

# Proposed Rule 7.3 [RPC 1-400] “Direct Contact with Prospective Clients”

(Draft #8, 10/2/09)

**Summary:** Proposed Rule 7.3 is the third of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client, such as by live, telephonic or real-time electronic communication, or by targeted marketing.

## Comparison with ABA Counterpart

| Rule  | Comment   |
|---|---|
| <input checked="" type="checkbox"/> ABA Model Rule substantially adopted      | <input checked="" type="checkbox"/> ABA Model Rule substantially adopted        |
| <input type="checkbox"/> ABA Model Rule substantially rejected                | <input type="checkbox"/> ABA Model Rule substantially rejected                  |
| <input checked="" type="checkbox"/> Some material additions to ABA Model Rule | <input type="checkbox"/> Some material additions to ABA Model Rule              |
| <input type="checkbox"/> Some material deletions from ABA Model Rule          | <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule |
| <input type="checkbox"/> No ABA Model Rule counterpart                        | <input type="checkbox"/> No ABA Model Rule counterpart                          |

## Primary Factors Considered

Existing California Law

Rule RPC 1-400.

Statute Bus. & Prof. Code §§ 6157 et seq.

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 3

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

A number of legal professionals believe that the restrictions on direct marketing in Rule 7.3 run afoul of lawyers' First Amendment rights, citing to Supreme Court precedent. See Explanation of Changes for paragraph (a).

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 7.3\* Direct Contact with Prospective Clients

October 2009

(Draft rule revised after consideration of public comment.)

### *INTRODUCTION:*

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. **Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client.** Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

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\* Proposed Rule 7.3, Draft 8 (10/2/09)

*INTRODUCTION (Continued):*

3. Proposed Rule 7.3 includes the basic concepts contained in Model Rule 7.3: a prohibition on any form of real-time communication to solicit legal business unless the person being targeted is related to the lawyer or is also a lawyer (paragraph (a)); a prohibition on *any* kind of communication with prospective clients under certain circumstances (paragraph (b)); a provision imposing labeling requirements on written marketing materials to avoid confusing the recipient (paragraph (c)); and an exception permitting a lawyer to engage the services of a group legal services plan that does utilize real-time communication in its marketing (paragraph (d)).
4. Proposed Rule 7.3 diverges from the Model Rule by including a savings clause to avoid potential Constitutional problems, (paragraph (a)); prohibiting a broader range of overreaching conduct, (paragraph (b)(2)); and prohibiting the solicitation of a person known to be already represented, (paragraph (b)(3)).
5. The Model Rule comment has been revised to remove purely expository language, (e.g., Comments [3] and [6]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Definition.* Commission considered whether to include a definition of “solicitation” in Rule 7.3, as found in current rule 1-400 (B). It determined that there was no need to for a separate definition as the subject of the prohibited conduct is sufficiently described in the Rule.
7. *Cooling-off Period.* A State Bar member suggested that the Commission consider a provision establishing a “cooling off” period after the occurrence of an event that gives rise to a need for legal services before a lawyer or a representative of the lawyer could communicate with a prospective client by targeted mail. See, e.g., *Fla. Bar v. Went for It, Inc.* (1995) 515 U.S. 618. The Commission does not believe such a provision is necessary because the concerns inherent in such a prohibition are adequately addressed in paragraph (b).
8. *Variation in Other Jurisdictions.* Despite the fact that advertising of legal services and the solicitation of prospective clients should be an area of lawyer regulation where national uniformity is warranted, there is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California regulatory landscape.

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p>   | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p>   | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
|---|--|--|
| <p>(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:</p> | <p>(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for <del>the lawyer's</del> doing so is the lawyer's pecuniary gain, <u>unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or</u> unless the person contacted:</p> | <p><u>Paragraph (a)</u> tracks the language of paragraph (a) of Model Rule 7.3(a) in prohibiting in-person, live telephone or real-time electronic contact to solicit fee-paying employment from a prospective client. The phrase "real-time electronic contact" was added by the ABA Ethics 2000 Commission to extend the prohibition on solicitation to electronic communications with prospective clients in real time, for example, communications in Internet chat rooms or by instant messaging. The interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in real-time telephone contact.</p> <p>Paragraph (a) also adds the savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, has arguably rendered prohibitions such as those found in Rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the Rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an "all or nothing" invalidation of the Rule avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).</p> |

