduct* Rule 7.3(c) (1999); *Ky. Rules of Prof. Conduct* Rule 7.05(b) (1999); *Miss. Rules of Prof. Conduct* Rule 7.2(p) (2000); *N.M. Rules of Prof. Conduct* Rule 16-707(B) (2000); *N.Y. Code of Prof. Resp.* DR 2-101(F)(1) (1999); *R.I. Rules of Prof. Conduct* Rule 7.3(b)(1)(b) (2000); *S.C. Rules of Prof. Conduct* Rule 7.3(d) (1999); *Tenn. Rules of Prof. Conduct* Rule 2-101(D)–(F) (2000); *Tex. Disciplinary Rules of Prof. Conduct* Rule 7.07(a), (b) (1999); *Wis. Rules of Prof. Conduct* Rule 7.3(b) (1999). Arizona and Iowa make such a rule applicable only to direct-mail solicitations. *See Ariz. Rules of Prof. Conduct* Rule 7.3(c) (2000); *Iowa Code of Prof. Resp.* DR 2-101(A)(4)(d) (2000).

142. Four states have screening requirements. *See Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(2)(C); *Ky. Rules of Prof. Conduct* Rule 7.05(b)(2); *N.M. Rules of Prof. Conduct* Rule 16-707(E) (2000); *Tenn. Rules of Prof. Conduct* Rule 2-101(F) (2000).

143. Five states prohibit the use of testimonials or endorsements. *See Fla. Rules of Prof. Conduct* Rule 4-7.2(b)(1)(E) (2000); *Ind. Rules of Prof. Conduct* Rule 7.3(d)(3) (1999); *Nev. Rules of Prof. Conduct* Rule 195(4) (1999); *N.M. Rules of Prof. Conduct* Rule 16-701(A)(2) (2000); *Ohio Code of Prof. Resp.* DR 2-101(A)(3) (2000).

144. Three states prohibit dramatizations. *See Ark. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Miss. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Nev. Rules of Prof. Conduct* Rule 196(5) (1999).

145. Seven states permit the use of testimonials or endorsements, however, disclosures are required. *See Cal. Rules of Prof. Conduct* Rule 1-400, Standard 2 (1999); *La. Rules of Prof. Conduct* Rule 7.1(a)(vi) (1999); *Mo. Rules of Prof. Conduct* Rule 7.1(g) (1999); *Or. Code of Prof. Resp.* DR

harbor provisions in their regulations, which list permitted information presumed to be in compliance with the rules.[146] Other states require disclaimers,[147] for example: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."[148] Restrictions on direct mail also vary,[149]

2-101(A)(b) (1999); *Pa. Rules of Prof. Conduct* Rule 7.2(e) (2000); *Va. Rules of Prof. Conduct* Rule 7.1(4) (2000); *Wis. Rules of Prof. Conduct* Rule 7.1(a)(4) (1999). For instance, California requires language to the effect that "this testimonial or endorsement does not constitute a guarantee, warranty or prediction regarding the outcome of your legal matter." *Cal. Rules of Prof. Conduct* Rule 1-400, Standard 2; Seven states permit dramatizations but require disclosure. *See Cal. Rules of Prof. Conduct* Rule 1-400, Standard 13 (1999); *La. Rules of Prof. Conduct* Rule 7.1(a)(vi); *Mo. Rules of Prof. Conduct* Rule 7.1(g); *Or. Code of Prof. Resp.* DR 2-101(A)(6); *S.D. Rules of Prof. Conduct* Rule 7.1(c)(12) (1999); *Va. Rules of Prof. Conduct* Rule 7.1(a)(4); *Wis. Rules of Prof. Conduct* Rule 7.1(a)(4). In four states actors portraying lawyers or clients is either prohibited or must be disclosed. *See Iowa Code of Prof. Resp.* DR 2-101(B)(5) (2000); *Nev. Rules of Prof. Conduct* Rule 196(2) (1999); *Pa. Rules of Prof. Conduct* Rule 7.2(f) (2000); *S.D. Rules of Prof. Conduct* Rule 7.2(h) (1999).

146. Safe-harbor provisions are incorporated into the rules of 13 states. *See Ariz. Rules of Prof. Conduct* ER 7.1(d) (2000); *Conn. Rules of Prof. Conduct* Rule 7.2(h) (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.2(c)(10) (2000); *Ind. Rules of Prof. Conduct* Rule 7.1(b) (1999); *Iowa Code of Prof. Resp.* DR 2-101(C) (2000); *Ky. Rules of Prof. Conduct* Rule 7.05(1)(a) (1999); *Miss. Rules of Prof. Conduct* Rule 7.2(n) (2000); *Nev. Rules of Prof. Conduct* Rule 196(12) (1999); *N.M. Rules of Prof. Conduct* Rule 16-702(D) (2000); *N.Y. Code of Prof. Resp.* DR 2-101(C) (1999); *S.D. Rules of Prof. Conduct* Rule 7.2(f) (1999); *Tenn. Rules of Prof. Conduct* Rule 2-101(B) (2000); *Tex. Disciplinary Rules of Prof. Conduct* Rule 7.07(d) (1999).

147. Ten states require that disclaimers be included in solicitation materials. *See Ala. Rules of Prof. Conduct* Rule 7.2(e); *Fla. Rules of Prof. Conduct* Rule 4-7.3(b); *Iowa Code of Prof. Resp.* DR 2-101(B)(4)(c) (2000); *Miss. Rules of Prof. Conduct* Rule 7.2(d) (2000); *N.J. Rules of Prof. Conduct* Rule 7.3(b)(4)(ii) (1999); *N.M. Rules of Prof. Conduct* Rule 16-702(E) (2000); *Okla. Rules of Prof. Conduct* Rule 7.2(e)(1) (2000); *S.C. Rules of Prof. Conduct* Rule 7.3(c)(3) (1999); *Tenn. Rules of Prof. Conduct* Rule 2-101(N) (2000); *Tex. Disciplinary Rules of Prof. Conduct* Rule 7.05(b)(2) (1999).

148. *Fla. Rules of Prof. Conduct* Rule 4-7.2(d) (1991); *see also* Wendy R. Leibowitz, *The Sins of Law Firm Web Sites: Are Ethical, Dignified Sites Dull?*, Nat'l L.J., Aug. 18, 1997, at B6.

149. Fourteen states have restrictions on direct-mail solicitations. States may limit the size and color of print of required labels, restrict postings to regular mail, or require disclosures relating to how the lawyer learned of a specific legal need. *See Ala. Rules of Prof. Conduct* Rule 7.3(b)(2)(ii)–(v); *Ariz. Rules of Prof. Conduct* ER 7.3(b) (2000); *Ark. Rules of Prof. Conduct* Rule 7.3(b) (2000); *Colo. Rules of Prof. Conduct* Rule 7.1(c) (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(2)(G) (2000); *Iowa Code of Prof. Resp.* DR 2-101(B)(4)(d) (2000); *La. Rules of Prof. Conduct* Rule 7.2(b)(iii) (1999); *Nev. Rules of Prof. Conduct* Rule 197(2), (3) (1999); *N.J. Rules of Prof. Conduct* Rule 7.3(b)(4) (1999); *N.M. Rules of Prof. Conduct* Rule 16-702(E) (2000); *Okla. Rules of Prof. Conduct* Rule 7.2(f) (2000); *Or. Code of Prof. Resp.* DR 2-101(H) (1999); *Tenn. Rules of Prof. Conduct* Rule 2-101(N); *Tex. Disciplinary Rules of Prof. Conduct* Rule 7.05(b)(2). Disclaimers are also required in New Jersey and Oklahoma. *See N.J. Rules of Prof. Conduct* Rule 7.3(b)(4)(ii); *Okla. Rules of Prof. Conduct* Rule 7.2(e)(1).

and responding to the U.S. Supreme Court's *Went For It* decision,[150] some states include a waiting period for solicitation in mass disasters or personal-injury accidents.[151] With greater numbers of lawyers using the Internet as a means of communication, state-by-state regulation and the resulting jurisdictional differences have become increasingly problematic for lawyers attempting to comply with applicable ethics rules.

A lawyer disseminating information on the Internet necessarily crosses state lines and national boundaries within the context of the communication. Concerned with following the rules on lawyer publicity and avoiding related problems, lawyers want to know what rules are applicable and how they should be interpreted. The Model Rules, initially adopted in 1983,[152] were developed and crafted within the context of print and broadcast media.[153] Although the Model Rules do not expressly address lawyer communications through World Wide Web sites or other uses of the Internet, recently released public-discussion drafts with proposed changes to the Model Rules directly address electronic communications.[154] With few exceptions, state ethics rules

150. *See supra* notes 124–30 and accompanying text.

151. Seven states impose a time period during which solicitation may not be made for mass disaster or personal-injury accidents. Alabama, Arkansas, Colorado, Florida, New Jersey, and Louisiana have a 30-day waiting period. *See Ala. Rules of Prof. Conduct* Rule 7.3(b)(1)(i) (2000); *Ark. Rules of Prof. Conduct* Rule 7.2(c) (2000); *Colo. Rules of Prof. Conduct* Rule 7.3(c) (2000); *Fla. Rules of Prof. Conduct* Rule 4-7.4(b)(1) (2000); *N.J. Rules of Prof. Conduct* Rule 7.3(b)(4); *La. Rules of Prof. Conduct* Rule 7.1(a)(viii)(A) (1999). A 45-day waiting period has been implemented in Nevada. *See Nev. Rules of Prof. Conduct* Rule 198(8) (1999).

152. *See supra* note 94 and accompanying text.

153. *See* Krakaur, *supra* note 133, at 54.

154. *See* Center for Prof. Resp., *supra* note 134. Since the inception of the Model Rules in 1983, there have been 19 amendments; six of these have been added to the section governing advertising and solicitation. *See White Paper*, *supra* note 131, at 6.

At the time this Article was written, Ethics 2000 released proposed changes to Model Rules 7.2 and 7.3, directly addressing electronic communications. The proposed rules, released for public discussion on February 21, 2000, would amend Model Rule 7.2(a) to state: "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, or through written, recorded or electronic communication." *Model Rules of Professional Conduct* Proposed Rule 7.2 (2000). Comment 3 to Proposed Model Rule 7.2 would add the following language:

> Similarly world wide websites can be an important source of information about legal services and 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 conversation that is not initiated by the prospective client.

Model Rules of Professional Conduct Proposed Rule 7.2 cmt.3. Proposed Model Rule 7.3 adds "real-time electronic contact" to the prohibited communications in Rule 7.3(a) and Proposed Rule 7.3(c) requires that targeted electronic communications soliciting professional employment be marked "Advertising Material." *Model Rules of Professional Conduct* Proposed Rule 7.3. Comment 1 to

give little guidance on use of the Internet by lawyers. While the rules of some jurisdictions refer to advertising via electronic media[155] and a handful address the Internet directly,[156] the application of existing rules to the use of the Internet by lawyers largely has been left to ethics opinions by the individual states.[157]

B. Communication on the Internet as Commercial Speech

In contrast to a decade ago, most lawyers and law firms in this country now have Web sites.[158] The home pages established by these lawyers and their firms vary greatly, from simple straightforward text to vibrant graphics and pictures.[159] Most sites contain biographical information about the lawyers, with information about the firm and its practice.[160] Some sites contain general information on designated legal topics and provide "hypertext" links to other material.[161] A firm might provide links to files it maintains, such as publications by its lawyers, or link to sites outside the firm, such as independent legal research materials.[162] Law-firm Web sites often include expedited ways to contact the firm by e-mail and invite visitors to enter their names in a "guest book."[163] Many large firms also post recruiting information, such as starting salaries and profiles of their primary practice areas and branch offices.[164]

Proposed Rule 7.5 would add the following language: "[a] lawyer or law firm may also be designated by a distinctive website address or comparable professional designation." *Model Rules of Professional Conduct* Proposed Rule 7.5 cmt.1.

155. Eight states' rules reference electronic media. *See Ariz. Rules of Prof. Conduct* ER 7.1(q) (2000); *Conn. Rules of Prof. Conduct* Rule 7.2(d) (2000); *Ga. Code of Prof. Resp.* DR 2-101(B)(6) (1999); *Iowa Code of Prof. Resp.* DR 2-101(B)(5) (2000); *Miss. Rules of Prof. Conduct* Rule 7.5 (2000); *Nev. Rules of Prof. Conduct* Rule 196(2) (1999); *Vt. Rules of Prof. Conduct* Rule 7.2(a) (1999); *Va. Rules of Prof. Conduct* Rule 7.1(b) (2000). Massachusetts, which recently adopted the Model Rules, expands the definition of "legal directory" to include "an electronic or computer-accessed directory." *See Mass. Rules of Prof. Conduct* Rule 7.2(a) (1999).

156. *See infra* notes 224–33 and accompanying text.

157. *See Internet*, *supra* note 1, at 81:552.

158. *See supra* notes 13–14 and accompanying text.

159. *See Internet*, *supra* note 1, at 81:554.

160. *See* Hansen, *supra* note 13, at 238.

161. *See Internet*, *supra* note 1, at 81:554.

162. *See id.*

163. *See* Hansen, *supra* note 13, at 238.

164. *See id.*; *see also* Beth Berselli, *Firms Find Web Sites Attract Clients, Recruits, Prestige*, Washington Post, Sept. 22, 1997, at F7.