\* Proposed Rule 7.3, Draft 8 (10/2/09); redline/strikeout showing changes to the ABA Model Rule.

| <p style="text-align: center;"><u>ABA Model Rule</u><br/>Rule 7.3 Direct Contact with Prospective Clients</p>  | <p style="text-align: center;"><u>Commission's Proposed Rule*</u><br/>Rule 7.3 Direct Contact with Prospective Clients</p>   | <p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>   |
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|  |  | <p><i>Minority.</i> A minority of the Commission objects to paragraph (a) on the ground that a lawyer should be able to solicit sophisticated clients by a live, telephonic or real-time electronic communication as was sanctioned for accountants in <i>Edenfield</i>. The minority adds that unless the lawyer is willing to risk of discipline by appealing his or her case to the Supreme Court, the lawyer is prohibited from making such solicitations.</p> |
| <p>(1) is a lawyer; or</p> <p>(2) has a family, close personal, or prior professional relationship with the lawyer.</p>  | <p>(1) is a lawyer; or</p> <p>(2) has a family, close personal, or prior professional relationship with the lawyer.</p>  | <p><i>Subparagraphs (a)(1) and (a)(2)</i> are identical to MR 7.1(a)(1), and recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer, or has a family, close personal or prior professional relationship with the soliciting lawyer. See also comment [4].</p>   |
| <p>(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:</p> | <p>(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:</p> | <p><u>Paragraph (b).</u> Paragraph (b) is intended to prohibit otherwise permitted forms of solicitation which, under particular circumstances, offer an opportunity for abuse by a lawyer.</p> <p>The introductory paragraph of paragraph (b) is identical to that of Model Rule 7.3 and describes the kind of conduct that ordinarily is permitted under Rules 7.1, 7.2 or 7.3(a).</p>   |
| <p>(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or</p>  | <p>(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or</p>  | <p><i>Subparagraph (b)(1)</i> is identical to Model Rule 7.3(b)(1).</p>  |

| <p style="text-align: center;"><u>ABA Model Rule</u><br/>Rule 7.3 Direct Contact with Prospective Clients</p> | <p style="text-align: center;"><u>Commission's Proposed Rule*</u><br/>Rule 7.3 Direct Contact with Prospective Clients</p>  | <p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>   |
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| <p>(2) the solicitation involves coercion, duress or harassment.</p>  | <p>(2) the solicitation <u>is transmitted in any manner which</u> involves <u>intrusion, coercion, duress</u><del> or harassment,</del> <u>compulsion, intimidation, threats, or vexatious or harassing conduct; or</u></p> | <p><i>Subparagraph (b)(2)</i> addresses the same concept as Model Rule 7.3(b)(2), i.e., overreaching by a lawyer in the manner in which the solicitation is made. Subparagraph (b)(2) uses language currently found in CRPC 1-400(D)(5). The Commission believes that by providing a broader range of conduct that is prohibited, the language provides better protection for susceptible persons in need of legal services and better notice to lawyers than does the Model Rule's language.</p> <p>Subparagraph (b)(2) adds the concept of "intrusion". A minority of the Commission was concerned that prohibiting "intrusion" might result in a prospective client losing rights after being contacted by a non-lawyer defense representative (e.g., an insurance adjuster). The majority, however, believes that the prohibition's protection of privacy rights outweighed that concern. The minority also suggests that any communication to a prospective client is an "intrusion," making the rule overbroad and requiring lawyers to risk discipline for even non-objectionable communications.</p> |