An initial question to be addressed when considering the applicability of state ethics rules to the Internet is whether a lawyer's communication constitutes commercial speech.[165] Commercial speech is speech whose purpose is "to [do] no more than propose a transaction."[166] However, the regulations on advertising and solicitation that impose restrictions on commercial speech are limited to speech of that kind.[167] If a law firm or lawyer Web site is not commercial speech, it is exempt from such state regulation and entitled to greater First Amendment protection.[168] In *Texans Against Censorship, Inc. v. State Bar*,[169] the district court considered whether Texas ethics rules on lawyer advertising and solicitation applied to an advertisement placed by a lawyer proposing a new method for judicial selection.[170] Focusing on the content of the lawyer advertisement rather than its motivation, the district court noted that "it is only when the message conveyed by the communication suggests to the public, or a specific individual, that the lawyer's professional services are available for hire that the communication must meet the requirement of the amended rules."[171] The district court determined that the advertisement did not propose a commercial transaction, even though the lawyer admitted that he hoped it would generate business.[172]

Using a content-based approach when considering law firm and lawyer Web sites, it is unclear if the information contained on lawyer home pages should be labeled "commercial." While it may be the intent of lawyers to promote their practice when establishing Web sites, a great deal of the material contained on a home page may be informational in nature, and not be commercial speech.[173] Furthermore, it may be difficult to discern the distinction between commercial speech and noncommercial expression,[174] or the commercial and noncommercial

165. *See* Hornsby, *supra* note 9.

166. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66 (1983)). *But see supra* note 46.

167. *See* William E. Hornsby, Jr., *Ethics Rules for Ads May Cover Web Sites*, Nat'l L.J., Jan. 29, 1996, at C1, 9; *White Paper*, *supra* note 131, at 20.

168. *See* Keith Forkin, *Web Pages as Lawyer Advertising* (on file with author).

169. 888 F. Supp. 1328 (E.D. Tex. 1995).

170. *See id.* at 1343.

171. *Id.* at 1344.

172. *See id.*

173. *See supra* notes 160–64 and accompanying text.

174. *See Texans Against Censorship*, 888 F. Supp. at 1345.

speech may be intertwined. In *Riley v. National Federation of the Blind*,[175] the U.S. Supreme Court stated that when "component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase."[176] The Court extended full First Amendment protection to such speech.[177]

Although commercial and noncommercial speech might coexist on a home page, opinion differs as to whether it is necessarily "inextricably intertwined." Purely informational portions of home pages are not considered commercial speech, but biography, specialty and e-mail sections on a home page usually are.[178] One school of thought posits that commercial and noncommercial speech on a Web site can be separated.[179] Another school of thought views a home page as a single entity with interconnected parts, providing "no way for a law firm to separate the commercial and noncommercial sections . . . ."[180] If the latter is true, an argument can be made that home pages should not be subject to the rules that regulate commercial speech. Following traditional legal mandates, one can argue that the noncommercial aspects of a home page should provide the site with full First Amendment protection.

In light of today's technology, the legal community is faced with the realization that the ability to "separate" speech, in the traditional sense, may no longer be the appropriate factor to consider when considering First Amendment protection for speech. Just as emerging technologies pose problems for our current regulatory structure,[181] traditional judicial tests developed within the perspective of broadcast and print media may prove to be ineffective for innovative forms of communication. Rather than considering whether speech can be separated, the nature of a Web site may be such that if the site is established by a for-profit entity, such as a law firm, its commercial aspects should trump its noncommercial components. The commercial aspects of a site would result in ethical

175. 487 U.S. 781 (1988).

176. *Id.* at 796.

177. *See id.*

178. *See* Forkin, *supra* note 168.

179. *See White Paper*, *supra* note 131, at 23.

180. *See* Forkin, *supra* note 168. A possible solution to the problem of overlapping commercial and noncommercial speech on home pages is for a law firm to use two separate home pages, ensuring that the "informational" home page does not advertise legal services and can be accessed without contacting the home page containing legal advertising. *See id.*

181. *See infra* Part IV.

rules being applied to the content of the entire site, rather than the noncommercial aspects of a Web site elevating the commercial aspects to full First Amendment protection.

C. *State Ethics Rules that Are Applicable to Internet Communications*

State ethics opinions are often advisory and usually respond to fact-specific questions. A number of states have considered fact-specific matters relating to emerging technologies and thus far have uniformly held their rules to be applicable to lawyer communications on the Internet.[182] Interestingly, most of these decisions have been made with little or no concern for the characterization of speech as commercial or noncommercial.

In Pennsylvania, a member of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility informed a law firm that if a Web site contains communications about a lawyer or the lawyer's services, it constitutes lawyer advertising and is subject to the Rules of Professional Conduct.[183] Similarly, an opinion of the Iowa Supreme Court Board of Professional Ethics and Conduct reasoned that since lawyer and law-firm home pages or Web sites are "generally designed to promote the firm and to sell legal services of the firm and constitute advertising," there must be compliance with the rules governing lawyer advertising.[184] Alabama's Disciplinary Commission of

182. *See* Peter Krakaur, *Ethical Considerations for Internet Acceptable Use Policies*, (on file with author).

183. *See* Pennsylvania Bar Ass'n, Comm. on Legal Ethics and Prof. Resp., Advisory Op. 96-17 (1996). The opinion goes on to state that a Web page is in the public domain and qualifies as "public media," similar to newspapers, radio, or television. *See id.* Furthermore, any content permissible under Rules 7.1–7.6 should also be permissible on a Web page. *See id.*

184. *See* Iowa Sup. Ct., Bd. of Prof. Resp., Formal Op. 96-1, [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) IA: opinions 14 (1996) [hereinafter *Iowa Formal Op.*]. The opinion states that mandated disclosures "must be located and set forth in full (and not merely by hyper-text link) on the first page or screen of the lawyer's home page or web site and in any location where there appears biographical matter other than the name, address, telephone and fax numbers for the lawyer or the firm." *Id.* An exception to requiring conformity with these Rules is the inter-exchange of legal information with clients, another law firm or other members of the web site firm. *See id.* The opinion went on to state:

> [W]ith sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or nonsecure Intranet or other forms of proprietary networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system.

the Office of General Counsel, in sweeping language, released an ethics opinion stating that "*any* information made available to the public about a lawyer or a lawyer's services on the Internet or private on-line services is subject to regulation under the rules on advertising and solicitation."[185]

While states have uniformly held their rules to be applicable to lawyer communications on the Internet, they differ on exactly which rules relate to given situations. For instance, the State Bar of Arizona's Committee on the Rules of Professional Conduct took the position that a firm's Web site is considered a communication about a lawyer that would be subject to the ethical requirements of Rules 7.1–7.5.[186] The South Carolina

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Id. One year later this language was amended to delete "or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system" in favor of the following language: "to be protected as agreed between counsel and client." *Id.* at 42. In responding to an inquiry regarding required disclosures, the Board gave the following guidance:

> (1) A firm cannot advertise areas of practice, only lawyers can;
>
> (2) Only lawyers who have filed a report of compliance pursuant to DR 2-105(A)(4) may advertise areas of practice;
>
> (3) Only three areas of practice may be advertised by a lawyer;
>
> (4) If the term "general practice" is advertised with "areas of practice" it must be in accordance with DR 2-105(B);
>
> (5) If areas of practice are advertised they must be preceded by the words "practicing primarily in" or "practice limited to" . . . .

Iowa Formal Op., [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) at 15 (citations omitted). In response to an inquiry on what constitutes "sensitive material," the Board stated that "what is considered 'sensitive material' is a question of fact to be determined on a case by case basis." *Id.* at 41.

185. Alabama Bar Ass'n, Disciplinary Comm'n, Ethics Op. 96-07, [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) AL: opinions 24 (1996) (emphasis added). "It makes no difference whether it is done through a web page, a bulletin board, or via unsolicited electronic mail. Any advertising or promotional activity transmitted through the use of a computer is subject to regulation like any other form of lawyer advertising." *Id.*

186. State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 97-04 (Apr. 7, 1997). In addition to noting the applicability of the ethics rules to firm Web sites, the State Bar of Arizona's Committee on the Rules of Professional Conduct provided answers to ten other frequently presented issues on lawyers using computerized communications (bracketed explanations added):

> (2) If a law firm has offices in many states, must the firm comply with Arizona ethics rules if the firm has either an office in Arizona or attorneys admitted to practice in Arizona?
>
> Yes. [Opinion notes affirmative response even if advertisement appears, electronically, inside and outside of state].
>
> (3) Can a "web site" use a tradename as the law firm name?
>
> No. [Arizona rules prohibit use of trade names but opinion notes domain names are not subject to this limitation].

Ethics Advisory Committee informed a lawyer that it was permissible for him to maintain a presence on electronic media for the purpose of discussing legal topics generally, but the restrictions in Model Rules 7.1–7.3 must be followed for communications, advertising, and direct contact with prospective clients.[187] An advisory ethics opinion of the Board of

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(4) Can a lawyer mention either in a web site or simply in responding to a question in a "chat room" that he or she specializes in water law?

> No. [Arizona rules on certification of specializations must be followed and water law is not an area certified as specialty].

(5) Is it a violation of ER 7.3 to contact a prospective client directly via e-mail if you know that the person needs legal representation for a particular matter?

> Maybe. [Although application may create dilemma, there must be compliance with ER 7.3 disclosure obligations; communication with potential client in cyberspace should not be considered either prohibited telephone or in-person contact].

(6) Should lawyers answer specific legal questions posed in "chat rooms" or "news groups"?

> Probably not. [Unless question is of general nature and advice is not fact-specific, inability to screen for potential conflicts and possibility of disclosing confidential information is problematic].

(7) May a lawyer join an on-line lawyer referral service?

> Probably not. [Referral service must be "operated, sponsored, or approved by a bar association" and currently no on-line services are so approved].

(8) Should lawyers communicate with existing clients, via e-mail, about confidential matters?

> Maybe. [Inadvertent disclosure of confidential information is concern].

(9) May lawyers place on-line intake forms for prospective clients on their web sites and, if so, may the client respond via the web site?

> Probably. [Sending forms is not problematic but completed forms should not be transmitted electronically to avoid possible inadvertent disclosures of confidential information].

(10) Do lawyers need to submit a copy of their web sites to the State Bar and the Supreme Court pursuant to ER 7.3?

> Probably not. [Web sites are not sent directly to prospective clients but are designed to provide general information about law firm].

(11) Do lawyers need to keep a copy of their web sites and any changes that they make to their web sites pursuant to ER 7.1(o)?

> Yes. [Copies of web sites, and material substantive changes, need to be kept in retrievable format for three years after dissemination].

Id.

187. *See* South Carolina Bar Ass'n, Ethics Comm., Advisory Op. 94-27, [1995 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) SC: opinions 58 (1995). A South Carolina Bar member with a physical disability wished to approach on-line services about setting up an electronic law office for providing legal information and advice to persons across the United States. *See id.* The Committee divided the inquiry into two parts: first, providing legal information generally, such as

Professional Responsibility of the Supreme Court of Tennessee stated that ethical rules regarding publicity are applicable to postings on the World Wide Web.[188] However, the Tennessee opinion distinguished these permissible postings, to which readers choose to have access, from general postings to news groups on the Internet, which it viewed as akin to impermissible forms of solicitation.[189] Likening a law-firm home page to a yellow-page telephone directory or firm brochure, an Illinois State Bar Association Advisory Opinion on Professional Conduct found Rules 7.1 and 7.2 to be applicable, but not Rule 7.3, since such materials are not directed to specific recipients.[190] Similarly, a Michigan opinion held that posted information on the Internet must comply with the mandates

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through educational and informational programs; and second, representing clients via electronic media. *See id.* The Committee found no problem with participating in general discussions on legal topics via electronic media. *See id.* The Committee raised several concerns with the second matter, however, regarding communications, conflicts of interest, confidentiality, and unauthorized practice of law. *See id.* Included in the Committee opinion was the following:

> Since a public advertisement on electronic media is necessarily available to a universal audience, the attorney will be placing advertising designed to reach potential clients in jurisdictions in which he is not admitted to practice. Under Rule 7.2(a), any notice or advertisement disseminated by public media must clearly identify the geographic limitations of the lawyer's practice, so that it is clear that he may not practice law except in those states in which he is admitted to practice.

Id. at 59. In 1997, the Ethics Advisory Committee re-examined Advisory Opinion 94-27 "in light of the current state of technology." *See* South Carolina Comm., Advisory Op. 97-08, [1997 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) SC: opinions 33 (1997). The opinion, however, was limited to the question of confidential communications via e-mail. *See id.*

188. *See* Tennessee Sup. Ct. Bd. of Prof. Resp., Advisory Op. 95-A-570 (1995).

189. *See id.* The Board opined that general postings to news groups on the Internet often arrive on a user's screen unsolicited. *See id.* The user in essence pays for these communications since most Internet users pay access charges. *See id.* The Board condemned such communications by likening them to telephone calls or direct personal solicitations. *See id.* As to responding to a posting on the Internet asking for legal advice, the Board noted in an opinion released later that year that the rules on advertising and publicity are generally inapplicable, but other provisions of the rules do apply, such as those relating to confidentiality, competence, and conflicts of interest. *See* Tennessee Sup. Ct., Bd. of Prof. Resp., Advisory Op. 95-A-576 (1995).