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| <p>(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).</p> | <p>(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" <u>or words of similar import</u> on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), <u>or unless it is apparent from the context that the communication is an advertisement.</u></p> | <p><u>Paragraph (c)</u> is based on Model Rule 7.3(c). The phrase "or words of similar import" has been added following "Advertising Material." That phrase is currently found in Standard (5) to CRPC 1-400. It provides lawyers with some flexibility in how they identify marketing materials they send to prospective clients. Regardless of the specific language used, the recipient must be made aware that the communication is an advertisement.</p> <p>Paragraph (c) also adds the clause: "or unless it is apparent from the context that the communication is an advertisement." That clause has been added in recognition that it is usually apparent from the communication itself that the communication is an advertisement.</p> |
| <p>(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.</p>   | <p>(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.</p>  | <p><u>Paragraph (d)</u> is identical to Model Rule 7.3(d). Paragraph (d) permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal services plan, so long as paragraph (d)'s conditions are satisfied. See also comment [8].</p>   |

| <p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><b><u>Commission's Proposed Rule</u>*</b></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>  | <p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>  |
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| <p>[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.</p> | <p>[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.</p> | <p>Comment [1] is identical to Model Rule 7.3, cmt. [1]. Comment [1] explains the rationale for prohibitions on solicitations made by lawyers in real-time.</p> |
| <p>[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available</p>   | <p>[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available</p>   | <p>Comment [2] is identical to Model Rule 7.3, cmt. [1]. Comment [2] explains the rationale for regulating "real-time" communications.</p>                      |

\* Proposed Rule 7.3, Draft 8 (10/2/09).

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| <p>lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.</p>  | <p>lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.</p>   |   |
| <p>[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.</p> | <p>[3] The use of general advertising and written, recorded or electronic communications to transmit information from <u>a lawyer</u> to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. <del>The contents of direct in person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.</del></p> | <p>Comment [3] is based on Model Rule 7.3, cmt. [3]. The last two sentences of Model Rule 7.3, cmt. [3], have been deleted as unnecessary exposition.</p> |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><u>Commission’s Proposed Rule*</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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| <p>[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.</p> | <p>[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has <u>a</u> close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there <del>a</del> serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in <del>Rule 7.3</del><u>paragraph</u> (a) and the requirements of <del>Rule 7.3</del><u>paragraph</u> (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of <u>bona fide</u> public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.</p> | <p>Comment [4] is identical to Model Rule 7.3, cmt. [4], except that changes have been made to conform the comment to California Rule style and also to insert an “a” that is missing in the Model Rule. Comment [4] clarifies subparagraphs (a)(1) and (a)(2), which recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer or has a family, close personal or prior professional relationship with the soliciting lawyer.</p> <p>The phrase “bona fide” has been added to “public or charitable legal-service organizations” to create a parallel construction with the following clause.</p> |
| <p>[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2</p>  | <p>[5] <del>But even</del><u>Even</u> permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, <u>(ii) is transmitted in any manner</u> which involves <u>intrusion, coercion, duress, compulsion, intimidation, threats, or harassment vexatious or harassing conduct</u> within the meaning of <del>Rule 7.3</del><u>paragraph</u> (b)(2), or <del>which</del><u>(iii)</u> involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of <del>Rule</del></p>  | <p>Comment [5] is based on Model Rule 7.3, cmt. [5]. Comment [5] clarifies subparagraphs (b)(1)-(2), which prohibit otherwise permitted forms of solicitation that, under the particular circumstances identified, present an opportunity for abuse by a lawyer. Changes from Model Rule 7.3, cmt. [5] are intended to conform the comment to the revised language in subparagraph (b)(2). See Explanation of Changes for subparagraph (b)(2). The last sentence of Model Rule 7.3, cmt. [5], has been deleted as unnecessary exposition.</p>  |

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| <p>the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)..</p>   | <p><del>7.3 paragraph (b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).</del></p>   |  |
| <p>[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.</p> | <p>[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a <u>bona fide</u> group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. <del>This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.</del></p> | <p>The first sentence of Comment [6] is identical to Model Rule 7.3, cmt. [6], except that the phrase "bona fide" has been included to modify "group or prepaid legal plan." The remainder of Model Rule 7.3, cmt. [6] has been deleted as unnecessary exposition.</p> |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients<br/>Comment</b></p>   | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients<br/>Comment</b></p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
|---|---|--|
| <p>[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.</p>   | <p>[7] The requirement in <del>Rule 7.3(c)</del> <u>this Rule</u> that certain communications be marked "Advertising Material" <u>or with words of similar import</u> does not apply to communications sent in response to requests of potential clients or their <del>spokespersons or sponsors</del> <u>representatives</u>. <u>Paragraph (c) does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule, nor does it apply where it is apparent from the context that the communication is an advertisement.</u></p>  | <p>Comment [7] is based on Model Rule 7.3, cmt. [7]. The changes conform the Comment to the revisions made to paragraph (c). The word "representatives," a more general term, has been substituted for the phrase "spokespersons and sponsors." The last clause of the last sentence of the Model Rule comment has been deleted in favor of the more concise, "does not apply to."</p> |
| <p>[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these</p> | <p>[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. <u>The</u> organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. <u>For example,</u> paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these</p> | <p>Comment [8] is identical to Model Rule 7.3, cmt. [8], except that it adds a cross-reference to Rule 5.4, which regulates lawyer's activities with non-lawyers.</p>  |

| <p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 7.3 Direct Contact with Prospective Clients</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p> |
|---|--|--|
| <p>organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).</p> | <p>organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See <a href="#">also Rules 5.4 and 8.4(a)</a>.</p> |  |

## Rule 7.3 Direct Contact with Prospective Clients

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, unless the person contacted:
- (1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
  - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct;~~or~~
- ~~(3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.~~
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) ~~Notwithstanding~~Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

### COMMENT

- [1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately.

The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

- [2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.
- [3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.
- [4] There is far less likelihood that ~~abuse will occur when the person contacted is a lawyer, a lawyer would engage in abusive practices against an individual who is a~~ former client, or ~~one~~ with whom the lawyer has a ~~prior~~ close personal or family relationship, or in situations

in which the lawyer is ~~not~~ motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

- [5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1), ~~or (iv) is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of paragraph (b)(3) is prohibited.~~
- [6] This Rule isdoes ~~not intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

- [7] The requirement in paragraph (c) that certain communications be marked “Advertising Material” or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) ~~is~~ also does not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.
- [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules ~~{5.4}~~ and 8.4(a).

**Rule 7.3 Direct Contact with Prospective Clients**  
**(Commission’s Proposed Rule – Clean Version)**

- (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer’s pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
  - (1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
  - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
  - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or

electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

**COMMENT**

[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and

recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

- [3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.
- [4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide

political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

- [5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).
- [6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.
- [7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.
- [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact

is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

## Rule 7.3: Direct Contact with Prospective Clients

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Arizona** adds a subparagraph (b)(3) prohibiting solicitation relating to a personal injury or wrongful death within 30 days after the occurrence, and Arizona adds detailed requirements regarding targeted mail.

**California:** Rule 1-400 provides, in pertinent part, as follows:

(B) For purposes of this rule, a “solicitation” means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is ...

(b) delivered in person or by telephone, or

(c) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the

United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited....

In addition, California Business & Professions Code §6152(a)(1) provides, in part, that it is unlawful for any person “to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever....”

**Colorado:** Rule 7.3(c) imposes a waiting period of 30 days after an event causing personal injury or death before a lawyer may solicit professional employment in connection with the event unless the lawyer has “a family or prior professional relationship with the prospective client.” The rule also prohibits solicitation if the sending lawyer “knows or reasonably should know” that the recipient is represented by a lawyer in the matter, and requires the sending lawyer to say whether that lawyer will “actually handle the case or

matter” or if it “will be referred to another lawyer or firm.” Rule 7.3(d) prohibits the envelope from revealing “the nature of the prospective client’s legal problem.”

**Connecticut:** Rule 7.3 differs significantly from ABA Model Rule 7.3. For example, Rule 7.3(a)(4) does not prohibit personal, live telephone, or real-time electronic contact with a prospective client that is “a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.” Rule 7.3(b)(b) forbids a lawyer to “contact, or send, a written or electronic communication to, a prospective client” if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer:...

(3) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; [or]

(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. , ..

Connecticut Rule 7.3(b)(5) prohibits written solicitation in personal injury or wrongful death matters for 40 days after an accident or disaster. Rule 7.3(c) requires every written communication used by a lawyer “for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter” to say “Advertising Material” on the envelope and first page “in red ink.” Rule 7.3(d) requires the first sentence of a written communication about a specific matter to say: “If you

have already retained a lawyer for this matter, please disregard this letter.”