In 1997 Tennessee was the first jurisdiction in the United States to sanction a lawyer for an Internet advertising practice by suspending his license to practice for one year. *See Tennessee Disciplines Lawyer for Internet E-mail Campaign*, 13 Laws. Man. on Prof. Conduct (ABA/BNA), at 218 (July 23, 1997). Laurence A. Canter attempted to attract clients by transmitting unsolicited e-mail advertisements to more than 10,000 Internet users and on-line discussion groups. Adopting a hearing committee's findings, the Tennessee Supreme Court found that Cantor intruded on the recipients' privacy and damaged the legal profession's reputation by compelling the recipients to pay for unwanted advertisements. *See id.*

190. Illinois State Bar Ass'n, Advisory Op. 96-10 (1997). The opinion indicates that participation in an electronic bulletin board or chat group could call Rule 7.3 into play when a lawyer initiates an unrequested contact with a specific person or group. *Id.*

of Rules 7.1 and 7.2, but not with Rule 7.3, since it is in the nature of general material with which the user initiates contact.[191]

Taking a slightly different tack, the Massachusetts Bar Association Committee on Professional Ethics indicated that because Web sites do not constitute the "solicitation of professional employment," the labeling and retention requirements of the rules are not applicable.[192] Similarly,

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191. *See* State Bar of Mich., Informal Op. RI-276 (1996) (visited Apr. 18, 2000) <http://www.michbar.org/opinions/ethics/numbered_opinions/ri-276.htm> [hereinafter *Michigan Ethics Opinion*]. Home pages, libraries, and chat rooms were examples of posted information that can be accessed by Internet users. *See id.* Posted information was distinguished from Internet communications which are initiated, such as e-mail. *See id.*

192. Massachusetts Bar Ass'n, Comm. on Prof. Ethics, Op. 1997-130 (1997) (visited Apr. 18, 2000) <http://www.legalethics.com/states/1997_130.htm>. The Committee considered this matter within the context of an inquiry by the Massachusetts Lesbian and Gay Bar Association (MLGBA), asking whether it could establish a Web site which would contain a membership directory accessible by the public in making the selection of a lawyer. Three types of membership listings were presented which would be available at the preference of the listing attorney:

> Option 1: An abbreviated version of the particular attorney's listing in the MLGBA's current print membership directory, which typically includes the member's name, firm name, address, telephone and telecopier number, admission information, and practice areas, as well as a direct connection or "hot link" to the attorney's electronic mailbox address, if he or she possesses one; or
>
> Option 2: A hot-link to the particular attorney's own existing World Wide Web site, if he or she possesses one; or
>
> Option 3: A hot-link to an individualized World Wide Web site created and maintained for the particular attorney by MLGBA personnel for an additional reasonable fee. It is anticipated that such individual web-sites will be more extensive, more attractive and more flexible than the standard directory listings envisioned under Option 1, noted above.

Id. In addressing questions posed by the MLGBA with respect to these options, the Committee responded that Option 1 did not represent any significant departure from the long-accepted practice of publishing bar directories, subject only to the non-deception, source limitations, and "limitation on practice" provisions of the rules. The Committee further responded that with respect to Option 2, the MLGBA would have no greater obligation to police the content of individual attorney Web sites than it would to police the content of participating members' firm brochures in MLGBA written bar directories. The Committee went on to state the following:

> The Committee further believes that individual attorney web-sites need not be labeled "advertising" pursuant to DR 2-103(C)(1). Entering an attorney web-site in this context is an intentional act on the part of the prospective client that best can be analogized to contacting or physically visiting the attorney in order to obtain further information. Lawyers' responses to such inquiries traditionally have not been regarded as "solicitation" of professional employment targeted or "directed to [a] prospective client," and therefore do not qualify as "advertising" under DR 2-103(C)(1).

Id. Responding to additional specific queries, the Committee stated that a bar directory, whether written or computerized, is not necessarily a lawyer referral service. Unlike a lawyer referral service, which anticipates the actual referral of designated participating attorneys, a bar directory compiles information to be used in a prospective client's self-selection of a lawyer. *See id.*

the New York County Lawyers' Association Committee on Professional Ethics held that advertising on the Internet is permissible as long as it conforms with the applicable disciplinary rules,[193] but stated that on-line directory information need not comply with the rules' filing requirements since such requirements apply only to distribution by "means '*other than* by radio, television, directory, newspaper, magazine or other periodical.'"[194] North Carolina opinions held that a lawyer may participate in a directory of lawyers on the Internet, pay a fee for the

193. *See* New York County Law. Ass'n, Comm. on Prof. Ethics, Op. 921 (1997). A special-interest organization of lawyers wanted to include an icon for an Attorney Referral Board on its home page. *See id.* The Internet service provider would have included this service at no additional charge for six months, in hopes that subscribing attorneys would make use of the Internet provider's services. *See id.* The user would be directed to a list of subject areas where a description of the law, along with a list of attorneys practicing in the described area, would be displayed. *See id.* The opinion states that an Internet directory listing of attorneys does not differ from other directory listings of attorneys published by an organization. *See id.* It does note, however, that "'Attorney Referral Board' is potentially misleading, in that it may indicate that the participating attorneys have in some way been recommended by the sponsoring organization." *Id.* Noting that "[a] lawyer may not pay for a recommendation of employment," the opinion goes on to state that "[n]othing of value will pass to the provider as a result of any employment generated by a listing, and any recommendations that are made are those of the sponsoring organization, which has provided the listings as a service to its members." *Id.*

In contrast to the proposition described in New York, a Nebraska State Bar Association Advisory Committee reviewed an attorney request for an opinion regarding participation in a lawyer-referral program that is "for profit." Nebraska State Bar Ass'n, Advisory Comm., Advisory Op. 95-3, [1996 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) NE: opinions 13 (1995). The referral program is a service that can be accessed at on-line shopping malls to identify a limited number of participating lawyers who have paid a fee (between $375 and $950 for a six month period) to be included in the directory. *See id.* The Nebraska Committee regarded this practice as falling within the prohibition that condemns giving value for the recommendation of legal services under DR 2-103(A). *See id.* Quoting from a previous opinion, the Nebraska Committee restated the following:

> The provisions of DR 2-103(A) clearly allow a lawyer to pay for advertising or written communications generated by the lawyer ("self-advertising"). It is also clear that a lawyer may pay the "usual charges" of a not-for-profit lawyer referral service or other legal service organization. It is the opinion of the Committee, however, that paying a second party for the second party's advertising and promotional expenses, plus an administration fee, falls squarely within the prohibition against giving "anything of value to a person for recommending the lawyer's services" and does not fall within the exception for advertising expenses.

Id. (quoting Op. 89-3 (1989)).

194. New York County Law. Ass'n, Comm. on Prof. Ethics, Op. 921 (citing DR 2-101(F)(1)) (emphasis added). More recently, the Nassau County, New York Ethics Committee also determined that the advertisement copy-retention and filing requirements were not applicable to banner advertisements on the Internet since Internet advertisements and Web sites are more like broadcast commercials or published advertisements than private written solicitations. *See* Nassau County (N.Y.) Bar Ass'n, Comm. on Prof. Ethics, Op. 99-3 (1999).

listing,[195] and display truthful information about the lawyer's services on a Web site provided there is compliance with applicable rules.[196] To that end, the North Carolina Committee stated that compliance with the retention requirement was necessary and "may be achieved by printing a hard copy of all screens on the Web site as launched and subsequently printing hard copies of any material changes in the format or content of the Web site."[197]

D. Status of Electronic Communication Components Varies

Just as promulgated rules and their specific applicability to electronic communications vary from jurisdiction to jurisdiction, there appears to be state-by-state variation in evaluating the status of components of the Internet (for example, home pages, newsgroups, e-mail, and chat groups). For instance, it is generally held that lawyers may post information about the availability of their services to a home page or a newsgroup for interested people to read.[198] Newsgroup postings are routinely analogized to newspaper or magazine advertisements, and must

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195. North Carolina State Bar, Proposed Op. RPC 241, [1997 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) NC: opinions 15 (1996). The situation being reviewed was the development of an Internet site by a private company to be known as the National Attorney Locator. It was described as follows:

> The site will contain an electronic directory of lawyers. The directory will include listings for lawyers from across the United States. These listings can be searched by lawyers' geographic location and areas of legal practice. Each listing will include the name of the lawyer or law firm, the name of a contact person at the firm, address, phone number, fax number, e-mail address, and areas of practice. Lawyers must apply and pay a fee to be listed on the directory. The Internet site will have a hypertext section on "Choosing an Attorney" which includes a statement that the National Attorney Locator is not a referral service but an electronic directory.

Id. The Committee stated that information contained within these listing must be truthful and not misleading. *See id.* To avoid being misleading, the listing should state where the lawyer is licensed to practice law and the location of the lawyer's principal office. *See id.* Rules relating to specialization also must be followed. *See id.*

196. *See* North Carolina State Bar, Proposed Op. RPC 239, [1996 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) NC: opinions 9 (1996).

197. *Id.* The opinion goes on to note that "[t]hese hard copies should be retained for two years together with a record of when the screens were used on the Internet." *Id.* The Arizona Committee also determined that retention of copies of Web sites was necessary, along with copies of material changes. State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 97-04, at 6 (Apr. 7, 1997). However, copies of Web sites did not need to be submitted to the state bar because they are "designed to provide general information about a law firm and are not sent directly to certain prospective clients . . . ." *Id.*

198. *See generally supra* notes 183–97 and accompanying text.

comply with the applicable rules on lawyer advertising.[199] Making information available on a home page or newsgroup casts the lawyer in a role that is initially passive, with the public being free to access and act upon the available information. However, as a lawyer's conduct becomes less passive, such as when a lawyer uses e-mail to communicate with prospective clients,[200] opinion varies on how this conduct should be characterized.

A Michigan ethics opinion found the use of e-mail permissible, likening e-mail to a facsimile transmission or post card.[201] In contrast, a Tennessee ethics opinion likened promotional e-mail to a telephone call, which triggered the prohibition against telephone contact in Model Rule 7.3.[202] The Tennessee opinion reasoned that a promotional e-mail posting to newsgroups resembles a phone call because it imposes extra access charges on users, intrudes on their privacy, and cannot be easily ignored.[203] More typically, unsolicited e-mail messages sent to prospective clients have been likened to letters, although its been noted that e-mail reaches potential clients more quickly than the post and may have a greater impact on the recipient.[204]

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199. *See, e.g.*, Brian G. Gilpin, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 713 (1995).

200. An e-mail message is generally not sent in one piece but in different packets from server to server ("packetization"), using "routers to determine which path will take the message to the intended destination." Leonard, *supra* note 1, at 855. This raises particular concern regarding the application of the attorney-client privilege and duty of confidentiality to e-mail communications. *See id.* at 853. The application of the attorney-client privilege and the duty of confidentiality to communications on the Internet are not subjects of this Article.

201. *See* State Bar of Mich., Op. RI-276 (1996) (visited Apr. 18, 2000) <http://www. Michbar. org/opinions/ethics/numbered_opinions/ri-276.htm>. The Michigan Committee noted that e-mail is "not as private as sending a sealed letter, and there is an expectation, but no guarantee, that the communication has been received by the intended recipient." *Id.*

202. *See* Tennessee Sup. Ct., Bd. of Prof. Resp., Advisory Op. 95-A-570 (1995).

203. *See id.* It should be noted that Model Rule 7.3 prohibits only live telephone contacts, and arguably an uninvited e-mail solicitation would more closely resemble a recorded telephone call rather than a live telephone contact. *Model Rules of Professional Conduct* Rule 7.3 (1983). A proposed Tennessee rule would treat a computer transmission similar to a targeted mailing, providing as follows at Proposed Rule 7.3 (b) and (c):

> .(b) A lawyer shall not solicit professional employment by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a specifically identified recipient who has not initiated the contact with the lawyer if
>
> (1) the person solicited has made known to the lawyer a desire not to be contacted by the lawyer; or
>
> (2) the communication constitutes overreaching, coercion, duress, harassment, undue influence, intimidation, or fraud; or

If one views e-mail transmissions in the same light as letters, the question arises whether such communications more closely resemble a targeted letter or a general mailing. In making a distinction between the two, the probable determinative factors would be the nature of the message's content and whether the communication is responding to a particular problem of the recipient. By imposing requirements similar to those for targeted mailings, a new Florida rule treats e-mail messages to prospective clients as direct-mail communications without making a distinction as to content or recipient status, thus applying regulations similar to those required for targeted mailings for all such communications.[205] A proposed revision to Model Rule 7.3 treats e-mail

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(3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, worker's compensation or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident or disaster occurred more than 30 days prior to the mailing or transmission of the communication or the lawyer has a family or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send or dispatch a communication soliciting professional employment from a specifically identified recipient who has not initiated a contact with the lawyer and with who the lawyer has no family or prior professional relationship unless the communication complies with the following requirements:

(1) Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "This is an advertisement" as follows:

(a) in written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written material . . . .

Tennessee Bar Ass'n, Comm. for Study of Standards of Prof. Conduct, *Final Report*, Proposed Rule 7.3 (2000).

204. *See Internet*, *supra* note 1, at 81:559. It has been noted that "[a]s Web technology shifts to a 'push'-oriented paradigm in which information is sent to targeted recipients, advertising activity on the Web may become more intrusive, potentially undercutting the argument that commercial speech on the Web should be minimally regulated because it must be actively sought out by users." John B. Kennedy, *Legal Advertising and Ethics on the World Wide Web*, N.Y. L.J., Jan. 27, 1997, at S1, S9. However, this "push" technology, which gets a lawyer or firm's name into certain e-mail boxes "amounts to little more than plain old e-mail." Kevin Lee Thomason, *"Interactivity" is a Buzzword for Web Sites*, Nat'l L.J., Mar. 9, 1998, at B9, B12.

205. The new Florida rule, which was approved by the Board of Governors at its meeting in Key Largo on May 30, 1997, was approved by the Florida Supreme Court on December 17, 1999 and corrected on December 30, 1999. Florida Rule 4-7.6(c) on Electronic Mail Communications provides as follows:

A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the

messages as targeted mailings when they are directed to "a prospective client known to be in need of legal services in a particular matter."[206]

More troubling than the use of promotional e-mail by lawyers is uninvited, interactive communications initiated by lawyers on the Internet. Unsolicited messages to prospective clients sent during "real time" conversations in Internet chat groups appear to move closer to in-person contact or live telephone communications. These exchanges have been viewed as resembling an actual conversation, except that "the dialogue is textual rather than oral."[207] The Committee in Michigan viewed these uninvited interactive conversations as direct solicitation, which is outside activity permitted by Model Rule 7.3.[208] A similar position has been taken in the recent proposed changes to Model Rule 7.3.[209] However, the Committee in Arizona determined that

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lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

(1) the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(E), (b)(2)(G), (b)(2)(H), (b)(2)(J), and (b)(2)(K) of rule 4-7.4 are met;

(2) the communication discloses 1 or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised, in accordance with subdivision (a)(2) of rule 4-7.2; and

(3) the subject line of the communication states "legal advertisement."

Fla. Rules of Prof. Conduct Rule 4-7.6(c) (1999). A Comment to the rule provides in pertinent part:

The specific regulations that govern computer-accessed communications differ according to the particular variety of communication employed. For example, a lawyer's Internet web site is accessed by the viewer upon the viewer's initiative and, accordingly, the standards governing such communications correspond to the rules applicable to information provided to a prospective client at the prospective client's request.

In contrast, unsolicited electronic mail messages from lawyers to prospective clients are functionally comparable to direct mail communications and thus are governed by similar rules. Additionally, communications advertising or promoting a lawyer's services that are posted on search engine screens or elsewhere by the lawyer, or at the lawyer's behest, with the hope that they will be seen by prospective clients are simply a form of lawyer advertising and are treated as such by the rules.

Fla. Rules of Prof. Conduct Rule 4-7.6 cmt.

206. *Model Rules of Professional Conduct* Proposed Rule 7.3 (2000); *see also supra* note 134.

207. *See Internet, supra* note 1, at 81:560.

208. *See Michigan Ethics Opinion, supra* note 191. The Committee distinguished e-mail from immediate electronic conversations, which it characterized as "real time" communications, analogous to in-person solicitation. *Id.*

209. *See supra* note 154. The proposed revision to Model Rule 7.3 (a) states as follows: "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client with whom the lawyer has no family, close personal or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's

communicating with a potential client in a chat room should not be considered a prohibited telephone or in-person contact because the potential client "has the option of not responding to unwanted solicitations."[210] In addition to the fact that the recipient need not respond in chat-room communications, it should also be noted that unlike in-person solicitation, online communications are recorded. The fact that a communication is preserved would arguably decrease the likelihood of abusive practices historically feared in direct contact of prospective clients by lawyers.[211] The Philadelphia Bar Ethics Committee determined that lawyers generally may communicate in chat rooms with non-clients about the subject of pending or contemplated litigation.[212] However, the Philadelphia Bar Committee suggested that lawyers exercise caution and warned that "conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such."[213]

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pecuniary gain." *Model Rules of Professional Conduct* Proposed Rule 7.3(a) (2000). The Reporter's Explanation of Changes states the following with respect to "real-time electronic contact":

> The Commission, in accord with the ABA Commission on Responsibility in Client Development (formerly the Commission on Advertising), is recommending that lawyer Solicitation of business 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.

Model Rules of Professional Conduct Proposed Rule 7.3, Reporter's Explanation of Changes. The reference to the ABA Commission on Responsibility in Client Development, formerly the Commission on Advertising, relates to the White Paper submitted to Ethics 2000 by the ABA Commission on Advertising. *See generally White Paper*, *supra* note 131.

210. State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 97-04, at 3 (Apr. 7, 1997). The opinion further states, however, that if the lawyer initiates contact and the potential client has a known legal need for a particular matter, the lawyer must comply with disclosure obligations associated with targeted mailings. *See id.* at 4.

211. *See Internet*, *supra* note 1, at 81:560.

212. *See* Philadelphia Bar Ass'n, Prof. Guidance Comm., Op. 98-6 (Mar. 1998).

213. *Id.* The panel further cautioned lawyers to be mindful of the following: the lawyer "must be truthful in all comments made"; "may not communicate about the subject of a representation with a party he knows to be represented by another lawyer in the matter"; "may not deal on behalf of a client with a person who is not represented while the [lawyer] is stating or implying that he or she is disinterested, or give advice to an unrepresented person whose interests are or have a reasonable possibility of being adverse to the [lawyer's] client"; "should consider including on any communication a notice that he is a lawyer licensed in Pennsylvania, and he is not purporting to give any kind of advice other than in accordance with that status and that he is not purporting to practice law in any other jurisdiction"; and that an Internet discussion could result in the creation of an

While chat groups and conference areas raise concerns about overreaching by lawyers, of still greater concern are evolving forms of communication using computers, fiber optics, and video cameras. Attempting to simulate actual contact, the capacity to routinely bring virtual reality to remote contacts looms in the future.[214] As breakthroughs in technology continue to emerge, state-of-the-art communications are likely to be more life-like and ease of access is likely to increase. Regardless of whether these communications are recorded, their potential for intrusiveness is significant. It stands to reason that the closer technology comes to simulating face-to-face exchanges, communications seeking professional employment lend themselves to being condemned as impermissible solicitation.

E. Archiving and Labeling Requirements Applied to Electronic Communications

As technology continues to evolve, states are finding that rules crafted within the context of print and broadcast media raise repeated obstacles that appear to be gaining in significance. One problem lawyers are facing is the implementation of archiving and labeling requirements to electronic communications. The Model Rules archiving requirement that advertising materials be retained for two years, along with a record of when and where they are used,[215] presents practical problems for a lawyer with a home page. Similarly problematic for lawyers on the Web are requirements relating to targeted mailings, for which envelopes and recorded communications must be labeled "Advertising Material."[216]

Jurisdictions have taken different positions on whether filing and retention requirements are applicable to information posted on the Internet.[217] Because communications on the Internet present a cost-effective way to convey current information,[218] it is in the interest of the public, as well as the purveyor of the information, to keep posted

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attorney-client relationship, "with all that such a relationship implies including creation of potential conflicts of interest (*see* Rules 1.7 & 1.9) and expectations of confidentiality (*see* Rule 1.6)." *Id.*

214. *See* Gilpin, *supra* note 199, at 724–25.

215. *See Model Rules of Professional Conduct* Rule 7.2(b) (1983) (amended 1990); *supra* note 113 and accompanying text.

216. *Model Rules of Professional Conduct* Model Rule 7.3(c) (1983) (amended 1989); *supra* note 112 and accompanying text.

217. *See supra* notes 193, 195–96 and accompanying text.

218. *See* Hankins, *supra* note 16.

material timely. While proposed changes to the Model Rules allow for archiving by "electronic record,"[219] the Model Rules retention requirements may place an onerous burden on lawyers who vigilantly update and supplement information on their Web sites. Thus, archiving requirements can discourage a lawyer from revising a site with current material on a routine basis, working to the disadvantage of all involved. Furthermore, applying archiving requirements to cyberspace leaves the lawyer with significant questions. For instance, what type of record of electronic communications must be retained? What changes to a site must be documented? If a jurisdiction requires that certain material be screened, filed, or subject to a filing fee, does an update to a Web site trigger subsequent screening, filing, or fee responsibilities?

In addition to retention and record-keeping requirements, the Model Rules require that targeted solicitations be labeled "Advertising Material." Written within the context of print and broadcast media, these words must appear "on the outside envelope and at the beginning and ending of any recorded communication."[220] The proposed changes to the Model Rules would change this to read "on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication."[221] If e-mail is considered a targeted solicitation, then these labeling requirements are applicable. Lawyers using the Internet are faced with significant questions related to compliance. For instance, if it is determined that electronic communications should be labeled, then how should this requirement manifest? Furthermore, if electronic communications must be labeled, does this same requirement apply to linked material?

In an attempt to address the issue of Internet advertising, the Texas State Bar Association's Advertising Review Committee issued guidelines

219. The proposed change to Model Rule 7.2(b) provides as follows: "[a] copy, recording or electronic record of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used." *Model Rules of Professional Conduct* Proposed Rule 7.2(b) (2000) (strikethroughs omitted).

220. *Model Rules of Professional Conduct* Rule 7.3(c), *supra* note 112 and accompanying text.

221. *Model Rules of Professional Conduct* Rule 7.3(c). The proposed changes to Model Rule 7.3(c) would require that targeted electronic communications be labeled "Advertising Material":

> 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 manner, and with whom the lawyer has no family, close personal or prior professional relationship, shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication.

Id.

that appeared as interpretive comments to the Texas Disciplinary Rules of Professional Conduct.[222] Under these guidelines, Texas lawyers with a home page must submit a hard copy of the first screen shown when their ULR address[223] is accessed, along with a fee of $50, to the Advertising Review Committee.[224] Information linked to the first screen of a Texas lawyer's home page need not be submitted, however, unless it primarily concerns the solicitation of prospective clients.[225] A proposed Texas rule, which was voted down on a procedural challenge, retained its labeling requirement for written solicitations to be marked "ADVERTISEMENT," specifically making it applicable to both non-electronically transmitted communications and e-mail messages.[226] With the exception of Web sites and home pages, Florida's new rules on

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222. *See* Kennedy, *supra* note 204; *see also How Do Advertising Rules Apply to Lawyers on the Net?*, 12 Laws. Man. on Prof. Conduct (ABA/BNA), at 39 (Feb. 21, 1996).

223. *See infra* note 245 and accompanying text.

224. Subsection (c) of Proposed Texas Rule 7.07, Filing Requirements for Public Advertisements and Written, Recorded, or Other Electronic Solicitations, voted down on a procedural challenge, provided as follows:

> Except as provided in Paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the Internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's Website. As used in this Rule, a "Website" is a publication on the Internet or other network of computers, consisting of a file, a part of a file, or a collection of files, that is accessible to the general public. The filing shall include:
>
> (1) each unit of the Website up to a maximum of ten of those units that, standing alone, would not be exempt from filing under paragraph (e). As used in this subparagraph (1), a "unit" of a Website is the equivalent of one 8-1/2" x 11" printed page of text or one minute of audio or audio-visual production script;
>
> (2) a completed lawyer advertising and solicitation application form; and
>
> (3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be set for the sole purpose of defraying the expense of enforcing the rules related to such Websites. In addition, the fee set shall permit the filing party to submit any modifications made to the units of its Website filed pursuant to subparagraph (c)(1) within one year of their initial approval or pre-approval, for review by the Advertising Review Committee at no additional charge.

Tex. Disciplinary Rules of Prof. Conduct Proposed Rule 7.07(c) (1998). Subsection (e) of Proposed Rule 7.07 listed exclusions for the filing requirements, including "links to other Websites" and "other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation." *Tex. Disciplinary Rules of Prof. Conduct* Proposed Rule 7.07(e)(1)(x), (xi) (1998).

225. *See* State Bar of Tex., *Advertising Review Packet* cmt.17 (1998).

226. Proposed Texas Rule 7.05(b) provided as follows:

advertising require that a lawyer file a statement describing when and where the advertisement will appear, as well a $100 filing fee for "all computer-accessed communications concerning a lawyer's or law firm's service."[227] Proposed Tennessee Rule 7.2 specifically includes "World Wide Web site" in the list of approved media for lawyer advertising,[228] and has a filing requirement for advertisements[229] that mandates a subsequent filing for communications "changed in any material respect."[230]

While attempting to resolve issues by regulating unique features of media, state rules applying to Web sites should not create more questions

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Except as provided in paragraph (f) of this Rule, a written solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:

(i) in a color that contrasts sharply with the background color; and

(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;

(2) shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the "subject" portion of the standard electronic mail format and at the beginning of the message's text . . . .

Tex. Disciplinary Rules of Prof. Conduct Proposed Rule 7.05(b) (1998).

227. *Fla. Rules of Prof. Conduct* Rule 4-7.6 (1999).

228. Tennessee Bar Ass'n, Comm. for Study of Prof. Conduct, Final Report, Proposed Rule 7.2(a) (2000).

229. Tennessee Bar Ass'n, Comm. for Study of Prof. Conduct, Final Report, Proposed Rule 7.2(b). Proposed Rule 7.2(b) provides as follows:

Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility, provided, however, that such filing is not required for any communication that only includes the name, address and profession of the lawyer or has been exempted from the filing requirement by the Board of Professional Responsibility.

(1) If communications which are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by filing a single copy of the communication.

(2) If a communication which has previously been filed with the Board is changed in any material respect, a notice of the changes shall be filed with the Board within three days after its publication, distribution, or dispatch.

Id.

230. *Id.*

for lawyers than they answer. For example, in addressing the matter of fee applicability, the proposed Texas rules had stated that a required filing fee entitles the filing party to submit modifications to a Web site for review within one year at no additional charge.[231] While the rule attempted to resolve the fee issue, it did not explain which modifications to a Web site triggered the requirement of submission. If a site is updated on a weekly basis, the administrative burden of multiple submissions could be significant. Also, the proposed Tennessee rule limits subsequent filings to instances where there is a "material" change.[232] However, since "material" sets a subjective standard, it is unclear when subsequent filings are mandated.

Jurisdictions specifically addressing current electronic communication issues must be mindful that as technology continues to evolve, rules crafted today may not address emerging technological capabilities or issues. For instance, the proposed Texas rule specifically addressed non-electronically transmitted written communications, as well as e-mail messages. In the case of the latter, the proposed rule stated that "ADVERTISEMENT" shall be "plainly marked" in the "'subject' portion of the standard electronic mail format and at the beginning of the message's text."[233] Tailoring the rule to regulate a currently implemented

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231. *See Tex. Disciplinary Rules of Prof. Conduct* Proposed Rule 7.07(c)(3) (1998).