**District of Columbia:** District of Columbia omits Rule 7.3, but D.C. Rule 7.1(b) generally permits in-person solicitation by providing as follows:

(1) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

(A) The solicitation involves use of a statement or claim that is false or misleading...;

(B) The solicitation involves the use of coercion, duress or harassment; or

(C) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(2) A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in person contact.

D.C. also has adopted an unusual Rule 7.1(e) that provides, in part, as follows:

Any lawyer... who solicits... any person incarcerated at the District of Columbia Jail... for the purpose of representing that person for a fee paid by or on behalf of that person... in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person’s then-current lawyer prior

to accepting any fee from or on behalf of the incarcerated person.

**Florida:** Rule 4-7.4(a) defines the term “solicit” to include (among other things) contact by fax. Rule 4-7.4(b)(1), which is essentially the rule upheld in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), prohibits a lawyer from soliciting prospective clients in writing 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;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter....

Rule 4-7.4(b)(2) imposes stringent, detailed requirements on all written communications to prospective clients, including that the first sentence of every written communication prompted by a specific occurrence must be: “If you have already retained a lawyer for this matter, please disregard this letter.”

Florida Rule 4-7.6, entitled “Computer-Accessed Communications,” provides that all web sites controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services “(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law.” A lawyer shall not send an “unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment” unless it complies with a host of requirements, including that the

subject line of the communication must state “legal advertisement.”

**Georgia:** Rule 7.3(a)(3) prohibits a written communication relating to an accident or disaster involving the person to whom the communication is sent for 30 days after the accident or disaster. Georgia omits ABA Model Rule 7.3(c), but adds Rule 7.3(e), which provides that a lawyer “shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under” these rules. Georgia’s rule also adds detailed provisions regarding a lawyer’s participation in referral services.

**Illinois** defines “solicit” as contact with a person “other than a lawyer,” and Illinois permits solicitation “under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization whose purposes include... providing or recommending legal services.”

**Kentucky:** An elaborate Rule 7.60 (Kentucky Disaster Response Plan) addresses problems that occur when lawyers and nonlawyers who are not subject to disciplinary jurisdiction in Kentucky “engage in the provision of legal services, legal advice, and outright solicitation of persons and their families affected by a disastrous event.” The policy of Rule 7.60 is to “[m]onitor the conduct of all attorneys, both members and non-members of the Kentucky Bar Association, and thereby deter violations of the rules of ethical conduct...”

Kentucky has also enacted a criminal statute, Ky. Rev. Stat. §21A.300, providing that for 30 days after “the filing of a criminal or civil action, or claim for damages, or a traffic citation, injury, accident, or disaster,” an attorney “shall not

directly solicit... a victim of the accident or disaster, or a relative of the victim, for the purpose of obtaining professional employment,” and “shall not knowingly accept a referral from an attorney referral service” if the referral service has violated that prohibition. Ky. Rev. Stat. §21A.310 makes violation of the 30-day blackout law a Class A misdemeanor, and may subject an attorney to professional discipline in addition to any criminal penalty. Kentucky Supreme Court Rule 3.130 provides:

If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. A civil action for recovery of such fees may be brought in a court of competent jurisdiction.

**Louisiana:** In the rules effective December 1, 2008, Louisiana deletes Rule 7.3 and addresses solicitation in Rule 7.4. Among other variations, Rule 7.4(b)(1)(A) contains a provision that prohibits any solicitation (including letters) that concern “an action for personal injury or wrongful death... unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.” Rule 7.4(b)(2) also requires lawyers to include a variety of information in letters to potential clients.

**Massachusetts:** Rule 7.3(b)(1) prohibits solicitation if “the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer,” unless the solicitation is “not for a fee.” Rule 7.3(d) prohibits solicitation in person “or by personal communication by telephone, electronic device, or otherwise,” but Rule 7.3(e) exempts: (1) communications with “members of the bar of any state or jurisdiction”; (2)(A)

“grandparents of the lawyer or the lawyer’s spouse, (B) descendants of the grandparents of the lawyer or the lawyer’s spouse, or (C) the spouse of any of the foregoing persons”; (3) “prospective clients with whom the lawyer had a prior attorney-client relationship”; (4)(i) “non-profit and governmental entities” regarding their activities and (ii) “persons engaged in trade or commerce” in connection with their trade or commerce.