232. *See supra* note 229.

233. *Tex. Disciplinary Rules of Prof. Conduct* Proposed Rule 7.05(b)(2). The proposed Texas rule provided as follows:

> Except as provided in paragraph (f) of this Rule, a written solicitation communication to prospective clients for the purpose of obtaining professional employment:
>
> (1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:
>
> (i) in a color that contrasts sharply with the background color; and
>
> (ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;
>
> (2) shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the "subject" portion of the standard electronic mail format and at the beginning of the message's text;
>
> (3) shall not be made to resemble legal pleadings or other legal documents.

Tex. Disciplinary Rules of Prof. Conduct Proposed Rule 7.05(b)(1)–(b)(3) (1998). Similarly, the new Florida Rule requires that in an e-mail communication, "the subject line of the communication states 'legal advertisement.'" *Fla. Rules of Prof. Conduct* Rule 4-7.6(c)(3) (1999).

mode of communication is helpful today, but the rule should be more broadly crafted so the standard can be applied in other contexts as technological advances emerge. For example, in addition to referencing e-mail specifically, states could provide general mandates for electronic communications. As state committees, bar associations, and national commissions focus on issues related to emerging technologies, they must be mindful that technological innovations will out-pace mandated regulatory schemes. Any approach taken to formulating guidelines in this regard must be flexible and open to broad interpretation. If care is not taken, it is likely that rules will be outdated even prior to their implementation.

IV. SPECIFIC COMPONENTS OF THE INTERNET AND THE EFFICACY OF THEIR USE

Lawyers communicating on the Internet necessarily transmit information across state lines. While jurisdictions have disparate rules relating to advertising and solicitation, every jurisdiction prohibits lawyers from making communications that are false or misleading.[234] Although this mandate may sound straightforward, it is not: within the confines of broadcast and print media, courts[235] and state ethics

234. *See* Hill, *supra* note 41, at 91; Krakaur, *supra* note 133, at 2. Model Rule 7.1 prohibits misleading communications. *See supra* note 97. The proposed changes to Model Rule 7.1 would amend the rule to state simply: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *Model Rules of Professional Conduct* Proposed Rule 7.1 (2000). The proposed revision would relocate the remainder of current Model Rule 7.1 to the comments "as examples of statements that may be false or misleading." *Model Rules of Professional Conduct* Reporter's Explanation of Changes. It is noted that in making this change, "[t]he Commission concurred with the concern of the ABA Commission on Responsibility in Client Development (formerly the Commission on Advertising) that the specific prohibitions in paragraphs (b) and (c) are overbroad and may unduly deter the communication of truthful information." *Id.* This notation reflects positions taken in the White Paper submitted to Ethics 2000 by the ABA Commission on Advertising. *See White Paper*, *supra* note 131, at 32–33.

235. In reviewing challenged restrictions on speech, courts have found various types of statements in lawyer advertising to be misleading. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652 (1985) (holding that advertising stating that no fee will be charged is misleading, unless advertisement also states that client will remain liable for costs and expenses of litigation, if such costs inure to client); *In re* R.M.J., 455 U.S. 191, 205 (1982) (noting that advertisement stating that lawyer was "Admitted to Practice before: THE UNITED STATES SUPREME COURT" could be misleading to public unfamiliar with admission requirements); Spencer v. Honorable Justices of Pa. Sup. Ct., 579 F. Supp. 880, 887–88 (E.D. Pa. 1984) (holding it appropriate to ban use of subjective and difficult-to-verify terms, such as "experienced," "expert," "highly qualified," and "competent"), *aff'd*, 760 F.2d 261 (3d Cir. 1985); *In re* Zang, 741 P.2d 267, 276 (Ariz. 1987) (determining that law firm's advertisements referring to skill associated with aspects of personal-

committees[236] differ on what constitutes a false or misleading communication. This situation is further complicated by the intricacies of

injury litigation were false and misleading when no lawyer in firm had tried personal injury case to conclusion and firm typically referred actions culminating in litigation to other lawyers); People v. Carpenter, 893 P.2d 777, 777 (Colo. 1995) (implying that lawyer referral service supplying many lawyers in 13 fields was misleading, when in fact there were no more than five lawyers available in four fields); People v. Roehl, 655 P.2d 1381, 1383 (Colo. 1983) (determining that advertisements for routine legal services at fixed fee that did not disclose hidden costs were misleading); State v. Russell, 610 P.2d 1122, 1128 (Kan. 1980) (holding that intentionally publishing known falsehoods in attempt to gain personal advantage constitutes misrepresentation); Kentucky Bar Ass'n v. Gangwish, 618 S.W.2d 176, 176 (Ky. 1981) (holding that advertising under fictitious corporate name was misleading); Attorney Grievance Comm'n v. McCloskey, 511 A.2d 56, 59 (Md. 1986) (holding that national advertisement offering "quickie divorce" was misleading because it created unjustified expectations); State *ex rel.* Nebraska State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 55 (Neb. 1982) (determining that publishing criticism containing unfounded statements regarding opposing candidates in political campaign was misleading); *In re* Donnelly, 470 N.W.2d 305, 305 (Wis. 1991) (holding that advertising for Dominican Republic divorces was misleading, absent disclaimer of their questionable validity in given state); *see also* Eaton v. Supreme Ct., 607 S.W.2d 55, 59 (Ark. 1980) (holding that advertisement including "[o]ther legal problems?" and "there is no time or subject limitation" was misleading; could indicate to public that lawyer was competent to consult and advise on any legal question).

What has been judged to be misleading in one jurisdiction may not be misleading in another. In examining restrictions on lawyers' commercial speech, courts have also indicated types of statements which are not considered misleading. *See, e.g.*, Capoccia v. Committee on Prof. Standards, 59 U.S.L.W. 2445, 2445 (N.D.N.Y. 1990) (determining that advertising that lawyer is "smart, tough lawyer" who can obtain "fast, fair cash compensation" for automobile-accident victims not false and misleading in light of no-fault laws of jurisdiction); Lyon v. Alabama State Bar, 451 So. 2d 1367, 1372 (Ala. 1984) (holding that advertisement stating that "above fees do not include court costs" not misleading since it was sufficient to inform public to inquire about matter of court costs); Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 507 (Md. 1990) (holding that advertisement seeking clients for "palimony" cases, while crass and in bad taste, was not false and misleading despite ambiguity of words and notwithstanding fact that jurisdiction did not recognize all types of palimony claims).

236. When inquiring into whether a particular assertion by a lawyer is misleading, state ethics committees, either in a binding or an advisory fashion, have condemned certain practices. *See, e.g.*, Connecticut Bar Ass'n, Comm. on Prof. Ethics, Op. 88-3, [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) CT: opinions 36 (1988) (determining that advertisement employing fabricated newspaper article with headline "Biker Awarded $250,000 for Accident" was misleading; article not written by independent source but created for advertising purposes); District of Columbia Bar Ass'n, Legal Ethics Comm., Op. 235 (1993) (noting as possibly misleading law firm registered in another state as "limited liability partnership" or "limited liability company" using phrase "L.L.P." or "L.L.C." in advertising, because citizens may be unfamiliar with terms); Maryland State Bar Ass'n, Comm. on Ethics, Op. 91-16 (1991) (determining that using testimonials in which clients or actors describe services performed by lawyer was misleading because it could create unjustified expectations of potential clients); Pennsylvania Bar Ass'n, Comm. on Legal Ethics and Prof. Resp., Op. 85-170, [1986 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) PA: opinions 8 (1985) (opining that use of subjective terms such as "expert" or "competent" impermissible because such terms are inherently misleading); Philadelphia Bar Ass'n, Prof. Guidance Comm., Op. 95-12 (1995) (determining that advertising "25 Years of Legal Representation" and "30 Years Legal Representation" was contradictory and misleading because advertisement fails to explain to whom

cyberspace,[237] where ever-evolving technological advances may be evaluated from the perspective of disparate rules, most of which were drafted before widespread Internet use.

Characteristics of modern technology, such as domain names,[238] links,[239] meta tags,[240] invisible ink,[241] and the like, present new, problematic practices and issues. In fact, it is possible that the mere use of some technological aspects of cyberspace may in and of itself constitute misleading communications in certain jurisdictions.

A. Domain Names as Communications that May Be Misleading

For the Internet to function properly, each Internet computer must have a unique Internet Protocol (IP) address, so that messages can reach the proper place.[242] This IP address is combined with an alphabetical

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experience belonged and in what field experience was gained); Philadelphia Bar Ass'n, Prof. Guidance Comm., Op. 87-27 (1987) (deciding that using as reference "business lawyer" and claiming that one's "business plan" is "unique," "revolutionary," and gives "audit protection" may be misleading and create unjustified expectations); N.Y. State Bar Ass'n, Comm. on Prof. Ethics, Op. 539 (1982) (determining that lawyer describing selected past cases with recovery amounts in advertisement was misleading because it was difficult to verify, suggested lawyer can achieve similar results in other cases and gave appearance that lawyer has significant stature in given area).

As with court decisions, ethics committees from the various states have also differed on what constitutes a misleading communication. *See, e.g.*, Connecticut Bar Ass'n, Comm. on Prof. Ethics, Informal Op. 88-6, [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) CT: opinions 36 (1988) (opining that Yellow Pages advertisement stating that "We Will Investigate and Push Your Claims" was not misleading; neither promised that client would win nor created unjustified expectations about lawyer); District of Columbia Bar Ass'n, Comm. on Legal Ethics, Op. 188 (1987) (finding statement that "thousands of successful claims" had been brought against particular manufacturer not misleading; statement neither led people to believe that individuals recovered amount of their claim nor reflected any individual lawyer's rate of success); Nassau County (N.Y.) Bar Ass'n, Comm. on Prof. Ethics, Op. 6-87 (1987) (determining lawyer advertisement that corporations could be formed for "$65 plus disbursements" not misleading, despite later informing inquiring client that disbursements usually cost about $230).

237. Modern technology has provided "a unique medium—known as cyberspace—located in no particular location but available to anyone, anywhere in the world, with access to the Internet." Reno v. ACLU, 521 U.S. 844, 852 (1997).

238. *See infra* notes 245–56 and accompanying text.

239. *See infra* notes 257–75 and accompanying text.

240. *See infra* notes 286–90 and accompanying text.

241. *See infra* notes 291–94 and accompanying text.

242. *See* David G. Post, *Plugging In*, Am. Law., Sept. 1997. The Internet, created in the 1960s, was initially used primarily for research. It was managed by the Department of Defense's Advanced Research Projects Agency (DARPA) until the early 1980s, when the Domain Name System (DNS) was developed to translate Internet names into IP numbers for transmission across networks. *See*

name in a database[243] that can be accessed by the many Internet Service Providers.[244] Domain names are components of IP addresses, or Uniform Resource Locations (URL),[245] that have been compared to an individual or entity's telephone number.[246] Although there is authority that domain names cannot constitute law firm names,[247] the comment to Proposed Model Rule 7.5 states that "[a] lawyer or law firm may also be designated by a distinctive website address or comparable professional designation."[248] Arguably, domain names can also be compared to a type of a trade name.[249]

U.S. Dep't of Commerce, White Paper, Management of Internet Names and Addresses [hereinafter *Dep't of Com. White Paper*].

243. Historically, the National Science Foundation (NSF) has maintained a database matching numerical IPs with alphabetical names, which is sent to a designated root server. *See Dep't of Com. White Paper*, *supra* note 242. The root-server system is comprised of 13 file servers that collectively contain all Top Level Domain Names (TLDs). Routing requires universal name consistency. *See id.*

244. *See* Post, *supra* note 242.

245. A URL is a Web site address usually made up, in part, of top level and secondary domain names. *See infra* note 252.

246. *See* Reno v. ACLU, 521 U.S. 844, 852 (1997); Post, *supra* note 242. Unlike telephone numbers, however, domain names are not limited by a defined number of characters. *See id.*

247. *See supra* note 186; State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 97-04, at 3 (Apr. 7, 1997). The State Bar of Arizona Committee on the Rules of Professional Conduct was asked the following question: "Can a 'website' use a trade name as the law firm name?" The Committee's response was negative, since the Arizona rule prohibits the use of trade names for law firms. *Id.* The opinion went on to state that "(d)omain names, however, are not firm names and thus are not subject to this limitation." *Id.* The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline has also determined that domain names are not subject to regulation as firm names since domain names actually represent site addresses. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 99-4 (June 4, 1999). However, the Board determined that domain names are subject to rules that prohibit false or misleading communications and that restrict specialization claims. *See id.*

248. *Model Rules of Professional Conduct* Proposed Rule 7.5 cmt.1 (2000).

249. *See, e.g.*, *Model Rules of Professional Conduct* Rule 7.5 (1983). That rule addresses professional designations and trade names and provides as follows:

> Firm Names and Designations
>
> (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 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.

A portion of a domain name, as well as an e-mail address,[250] is usually selected by the user and then registered[251] to become that entity or person's Internet address or identifier.[252] The selection of a domain name or e-mail address is similar to the selection of a vanity-type telephone number, such as "1-800-LAWYERS," or, some may argue, a trade name, such as "Women's Law Forum."[253] However, should a lawyer select a domain name or e-mail address that contains language a jurisdiction has judged to be misleading, this may constitute a communication or professional designation that is considered deceptive. For instance, in Pennsylvania, the use of subjective terms such as "expert" or "competent" have been found to be inherently misleading.[254] Arguably, a

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(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.

Model Rules of Professional Conduct Rule 7.5. The Model Code precluded the use of trade names by lawyers, a practice condoned in the Model Rules. *Compare Model Code of Professional Responsibility* DR 2-102(B) (1969), *with Model Rules of Professional Conduct* Rule 7.5.

250. *See supra* note 6.

251. Until September 30, 1998, the registration and propagation of domain names was performed by Network Solutions, Inc., under a five-year cooperative agreement with the NSF. *See Dep't of Com. White Paper*, *supra* note 242. The Department of Commerce has designated the newly formed Internet Corporation for Assigned Names and Numbers (ICANN) to administer and maintain the DNS. *See* David G. Post, *The Domain Name System and Internet Governance*, (on file with author). In April, 1999, ICANN launched a pilot program "allowing five new firms to compete with NSI as domain name registrars." *New Net Authority Faults NSI Intransigence; Commerce Sees Bad Behavior on Both Sides*, 68 U.S.L.W., July 20, 1999, at 2046.

252. Domain names contain a number of components. One component is the generic Top-Level Domain (gTLD) that applies to the type of user and appears at the right end of the domain name. Over 200 country-wide gTLDs are administered by governments and private entities, such as ".jp" for Japan and ".fr" for France. Some gTLDs denote an intended function, such as ".com" for commercial uses, ".edu" for educational entities, and ".gov" for non-military governmental sites. *See Dep't of Com. White Paper*, *supra* note 242. Another domain name component is the second level domain (SLD) that appears to the left of the gTLD. The SLD name is generally selected and registered by the user, subject to limitations such as previously assigned names and trademark infringement. *See id.* These domain names are usually combined with "www" and "http" for World Wide Web and hypertext transfer protocol, respectively, to form a ULR which is a Web site address. *See id.* The SLD and gTLD names usually become part of an individual or entity's e-mail address, which is formulated by preceding the SLD and gTLD name with a selected notation for a specific individual or entity, and the symbol "@." *See White Paper*, *supra* note 131, at 15–16.

253. *But see supra* notes 247–249 and accompanying text.

254. *See* Pennsylvania Bar Ass'n, Comm. on Legal Ethics and Prof. Resp., Op. 85-170, [1986 Transfer Vol.] 5 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) PA: opinions 8 (1985); *see also id.* at Op.

Pennsylvania lawyer choosing a domain name encompassing these terms would be subject to discipline under Model Rule 7.1 since this rule applies to all communications about the lawyer or the lawyer's services, not just commercial speech.[255] Furthermore, Model Rule 7.5, which relates to firm names and designations, prohibits the use of "a firm name, letterhead or other professional designation that violates Rule 7.1."[256]

Take the hypothetical situation of a lawyer or law firm having a domain name or e-mail address that contains the language "excellent.competent.lawyer." If the lawyer is licensed to practice in a jurisdiction which condemns this language as misleading, the lawyer may be subject to discipline for incorporating "excellent" and "competent" into a domain name or e-mail address. If, conversely, the jurisdiction in which the hypothetical lawyer is licensed to practice finds this language permissible, its use as a selected reference may be perfectly appropriate.

B. A Lawyer's Responsibility for Material Linked to the Lawyer's Site

In addition to domain names or e-mail addresses, emerging technologies and cyberspace issues present multiple concerns relating to lawyer communications. One of these concerns relates to links, or hyperlinks, which are text or symbols that can be accessed on a site in order to switch to an identified item.[257] A Web site can be accessed directly through its URL, or through a link from any other linking site.[258] Just as a site can be accessed by a link, it can also link to other sites.[259] If a lawyer or law firm's Web site must comply with the applicable state ethics rules, is the lawyer also responsible for the efficacy of material on

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93-183B (1993); Philadelphia Bar Ass'n, Prof. Guidance Comm., Op. 87-27, [1989 Transfer Vol.] 4 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) PA: opinions 46 (1987).

255. *See supra* note 97 and accompanying text.

256. *See supra* note 97. In stating that a Web site address is a law-firm designation in the comment to Proposed Model Rule 7.5, it follows that "a law firm may not use a website address that violates Rule 7.1." *Model Rules of Professional Conduct* Proposed Rule 7.5 (2000).

257. Hyperlinks, or links, are "hidden code in a Web page that enables a user to leave that page and travel to another by merely clicking a mouse." Hankins, *supra* note 16.

258. *See White Paper*, *supra* note 131, at 16.

259. *See id.*

the site from which, or to which, the Web site of the lawyer is linked?[260] If a lawyer is responsible for linked material, must linked material be archived, or perhaps labeled, in accordance with the Model Rule mandates?[261]

The comments to the new Florida rules specifically state that the rules related to computer-accessed communications do not apply simply because someone links material to a lawyer's site.[262] What is not addressed, however, is whether the proposed rules apply when it is the lawyer who links material with his or her own site. It stands to reason that if lawyers are not responsible for material to which they link, "lawyers would be able to provide their potential clients with information, through the links, that would be impermissible for them to do directly."[263]

It is somewhat problematic to approach the issue of hypertext links from a traditional commercial-speech analysis. The regulations on advertising and solicitation that impose restrictions on commercial speech are limited to speech of that kind.[264] It follows that linked material must be deemed commercial speech if a lawyer is to be responsible for linked material's compliance with the rules on advertising and solicitation. Using a content-based approach, most linked material would probably be considered noncommercial, since the proposition of a transaction is not its underlying purpose.[265] The question then becomes whether the act of the linking should itself trigger the applicability of these obligations which restrict a lawyer's speech. If the mere act of linking triggers this responsibility, then the traditional basis upon which the commercial speech doctrine is based will be negated.[266]

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260. It has been suggested that to make lawyers responsible for the content of links would be an "enormous" burden. However, if lawyers are not responsible for the content of links, "a convenient loophole by which they could avoid the rules" would be created. *Id.* at 35.

261. *See supra* notes 112–13 and accompanying text.

262. The comment to new Florida Rule 4-7.6 provides that "[t]his rule is not triggered merely because someone other than the lawyer gratuitously links to, or comments on, a lawyer's Internet web site." *Fla. Rules of Prof. Conduct* Rule 4-7.6 cmt. (1999).

263. *See White Paper*, *supra* note 131, at 35.

264. *See supra* note 167.

265. *See supra* note 166 and accompanying text. A related question to the commercial-speech issue is whether the commercial and noncommercial aspects of the speech would be intertwined and if so, are they "inextricably intertwined"? *See supra* notes 174–79 and accompanying text.

266. The Ethics Committee of Nassau County, New York has favorably reviewed an advertising service plan which sells hyperlinks to an advertising lawyer's Web site, so long as the viewer does not communicate directly with the lawyer in a "real-time" dialogue. *See* Nassau County (N.Y.) Bar

It has been suggested that with links to Web pages, the archiving and labeling requirements of the Model Rules should apply only when the linked material is under the control of the lawyer.[267] An alternative test for Model Rule applicability is "whether the linked material is primarily concerned with obtaining clients."[268] The proposed Texas rules had specifically addressed this situation in terms of archiving by eliminating filing requirements "in the case of a Website" and "links to other Websites."[269] However, the proposed Texas rule required that the linked information not be false or misleading.[270] Arguably, this requirement makes the lawyer responsible for the content of linked material by implication, since the rule imposes a requirement related to the accuracy of the linked material.[271] If a lawyer is responsible for the content of

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Ass'n, Comm. on Prof. Ethics, Op. 99-3 (1999). An Ohio ethics committee has determined that a lawyer may be listed in an on-line membership directory of a professional association provided the information contained in law lists and law directories conforms to the advertising rules. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 99-3 (June 4, 1999). The lawyers being listed may have a link to their e-mail addresses or law firm Web sites. *See id.* This would not constitute a referral triggering application of DR 2-103 unless compensation is being provided for the referral or the directory is being used as part of a lawyer referral service that screens inquiries and provides referrals. *See id.* An Arizona Committee deemed on-line service that attempts to match clients with lawyers a "lawyer referral service" subject to Rule 7.1 when the service performs a screening function and there is a direct relationship between the fee paid by the participating lawyer and the number of questions referred to the lawyer. *See* State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 99-06 (June 9, 1999).

267. *See Internet, supra* note 1, at 81:555. "Arguably, any other material need not be archived because the lawyer is not 'responsible for its content' under Rule 7.2(d)." *Id.* However, if a lawyer is not responsible for the content of linked material, would linking to this information subject the lawyer to claims of misrepresentation?

268. *Id.*

269. *Tex. Disciplinary Rules of Prof. Conduct* Proposed Rule 7.07(e)(1)(xi) (1998).

270. *Tex. Disciplinary Rules of Prof. Conduct* Proposed Rule 7.07(e)(1).

271. Proposed Texas Rule 7.07(e) stated as follows:

> The filing requirements of paragraphs (a), (b) and (c) do not extend to any of the following materials:
>
> (1) an advertisement in the public media (including a Website) that contains only part or all of the following information, provided the information is not false or misleading:
>
> ....
>
> (x) in the case of a Website, other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations or legislation;
>
> (xi) in the case of a Website, links to other Websites ....

links, given the ease with which material can be changed, must a lawyer monitor all linked material for continued compliance with the rules? If a lawyer is responsible for the compliance of linked material, is the lawyer also responsible for the compliance of links to a link?

A burden on the lawyer to monitor linked material would pose an onerous obligation. From a practical standpoint, imposing this burden on lawyers eliminates their ability to link with other sites. Since links are "an integral feature of the web component of the World Wide Web,"[272] arguably a regulation which has the effect of precluding lawyers from engaging in linking would serve to suppress information to the consumer, rather than protecting the public from misleading practices. Some lawyers are avoiding linking because they feel that "all it does is make it easy for users to leave a site."[273] Instead, they are "mirroring" content onto their own site by getting permission to copy material, or if they link, "using 'frames' so that a user clicking on an off-site link never actually leaves."[274] The prevalent practice in this regard, however, seems to be for lawyers to include disclaimers "of any endorsement, responsibility or control on the law firm's part regarding any information" which might be found at the linking site.[275]

C. *Efficacy of Mechanisms for Priority Search Placement*

In addition to accessing a Web site through its URL or through a linking site, there are search engines that can identify sites mechanically by the words that appear in a site's HTML language (for example, meta tags, repetitive phrases, and invisible ink).[276] Search engines are designed to identify sources that contain certain key words, and depending on the words or phrase used in the search, thousands of matches to HTML language may be found.[277] Typically, a consumer conducting a search will view results on a screen that will show approximately ten matches at

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Tex. Disciplinary Rules of Prof. Conduct Proposed Rule 7.07(e)(1)(x), (xi) (1998). Unless the rule meant that only misleading linked material must comply with the filing requirement, which is unlikely, a lawyer may not link to a site that contains false or misleading information.

272. *White Paper*, *supra* note 131, at 34.

273. Thomason, *supra* note 204.

274. *Id.* When using a frame, the linked site appears in a window at the lawyer's site. *See id.*

275. Kennedy, *supra* note 204.

276. *See White Paper*, *supra* note 131, at 32.

277. *See id.* at 31.

a time.[278] As with yellow-page advertising, sources that appear at or near the beginning of a search are widely considered to have a competitive advantage.[279] A user, however, can increase the chance of a priority search placement by implementing mechanisms such as repetitive phrases, meta tags, or invisible ink.[280] The appropriateness of using practices that result in priority placement may be questionable, as might the character of the language selected in hopes of "snagging" a search.

Since search engines identify sites by looking for key words in HTML language, "if a lawyer's home page has repetitive words or phrases that correspond to those words or phrases used by the consumer to do the search, the web site will appear at or near the top of the resulting search."[281] The words can be part of the site itself, noted throughout the text, or sometimes listed at the end of the site as a block.[282] It stands to reason that the content of a repetitive phrase must comply with the applicable jurisdictional mandates. If a lawyer is precluded from using the term "competent" or "excellent," then its inclusion in a site is obviously improper. The more pressing issue, however, is whether the act of using repetitive words or phrases is an appropriate practice. In essence, is the implementation of a technologically available priority placement device misleading or inappropriate? Does the use of repetitive phrases merely serve to confuse the consumer, or is it helpful to the consumer seeking information?

A Nassau County, New York, ethics committee recently approved a cyberspace advertising plan where lawyers pay to be listed as "sponsors" in banner advertisements on Internet sites which provide information about various areas of the law.[283] However, the committee condemned as misleading a practice that would allow lawyers, for an increased fee, a priority placement at the head of such an alphabetical list and an identification as "lead counsel."[284] Viewing priority placement as an

278. *See id.*

279. *See id.*

280. *See id.* at 32–34.

281. *Id.* at 32.

282. *See id.*

283. *See* Nassau County (N.Y.) Bar Ass'n, Comm. on Prof. Ethics, Op. 99-3 (1999). The panel advised that to avoid any possibility of misunderstanding a disclaimer should be used indicating that the service is not an attorney-referral service, that it does not recommend the use of any attorney services, and that the "sponsor" attorney did not prepare legal information provided on the Internet site. *Id.*

284. *Id.*

available technological tool in one's dissemination of information, it does not appear that the practice of implementing priority placement should be subject to condemnation, although possible disclosures may be necessary. Arguably, the problem facing the Nassau County ethics committee was more the "lead counsel" designation, rather than an entity's placement out of alphabetical order. The committee noted that viewers could get the impression that those attorneys noted "are exceptional compared to other attorneys and are recommended as leading counsel."[285]

With a goal of getting information to the public, lawyers should be permitted to implement a priority-placement device using repetitive words or phrases, provided the content is neither deceptive nor misleading. While perhaps giving a lawyer a competitive advantage by virtue of where information appears in a recipient's search, an individual still merely accesses readily apparent information that he or she can choose to use or ignore. Repetitive phrases can be viewed as mere tools that expand the effectiveness of Internet advertising.