**Mississippi:** Rule 7.2(a) defines an “advertisement” as “an active quest for clients involving a public or non-public communication.” Rule 7.5(a) requires a lawyer to submit a “copy or recording of any advertisement” to the Office of the General Counsel of the Mississippi Bar (OGCMB) “prior to its first dissemination,” but Rule 7.5(b) exempts 13 categories of advertisements from the filing requirement, such as telephone directory advertisements, business cards, web pages, and “scholarly writings.” Under Rule 7.5(d), a lawyer may request an “advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication,” provided the advertisement is submitted at least 45 days in advance. The OGCMB must “render its advisory opinion within forty-five days of receipt of a request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period....” In that event, “the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.” Under Rule 7.5(d)(2), a “finding by the OGCMB of either compliance or non-compliance shall not be binding in disciplinary proceedings, but may be offered as evidence.”

**Missouri:** Rule 7.3(a) provides that a lawyer may not “initiate” in-person, telephone, or real-time electronic solicitation of legal business “under any circumstance, other than with an existing or former client, lawyer, close friend or relative.” Regarding written communications to “others,” Rules 7.3(b) and (c) provide as follows:

(b)(3) each written solicitation must include the following:

“Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri.”...

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) a lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

(c) A lawyer shall not send, nor knowingly permit to be sent... a written solicitation to any prospective client ... if:

(4) the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation...; or

(5) the written solicitation vilifies, denounces or disparages any other potential party.

**Montana:** Rule 7.3(b)(4) prohibits a lawyer from contacting a prospective client if “the lawyer reasonably should know that the person is already represented by another lawyer.”

**Nevada:** Rule 7.3(d) provides, in part: “Written communication directed to a specific prospective client who may need legal services due to a particular transaction or occurrence is prohibited in Nevada within 45 days of the transaction or occurrence giving rise to the communication.”

**New Hampshire:** Rule 7.3(a) does not use the words “solicit” or “pecuniary gain” but provides that a lawyer “shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment,” unless the person contacted fits the exemptions in ABA Model Rule 7.3(a)(1)-(2) or:

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

New Hampshire Rule 7.3(d)(iii) exempts contact with “those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others.”

**New Jersey** omits Rule 7.3(c) and Rule 7.3(d). In addition, to control solicitation after mass disasters, New Jersey adds Rule 7.3(b)(4), which provides that a lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if “the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event.” To prevent out-of-state attorneys from improperly soliciting New Jersey victims and their families after mass disasters, the Court’s Clerk has issued a statement saying that it “has jurisdiction over out-of-state attorneys who make such solicitations to prospective claimants in New Jersey.”

Regarding events other than mass disasters, New Jersey adds Rule 7.3(b)(5)(iii), which generally permits targeted mail if (among other things) it contains an additional notice that “the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625,”

**New York:** DR 2-103(B) provides as follows:

For purposes of this section “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient

or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

DR 2-103(A) provides as follows: “A lawyer shall not engage in solicitation by in-person or telephone contact, or by real-time or interactive computer accessed communication unless the recipient is a close friend, relative, former client or existing client....” Solicitation by any means is forbidden if (among other things) “the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.” DR 2-103(C) imposes detailed filing requirements for most solicitations, including “a transcript of the audio portion of any radio or television solicitation” and “if the solicitation is in a language other than English, an accurate English language translation.”

DR 2-103(G) restricts solicitation in personal injury and wrongful death cases as follows: “No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.” DR 7-111(A) is to the same effect as DR 2-103(G), but DR 7-111(B) adds: “This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms... who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.”

Also, under 22 NYCRR §130-1.1a, an attorney filing an “initiating pleading” must certify that “(i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom” and (ii) the matter was not obtained in violation of DR 7-111.

DR 2-103(K) provides that New York’s solicitation rules apply to lawyers from out of state who solicit clients in New York.

**North Carolina:** Rule 7.3(d)(1) defines the phrase “prepaid or group legal services plan,” and Rule 7.3(d)(2) sets forth detailed conditions that a lawyer must satisfy before participating in such a plan.

**Ohio:** Rule 7.3(c) requires targeted direct mail solicitation to: “(1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee” and “(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee’s case.” Rule 7.3(d) provides that before soliciting professional employment from a defendant in a civil action, a lawyer “shall verify that the party has been served with notice of the action filed against that party.” Service shall be verified by “consulting the docket of the court in which the action was filed....”

Ohio Rule 7.3(e) provides that if a communication solicits professional employment in a potential claim for personal injury or wrongful death within 30 days of an accident or disaster, the communication must include a lengthy text headed “Understanding Your Rights,” which provides, in relevant part, as follows:

2. *You do not have to sign anything*--You may not want to give an interview or recorded statement without

first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. *Your interests versus interests of insurance company*--Your interests and those of the other person’s insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage....

8. *Check a lawyer’s qualification*--Before hiring any lawyer, you have the right to know the lawyer’s background, training, and experience in dealing with cases similar to yours.

9. *How much will it cost?* --In deciding whether to hire a particular lawyer, you should discuss, and the lawyer’s written fee agreement should reflect:

a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will

payment be arranged? c. Who will handle your case?  
If the case goes to trial, who will be the trial attorney?

Furthermore, a footnote to “Understanding Your Rights” says, in part: “THE SUPREME COURT OF OHIO... NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS.”

**Pennsylvania** omits Rules 7.3(c) and (d).

**Rhode Island:** Rule 7.3(a)(3) permits “in-person, live telephone or real-time electronic contact” solicitation for profit if the prospective client is “a business organization, a not-for-profit organization, or governmental body and the lawyer seeks to provide services related to the organization.”

**South Carolina:** Rule 7.3(d) provides:

(2) Each written or recorded solicitation must include the following statements:

(A) “You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer” and

(B) “The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.”

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each written or recorded solicitation must include the following statement:

“ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211 TELEPHONE NUMBER 803-734-2038.” Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

See more discussion of South Carolina Rule 418 in Selected State Variations under Rule 8.5.

**Texas:** Rule 7.06 provides that a lawyer “shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these Rules.” In addition, under §38.12 of the Texas Penal Code it is a crime if a lawyer, “with intent to obtain an economic benefit ... (2) solicits employment, either in person or by telephone, for himself or for another.” Section 38.01(11) of the Texas Penal Code defines the phrase “solicit employment” as follows:

(11) “Solicit employment” means to communicate in person or by telephone with a prospective client or a member of the prospective client’s family concerning professional employment... arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing problem of the prospective client... for the purpose of providing professional services

to the prospective client, when neither the person receiving the communication nor anyone acting on that person's behalf has requested the communication. The term does not include a communication initiated by a family member of the person receiving a communication....

**Virginia:** Rule 7.3 prohibits "in-person" communications to a "non-lawyer" if the communication "has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made." Rule 7.3(c) prohibits a lawyer from assisting a "nonprofit organization" that engages in such communications, or in communications on the lawyer's behalf that are "false, fraudulent, misleading, or deceptive," and Rule 7.3(f) provides that in no event may a lawyer "initiate" in-person solicitation "for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship."

**Wisconsin:** Rule 7.3(b)(1) adds that solicitation is prohibited if "(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer." Rule 7.3(e) (e) provides that ordinarily a lawyer "shall not draft legal documents, such as wills, trust instruments or contracts, which require or imply that the lawyer's services be used in relation to that document."