In addition to the use of repetitive phrases, words can also be embedded in HTML language, thereby triggering a search through the use of meta tags and invisible ink.[286] Meta tags are words that are embedded in the documents and are not visible when viewing the home page of an entity.[287] While one visiting a site can take extra steps to call up the HTML language and view any meta tags through the site's source code,[288] their hidden nature may call into question whether the use of meta tags, in and of itself, constitutes a prohibited practice.

Although visibly hidden on a site, meta tags function as a device to give material priority placement during the conduct of a search.[289] While priority placement may be considered a deceptive practice or an unfair advantage by some, it seems that as with repetitive phrases, meta tags should be judged on the basis of their content, rather than condemned by the mere fact of their use.[290] If language incorporated into meta tags is

285. *Id.* The panel suggested a neutral way of describing these lawyers would be to reference them as "Attorneys Who Have Paid To Be Placed at the Head of the List." *Id.*

286. *See White Paper*, *supra* note 131, at 32.

287. *See* Hankins, *supra* note 16.

288. While not apparent when initially viewing a home page, meta tags can be seen by clicking on "view" and then clicking on "source." *See White Paper*, *supra* note 131, at 32.

289. *See id.*; *see also* Hankins, *supra* note 16.

290. *See White Paper*, *supra* note 131, at 33.

otherwise permissible for purposes of the ethical rules, lawyers should be permitted to take advantage of this technological feature in promoting the availability of their services. For instance, lawyers would be prohibited from using the meta tags "excellent" and "competent" in jurisdictions where those terms have been found to be misleading. Presumably, a lawyer in another jurisdiction could use these terms to trigger a search, provided the use of this language is permissible and the terms are descriptive of the lawyer. If the troubling feature of meta tags is the fact they are not readily apparent, perhaps lawyers should be required to record and retain any HTML language which results in priority placement as part of a jurisdiction's archiving requirements. Additionally, perhaps lawyers should be required to disclose the fact that meta tags are being used on the site itself, and include information on how the visitor can view meta tags through the site's source code.

Invisible ink is a feature whose use some find to be more problematic than the implementation of repetitive phrases or meta tags.[291] As with meta tags or repetitive phrases, invisible ink is used to give a site priority placement during a search.[292] However, unlike repetitive phrases or meta tags, the HTML language that would reveal the use and content of words or phrases in invisible ink is more difficult to access.[293] Nonetheless, as with meta tags, it stands to reason that the propriety of using invisible ink should be judged on the basis of the content of the programmed language used. While ease of access would effect the matter of enforcement of any applicable rules, the hidden nature of invisible ink should not, in and of itself, cause its use to be condemned if the language in question would otherwise be in compliance with the rules. Again, as with meta tags, the content of words or phrases in invisible ink could be recorded and retained, or subjected to a filing requirement implemented by the bar. Also, lawyers implementing invisible ink could be required to disclose the fact of its use on the site itself to avoid fostering a misimpression.[294]

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291. *See id.* "Invisible ink is the placement of words on a background with the same color as the background so that they are not visible." *Id.*

292. *See id.*

293. *See id.*

294. Proposed changes to the Model Rules make no provision regarding priority placement, an omission that is intentional. To that end, the Reporter's Explanation of changes states the following:

> Although aware of the creative techniques that can be used to increase the likelihood that a browser will be directed to a law firm's website and that there is some potential for improper use, the Commission thinks the Model Rules should not directly address such specific issues. If

As technology continues to evolve, it is evident that many additional practices will be available that address the access of information, as well as its delivery. Lawyers will continue to be faced with issues that relate to fundamental fairness and deception. It seems that the system will be best served by taking a content-based approach to these practices, provided that the mechanics used merely trigger a search and do not preclude a recipient from receiving information. Filing or recording requirements may be imposed, or to help avoid misleading communications, disclosure requirements may be implemented. However, significantly problematic to the lawyer in this regard are disparate standards. If state regulations vary as to permissible content or disclosure requirements, some lawyers will be disadvantaged. As communications become more sophisticated and intricate, disparate jurisdictional rules could work against lawyers in the more restrictive states and serve to deprive the public of useful information.[295] A uniform application of a content approach, along with archiving requirements and uniform disclosure mandates, would better serve the public as well as the profession.

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abuses arise, they can be adequately resolved by an application of the general principles in Rules 7.1 or 8.4.

Model Rules of Professional Conduct Proposed Rule 7.5, Reporter's Explanation of Changes (2000).

295. Inconsistent lawyer-publicity rules have caused problems for Member States' lawyers who engage in cross-border practice in the European Union. *See* Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 Geo. Wash. J. Int'l L. & Econ. 381, 443–47 (1995). A mandate imposed by some Member States requires lawyers to follow more restrictive home-state publicity rules when practicing in a host state:

> If lawyers must limit the dissemination of personal publicity to more restrictive standards than those of a jurisdiction in which they practice, the result will be the strengthening of barriers to cross-border practice. The Diploma Directive, Lawyers' Services Directive, Draft Establishment Directive, and the like are aimed at facilitating the ability of professionals to practice throughout the Member States. In order to effectuate this goal, the arena in which host- and home-state professional practice must be equalized. Preventing migrant lawyers from utilizing host-Member State publicity rules creates an unnecessary disadvantage to lawyers engaged in cross-border practice. If the spirit of free movement, the right of establishment, and the freedom to provide services are to be facilitated, lawyers must be able to take advantage of a host-Member States' rules. This is particularly significant when the rules at issue are those that would allow lawyers to publicize the availability of their services and provide the public with useful information.

Id. at 447 (footnote omitted).

D. *Determining Which Jurisdictions' Rules Are Applicable to Internet Communications*

The a-jurisdictional nature of the Internet makes information easily accessible without regard to state or national boundaries. Using the Internet, a potential client in one state can access a lawyer in another state as easily as a lawyer in his or her home state. Suppose a lawyer uses the domain name "excellent.competent.lawyer," or a meta tag to that effect, in a jurisdiction where such language is permissible. Arguably, the lawyer in the jurisdiction where this language is permissible has a competitive advantage over the lawyer in a jurisdiction where superlative language is precluded.[296] Further, suppose that via the Internet, this language, which is permissible in the lawyer's own jurisdiction, is accessed by a person in another jurisdiction where its use has been judged to be misleading. By what standard is a lawyer's communication judged? Is the lawyer who used this language subject to discipline by virtue of such a communication?[297]

Some lawyers with multiple bar admissions attempt to comply with the rules of each of the states where the lawyer, or a member of the lawyer's firm, is admitted to practice and in which the firm is seeking clients.[298] An ethics committee in Iowa has taken a different approach, however, suggesting that lawyers with multiple admissions establish separate Web sites for Iowa and non-Iowa offices, with no hypertext

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296. *See* Kennedy, *supra* note 204.

297. The legal profession is faced with significant questions regarding lawyers' Internet use beyond those related to the classification of communications and these communications' status as misleading or non-misleading. Is the informative nature of many Web sites and discussion groups such that presenting information constitutes giving legal advice? Will communicating on the Internet disqualify a lawyer or a lawyer's firm from representing other potential litigants due to conflict-of-interest concerns? Do lawyers disseminating information from their home state run the risk of facing charges or complaints of unauthorized practice of law? As to e-mail, since it is accessible by the Internet Access Provider and/or the System Operator, does it create an implied waiver of confidentiality? What is the significance of using disclaimers or encryption software? Does the interactive and informative nature of some electronic communications constitute the establishment of an attorney/client relationship? Regarding the latter, Professor Lanctot takes the position that giving specific legal advice to on-line questioners ordinarily will create an attorney-client relationship. *See* Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 Duke L.J. 147, 162 (1999).

298. In determining which states' rules apply to lawyers marketing services on the Internet, the following factors have been noted: "1) the states in which members of the firms are admitted to practice, 2) the states in which the firm is seeking clients and 3) the states in which the firm in fact practices." Hornsby, *supra* note 9.

links.[299] As an alternative, some lawyers attempt to follow the course of least resistance and comply with the most stringent regulations among the applicable states.[300]

These approaches, however, put a needlessly burdensome and sometimes impossible task upon the lawyer. Given the vast variation in state rules on advertising and solicitation, some applicable state requirements are so different that it is impossible to be in compliance in several states. Regarding the rules on communications, it is not an issue of some rules being more restrictive than others, rather it is an issue of the rules being conflicting or disparate. For instance, the labeling requirements of the various jurisdictions may be so different that it is impossible to be in compliance with multiple language, print size, and color requirements of several states.[301] This is further complicated by the fact that what appears on the screen of one person's computer may differ from that of another person, depending on the search engine and equipment used. Compliance with disclaimer requirements may also create an untenable situation. To date, attempted compliance by lawyers in this regard has led lawyers to engage in multi-page disclaimers.[302] This

299. *See* Iowa Sup. Ct., Bd. of Prof. Resp., Formal Op. 96-14, [1998 Transfer Vol.] Nat'l Rep. Legal Ethics (Univ. Pub. Am.) IA: opinions 14 (1996). It has been suggested that this separate Web-site requirement would be of little benefit to the public and would lead to incongruous, if not misrepresentative, results. *See* Krakaur, *supra* note 133.

300. *See* McCauley, *supra* note 4.

301. A disclosure obligation in Arizona requires that written communications under ER 7.3(b):

> [B]e clearly marked on the envelope and on the first page of the communication contained in the envelope, as follows: ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION. Said notification shall be printed in red ink, in all capital letters, in type size at least double the largest type size used in the body of the communication.

Ariz. Rules of Prof. Conduct Rule ER 7.3(b) (1997). When dealing with electronically transmitted solicitation, the Committee on the Rules of Professional Conduct suggested the following:

> If technologically feasible, lawyers should make reasonable efforts to comply with this requirement and send a copy of their communications, as required by ER 7.3(c), to the Clerk of the Supreme Court and the State Bar. Absent further clarification of these requirements by the Arizona Supreme Court, this Committee suggests that practitioners, at a minimum, include the disclaimer language in all capital letters on the e-mail "subject" line and in the body of the communication.

State Bar of Ariz., Comm. on Rules of Prof. Conduct, Formal Op. 97-04 (Apr. 7, 1997).

302. An example of a disclaimer attempting to comply with multi-jurisdictional mandates, found at King & Spalding's site, provides as follows:

> The materials on this World Wide Web site are provided for informational purposes only, do not constitute legal advice, do not necessarily reflect the opinions of King & Spalding or any of its attorneys or clients, and are not guaranteed to be correct, complete, or up-to-date. This World Wide Web site is not intended to create an attorney-client relationship between you and King &

practice, as well as other attempts to be compliant on a multi-jurisdictional basis, arguably serves to confuse, rather than inform, the public.[303] It stands to reason that prospective clients may view a lawyer with no disclaimer in a different light than a lawyer with a multi-page caveat.

Spalding, and you should not act or rely on any information in this World Wide Web site without seeking the advice of an attorney. We would be pleased to communicate with you by e-mail. However, if you communicate with us through this World Wide Web site or otherwise in connection with a matter for which we do not already represent you, your communication may not be treated as privileged or confidential. If you communicate with us by e-mail in connection with a matter for which we already represent you, please remember that internet e-mail is not secure and you should avoid sending sensitive or confidential internet e-mail messages unless they are adequately encrypted. In some jurisdictions this World Wide Web site may be considered advertising. The hiring of a lawyer is an important decision that should not be based solely upon written information about our qualifications and experience. King & Spalding has endeavored to comply with all known legal and ethical requirements in compiling this World Wide Web site. King & Spalding does not desire to represent clients based upon their review of any portions of this World Wide Web site that do not comply with legal or ethical requirements. The Legal Resources page on this World Wide Web site and some of the articles on this World Wide Web site contain links to other resources on the Internet. Those links are provided as citations and aids to help you identify and locate other Internet resources that may be of interest, and are not intended to state or imply that King & Spalding sponsors, is affiliated or associated with, or is legally authorized to use any trade name, registered trademark, logo, legal or official seal, or copyrighted symbol that may be reflected in the links. To the extent the State Bar Rules in your jurisdiction require us to designate a principal office and/or a single attorney responsible for this World Wide Web site, King & Spalding designates its office in Atlanta, Georgia, USA as its principal office and designates Bradley A. Slutsky as the attorney responsible for this World Wide Web site.

Texas attorneys not certified by the Texas Board of Legal Specialization.

Id. (visited July 15, 1998) <http://www.kslaw.com/disclaim.html>.

303. An example of a hypothetical disclaimer responding to fears relating to potential ethical violations and legal liability is as follows:

> This Web page is a public resource of general information which is intended, but not promised or guaranteed, to be correct, complete and up-to-date. However, this Web page is not intended to be a source of advertising, solicitation, or legal advice; thus the reader should not consider this information to be an invitation for an attorney-client relationship, should not rely on information provided herein and should always seek the advice of competent counsel in the reader's state. The owner does not intend links on the Web page to be referrals or endorsements of the linked entities, and the owner of this Web page will not accept referrals of employment from unregistered referral services. Furthermore, the owner of this Web page does not wish to represent anyone desiring representation based upon viewing this Web page in a state where this Web page fails to comply with all laws and ethical rules of that state. Finally, the use of Internet E-mail for confidential or sensitive information is discouraged.

Jeffrey R. Kuester, *Attorney Sites Can Avoid Violations of Ethics Rules*, Nat'l L.J., Aug. 12, 1996, at B11. It is questionable, however, whether disclaimer language can protect a lawyer from assertions that certain conduct amounts to advertising, solicitation, or the giving of legal advice.