TOTAL = 4    Agree = 0  
 Disagree = 0  
 Modify = 3  
 NI = 1

**Rule 7.3. Direct Contact with Prospective Clients.  
 [Sorted by Commenter]**

| No. | Commenter                                       | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment   | RRC Response  |
|-----|---|-----------------------|-----------------------------|----------------|---|---|
| 1   | Konig, Alan                                     | N/A                   | NI                          | Misc.          | Mr. Konig simply inquired: "Has the possibility of specifically prohibiting 'pop-up' windows as a form of electronic communication been considered?"  | The Commission took no action. Mr. Konig gives no reason for his request and it is not apparent to the Commission whether prohibiting pop-up windows by lawyers is an appropriate regulatory topic of an ethics rule. In fact, in some instances, pop-up windows at a lawyer's web site should be encouraged, for example, to include a disclaimer that a web site visitor should not disclose confidential information to a lawyer until the lawyer is able to make a conflicts check, etc. Second, pop up and "pop-under" windows are viewed as so annoying by consumers that the "market" would probably function to dissuade lawyers from using them. |
| 2   | Los Angeles County Bar Association (Louisa Lau) | M                     | Y                           | (a)            | LACBA believes that Rule 7.3(a) is unconstitutional and that lawyers should be permitted to engage in real-time solicitation of business clients, as that conduct is likely permitted under <i>Edenfield v. Fane</i> , 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). In that case, the Court held it would be unconstitutional to prohibit accountants, who unlike lawyers are not skilled in the arts of persuasion, to cold-call prospective business clients. LACBA has argued that the same rationale will be found to apply to lawyers and | The Commission did not make any changes to the Rule. This issue was squarely before the Commission during its deliberations. The Commission deliberated this issue extensively in e-mails and in a live meeting, and voted 7 to 2 (w/ one abstention) not to delete paragraph (a). The savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," was added expressly to address the constitutional concerns.  |

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED

**Rule 7.3. Direct Contact with Prospective Clients.  
[Sorted by Commenter]**

| No. | Commenter  | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment   | RRC Response  |
|-----|--|-----------------------|-----------------------------|----------------|---|---|
|     |  |                       |                             |                | that the RRC should anticipate that holding and remove paragraph (a), or at least carve out an exception for lawyers engaging in real-time solicitation of business clients.  |   |
| 3   | Orange County Bar Association<br>(Julie McCoy)         | M                     | Y                           | Misc.          | <p>Requests that in paragraph (c), the modifier “known” be changed to “known <u>or believed</u>,” so the provision would provide:</p> <p>“Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client <u>known or believed</u> to be in need of legal services in a particular matter ...”</p> <p>OCBA believes that limiting the prohibition to only instances where the lawyer “knows” is too narrow because a lawyer will often have good reason to “suspect” a particular person is in need of legal services and should comply with the Rule in those situations.</p> | The Commission did not make the change. Instead of making the change, the Commission has placed “know” in brackets pending the adoption of a definition for “know” as in Model Rule 1.0(f) (“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.) That should address OCBA’s concerns is “know” is too narrowly drawn.   |
| 4   | San Diego County Bar Association<br>(Andrew S. Albert) | M                     | Y                           | (c)            | Believes that the revisions to paragraph (c), i.e., adding the phrase “or words of similar import” and the clause, “or unless it is apparent from the context that the communication is an advertisement,” and deleting CRPC 1-400, standard (5)’s reference to “12-point print” together “may promote misleading advertisements” because it no longer requires the word “Advertisement”  | The Commission did not make the requested change. Paragraph (c) is identical to Model Rule 7.3(c), except for the addition of the phrase, “or words of similar import,” and the concluding clause: “or unless it is apparent from the context that the communication is an advertisement.” The Commission believes the Model Rule language, as revised, provides sufficient public protection. The phrase “or words of similar import” is from Standard |

**Rule 7.3. Direct Contact with Prospective Clients.  
[Sorted by Commenter]**

| No. | Commenter | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment  | RRC Response  |
|-----|-----------|-----------------------|-----------------------------|----------------|--|---|
|     |           |                       |                             |                | <p>or words of similar import to be on the first page of the document that is sent/communicated to the prospective client. The result may be that the recipient will be unable to distinguish between an official document and an advertisement. SDCBA is also concerned that this will leave open what is an “apparent” advertising communication.</p> <p>Believes the changes in the Rule regarding streamlining and modernizing the standards will result in greater clarity.</p> | <p>(5) to current rule 1-400 and the concluding clause simply recognizes that it is usually apparent from the communication itself that the communication is an advertisement.</p> <p>No response required.</p> |