It has been suggested that the Model Rules resolve the issue of which jurisdiction's rules are applicable in situations involving lawyer communications on the Internet. In 1993, ABA Model Rule 8.5 was amended to address the applicability of disciplinary authority and choice of laws when the rules of more than one jurisdiction could be applicable to a lawyer's conduct. Focusing on a lawyer with multiple bar admissions, Model Rule 8.5 indicates that the rules of the state in which the lawyer principally practices are applicable to the lawyer's conduct, unless the lawyer's conduct has its predominant effect in another jurisdiction in which the lawyer is licensed.[304] In the case of the latter, the rules of that jurisdiction apply.[305]

While touted as a possible solution to the choice-of-laws issue, in reality, Model Rule 8.5 provides only minimal help to lawyers within the context of Internet communications.[306] This is due to the nature of the Internet and because the rule is directed only to lawyers with multiple

304. Model Rule 8.5 provides as follows:

(a) *Disciplinary Authority.* A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) *Choice of Law.* In the exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applies shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Model Rules of Professional Conduct Rule 8.5 (1983) (amended 1993).

305. *See Model Rules of Professional Conduct* Rule 8.5

306. One author has taken the position that "[n]either the committee that drafted amended Rule 8.5, nor the House of Delegates that adopted it, anticipated its application to advertising." Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 715, 779 (1995). Its literal application "would paralyze large and mega-firm marketing initiatives." *Id.*

admissions. With use of the Internet, it is often impossible to determine in advance where a communication will have its "predominant effect," to use Model Rule 8.5 language.[307] Additionally, every lawyer using the Internet, regardless of his or her admission status, makes information available to every state and every country where people have Internet access. Model Rule 8.5 offers no help in resolving the dilemma of the lawyer whose communication is accessed by, or sent to, an individual or entity in a jurisdiction where that lawyer is not licensed to practice law. Emerging technology has torn down traditional jurisdictional boundaries. It is in the best interest of the public and the legal profession to confront this fact with the goal of resolution.

E. Lawyer Communications and the Unauthorized Practice of Law

As lawyers disseminate information electronically, reaching people without regard to geographic boundaries, the issue of unauthorized practice of law must be addressed. Since lawyers, with few exceptions, are authorized to practice law only in jurisdictions in which they are licensed,[308] certain communications on the Internet may subject lawyers to liability for unauthorized practice of law.[309] Addressing this inquiry

307. Hornsby, *supra* note 167, at C1, C19.

308. There are limited exceptions to the licensing restriction, such as appearing pro hac vice, or, "for this turn only." With the permission of the court, lawyers are sometimes permitted to represent clients in jurisdictions where they are not admitted to practice. There is no right to appear pro hac vice. *See* Leis v. Flynt, 439 U.S. 438, 442 (1979). In fact, "[i]n some jurisdictions, the attorney must enlist a local attorney as co-counsel. This requirement is to assure compliance with local procedure and provide accountability to the court, although some argue that it is really an economic device to protect the local bar." Mortimer D. Schwartz et al., *Problems in Legal Ethics* 35 (1997).

309. *See* Catherine J. Lanctot & James E. Maule, *The Internet—Hip or Hype? Legal Ethics and the Internet* (on file with author). An Oregon formal opinion held that it was permissible for a lawyer to offer an online information system to the public in a for-profit joint venture with a non-lawyer. *See* Oregon State Bar Ass'n, Formal Op. 1994-137, [1997 Transfer Vol.] 9 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) OR: opinions 2 (1994). The opinion found that the following factual situation did not constitute the promotion of the unlawful practice of law:

> Lawyer wishes to engage in a joint venture for profit with a non-lawyer to offer an online legal information system to the public that would provide information not only on substantive law issues but also on procedural and jurisdictional matters, such as identifying applicable rules, fees, and forms. The purpose of the proposed online information service is not only to enable users to handle some legal matters themselves but also to advise them when they should contact a lawyer. When accessed through a computer terminal, the online system would pose questions to the user and generate responses derived from the system's database, without the direct participation of an employee. The service would provide the user with a file consisting of the system's questions, the user's responses and the information the system had provided. The proposed enterprise does not involve the sale or distribution of legal software.

requires a two-stage approach. First, conduct that constitutes the practice of law must be identified; and second, it must be determined whether conduct identified as legal practice is unauthorized.

What constitutes the "practice of law" is not easy to define. Traditionally, the definition of "practice of law" has been left to the individual states, which have taken different approaches.[310] The Model Rules do not define the practice of law, but recently, the ABA Multidisciplinary Practice Commission posited the following definition for use in addressing multidisciplinary-practice (MDP) concerns:

> [A]n MDP professional would be presumed to be practicing law if the individual:
>
> ◦prepares any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instrument intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
>
> ◦prepares or expresses legal opinions;
>
> ◦appears or acts as an attorney in any tribunal;
>
> ◦prepares any claims, demands, or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
>
> ◦provides advice as to how any of the activities described above could be accomplished in accordance with applicable law; or
>
> ◦furnishes an attorney or other person to render the above services.[311]

Under either a typical "practice of law" standard or the MDP definition, a lawyer expressing legal opinions or providing legal advice

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Id.

310. *See Report of the Comm'n on Multidiciplinary Practice to the ABA House of Delegates*, Prof. Law., Spring 1999, at 1, 6 n.2.

311. Lance J. Rogers, *ABA Multidiciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 67 U.S.L.W. 2742, June 15, 1999, at 2744.

to an electronic-discussion participant in a chat room would be practicing law.[312] In this situation, the question of the attorney-client relationship would also be raised, as would the question of whether the lawyer is giving advice about the law in a jurisdiction in which the lawyer is not licensed to practice. However, stepping back from a substantive chat-room situation to e-mail or a Web site, what constitutes the practice of law is less clear. Posting information for view on a home page or Web site, arguably, would not constitute the practice of law.[313] As noted by the Nassau County, New York, Ethics Committee, "[a]dvertising out of state is not practicing out of state."[314] But e-mail communications, as contrasted with Web site postings, could raise practice-of-law claims, depending on the nature of the contact.

In Indiana, unauthorized practice is being used as a basis to sanction out-of-state law firms that send "solicitation letters to accident victims in violation of the rules governing such letters in the state where the victim resides."[315] Although rejected by the Supreme Court of Florida when adopting its new advertising and solicitation rules in December, 1999, a proposed Florida rule took the position that it had jurisdiction over lawyers who advertised or solicited for legal employment in Florida, even if those lawyers were not admitted to practice law in Florida. The proposed Florida rule provided that "lawyers, whether or not admitted to practice law in Florida, who solicit or advertise for legal employment in Florida or who target solicitations or advertisements for legal employment at Florida residents, *are engaging in the practice of law.*"[316] The rules went on to state, however, that they were not applicable to advertising not intended for dissemination in Florida and not concerning the provision of legal services in Florida.[317] The proposed Texas rule

312. *See* Lanctot & Maule, *supra* note 309.

313. A law-firm Web site that is passive and offers nothing other than general information and advertising has been held not to constitute sufficient contact to permit the exercise of personal jurisdiction over the firm. *See Typical Law Firm Internet Web Site Does Not Yield Personal Jurisdiction*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) No. 9, at 212 (May 26, 1999) (citing Remick v. Manfredy, No. 99-CV-0025 (E.D. Pa. Apr. 22, 1999)).

314. Nassau County (N.Y.) Bar Ass'n, Comm. on Prof. Ethics, Op. 99-3 (1999). The panel noted that Internet advertising is not problematic as long as the jurisdiction(s) in which the lawyer is licensed to practice are identified. *See id.*

315. Forkin, *supra* note 168.

316. *Fla. Rules of Prof. Conduct* Proposed Rule 3-1.3 (1998) (emphasis added).

317. *See Fla. Rules of Prof. Conduct* Proposed Rule 4-7.1(b). A condition to the rules' inapplicability is that the advertisement be "broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted" and that the advertisement comply "with the rules

provided that lawyers not licensed in Texas, who marketed their services in Texas, would be subject to potential unauthorized-practice-of-law sanctions.[318] This is but another example of how our traditional legal ethics rules based on individual state implementation fail to mesh with contemporary communications.

F. National Standards Called for in Lawyer Communications

Perhaps most troubling to lawyers using the Internet today is the question of what rules are applicable when information is accessed by individuals in jurisdictions where the lawyer is not licensed to practice. While a jurisdiction generally has no disciplinary authority over a lawyer who it has not licensed to practice, several states assert the right to discipline lawyers who are licensed in other states but practice within their jurisdiction.[319] If a lawyer's conduct is judged to be impermissible, the lawyer will be subject to discipline in his or her home jurisdiction.

The varying state regulations on lawyer communications, as well as concerns relating to unauthorized practice of law and impermissible solicitation, create confusion as well as an uneven playing field for lawyers engaging in practice. "As cross-border practice becomes more common and technological tools grow more sophisticated, lawyers increasingly will face the challenge of developing their practice while complying with the rules of professional conduct."[320] The rules of the collective states not only present problems for lawyers attempting to comply with ethical mandates, but also for the consumer. Since a potential client can access information about lawyers notwithstanding state lines, it is often difficult for the potential client to accurately compare information available on the Internet. Lawyers in the various

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governing lawyer advertising in that jurisdiction." *Fla. Rules of Prof. Conduct* Proposed Rule 4-7.1(b).

South Carolina Supreme Court Rule 418, titled "Advertising and Solicitation by Unlicensed Lawyers," requires lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers. *See South Carolina Adopts Novel Court Rule on Ads, Solicitation by Out-of-State Lawyers*, U.S.L.W., July 6, 1999, at 2006.

318. *See* Forkin, *supra* note 168.

319. *See supra* notes 311–14 and accompanying text. In addition, Alaska, Arkansas, California, Maryland, Michigan, and North Carolina have rules subjecting lawyers who are not admitted in their respective jurisdictions, but practice within their respective states, to the state's disciplinary authority. *See* Daly, *supra* note 306, at 749–50 & n.146.

320. Arthur Garwin, *Way Over the Client Limit*, A.B.A. J., Oct. 1999, at 71.

jurisdictions will obviously present information differently, depending on the applicable rules. It is not unreasonable for a potential client to view a lawyer with a long disclaimer more skeptically than a lawyer who has none. Nor is it unreasonable for a potential client to be more favorably impressed by a lawyer who describes his or her work in superlatives, rather than the lawyer who states limitations of his or her practice.

At the present time, the Model Rules are being reviewed and a discussion draft has been released suggesting changes to both the rules and comments that relate to lawyer communications reflecting Internet use and emerging technologies.[321] Although the suggested changes to the rules reflect some intricacies of electronic communication, they are relatively broad. Any rules that are implemented should be broad enough to relate to continually evolving technological advances. However, of paramount importance to lawyers is knowing exactly what the governing rules are. As is evident from the significant variation in communication standards of the Model Rule states today, Model Rule amendments to this effect will not provide the legal profession with the necessary solution.

The a-jurisdictional nature of the Internet is such that lawyer communications should be regulated by national standards rather than by individual state rules. This is not meant to suggest the creation of national licensing of lawyers, although some find "a uniform standard for the admission and discipline of lawyers in the federal courts" to be appealing.[322] Rather, what this Article suggests are uniform standards on lawyer communications, with interpretive guidelines, to be regulated by the individual states. While it is evident that state-based regulation will result in some differences in interpretation, uniform standards with interpretive guidelines will go a long way toward leveling the playing field. Lawyers need to know what rules are applicable and how they are being implemented. Lawyers need to be able to predict how their actions will be interpreted in order to properly conduct themselves in their legal practice. Technological changes have helped to render state-by-state

321. *See supra* note 131. The White Paper has been submitted to Ethics 2000 for their consideration in reviewing the Model Rules on lawyer communications. *See supra* note 131.

322. *See* Daly, *supra* note 306, at 782. Professor Daly goes on to state that "[i]f a national bar means a unitary system of admission and discipline, replacing the current state-based regime, the proposal is unrealistic as a matter of politics, unworkable as a matter of administration and unsound as a matter of policy." *Id.* Professor Daly questions the effectiveness of centralized regulation for a national bar, as well as its threat to the independence of the legal system. *See id.* at 783–84.

regulation of the profession in this regard both ineffective and obsolete. The fundamental question of characterization of conduct will best be addressed by a unified standard, providing a directive for lawyers and enabling the public to access information that can be more easily evaluated and understood.

V. CONCLUSION

The individual states have held that lawyer communications on the Internet are subject to rules governing lawyer advertising and solicitation. As lawyers and law firms increase their presence on the Internet, many lawyers are for the first time engaging in conduct that is considered advertising. Because each state has its own rules on lawyer communications that govern the lawyers practicing in its jurisdiction, members of the profession must contend with varying standards on a jurisdictional basis.

An overwhelming majority of the states have adopted the Model Rules. However, most of those states have decided to implement standards on lawyer communications that vary from the Model Rule mandates. Along with variation in the rules themselves, significant diversity exists in the interpretation and applicability of the rules. What is a misleading communication or practice in one jurisdiction may be permissible in another. Labeling and retention provisions are different, as are disclosure and disclaimer requirements. The nature of the Internet has the effect of tearing down traditional jurisdictional boundaries. Applying existing rules to electronic communications raises questions relating to which jurisdiction's rules apply, as well as which specific standard is applicable.

The Internet, having no geographic boundaries, should be regulated by national standards and not controlled by individual state rules. Lawyers need to know what rules are applicable and how they are being implemented. Lawyers need to be able to predict how their actions will be interpreted in order to properly conduct themselves in their practice of law. The fundamental question of characterization of conduct will best be addressed by a unified standard. This will help level the playing field among practitioners and enable lawyers to more effectively represent clients.