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## Solicitation

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### Key Concepts



- Lawyers may not directly solicit professional employment from anyone when they are significantly motivated by pecuniary gain.
  - Direct solicitation includes live telephone and real-time electronic contact.
  - Lawyers have a disclosure duty when sending targeted solicitations to persons known to need legal services.
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### Introduction



Rule 7.3 regulates everyone's favorite legal animal: the ambulance-chaser. General advertising to the public can generate positive business for lawyers, but not every advertisement will connect with consumers. A personal solicitation, by contrast, provides a unique opportunity for a lawyer to communicate beyond general advertising with consumers: a direct solicitation enables a lawyer to tailor the lawyer's business message to individual legal needs. An *in-person*, or direct, solicitation enhances this business opportunity further by permitting the lawyer to persuade his or her audience one-on-one.

A solicitation's enticing business potential, however, also creates tension with the legal profession's interests in protecting consumers and maintaining standards of conduct by licensed professionals. Anyone who has envisioned the paradigmatic ambulance-chaser lawyer can imagine how a direct, in-person solicitation could invite overreaching and uninformed decision-making, incentivize baseless claims, and undermine the integrity of the legal profession.<sup>1</sup> Therefore, in addition to the

general advertising standards provided in Rules 7.1 and 7.2, the Rules of Professional Conduct also specifically regulate solicitations by lawyers.

## The Rule

Rule 7.3 is organized into four subsections. These subsections regulate the major components of lawyer solicitations: (1) direct solicitations; (2) abusive solicitations; and (3) solicitation of vulnerable consumers with known legal needs.

### 1. Direct Solicitations

Rule 7.3 first addresses direct solicitations by lawyers:

#### THE RULE

#### Rule 7.3

#### Solicitation of Clients

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
  - (1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.

Rule 7.3(a) generally prohibits lawyers from directly soliciting professional employment. However, this prohibition is subject to two exceptions. Rule 7.3(b) further exempts certain prepaid and group legal plans from the direct solicitation prohibition in subsection (a):

- (b) 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.

This general prohibition reflects the judgment that direct solicitation involves “the potential for abuse,”<sup>2</sup> because direct solicitation “subject[s] a person to the private importuning of the trained advocate in a direct interpersonal encounter.”<sup>3</sup> Direct solicitation thus limits the solicited individual’s ability “to evaluate all available alternatives with reasoned judgment and appropriate self-interest.”<sup>4</sup> As a result, “[t]he situation is fraught with the possibility of undue influence, intimidation, and overreaching.”<sup>5</sup> Moreover, unlike commercial advertising, a lawyer’s direct solicitation often will produce no objective record of what was communicated to permit after-the-fact review of claimed untruthfulness, deception, or other misconduct.<sup>6</sup>

The Rules of Professional Conduct reason that the aforementioned risks justify a complete prohibition on direct solicitation, particularly when lawyers have other means to reach potential clients.<sup>7</sup> Rule 7.3(a) thus constitutes a prophylactic rule: proof of a prohibited solicitation will warrant discipline without case-specific proof of undue influence, intimidation, overreaching, or other harm from the solicitation. Instead, a lawyer must honor the direct solicitation prohibition regardless of how appropriately or carefully the lawyer might solicit someone for professional employment.

The definition of prohibited direct solicitations consequently proves critical. A 2013 amendment to Rule 7.3’s comments clarifies the definition of a solicitation generally:

A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.<sup>8</sup>

When made in person, a solicitation violates Rule 7.3(a). In addition, live telephone and real-time electronic contact violate this prohibition in the same manner as in-person solicitation. Accordingly, Rule 7.3(a) categorically prohibits lawyer-initiated, targeted communications to a specific person that the lawyer transmits in person, by live telephone contact, or by real-time electronic contact.

Rule 7.3(a) excepts certain audiences from the definition of prohibited solicitations. These exceptions include: when the solicited person “1) is a lawyer, or 2) has a family, close personal, or prior professional relationship with the lawyer.”<sup>9</sup> Because these individuals more effectively can engage a lawyer at arms-length, the soliciting lawyer is less able to strong-arm professional employment.<sup>10</sup> The Rules of Professional Conduct also take a similarly permissive view of direct solicitations by lawyers acting on behalf of prepaid and group legal services when the lawyer is not an owner or director of the service, and the lawyer does not solicit for a known legal need.<sup>11</sup>

Consider this problem, where a well-meaning lawyer’s marketing plan implicated the ban on direct solicitations, despite her motive to improve access to her legal services:

**Example.** Lawyer Sarah wanted to develop her family law and immigration law practice in her local community, so Sarah prepared an accurate and non-misleading brochure advertising her legal services. Sarah’s community included a large Spanish-speaking population, and Sarah was one of only a few lawyers in the area to offer fluent Spanish-language services; therefore Sarah printed her brochure in both English and Spanish. Sarah also hired local teenagers, who were fluent in Spanish, to distribute the brochures to homes and businesses in the community. Sarah instructed the teenagers to ring doorbells and enter businesses to hand the brochure to someone personally, if possible, so her brochure would not get lost in the mix. Sarah, however, gave the teenagers no information about her practice to share with recipients beyond the brochure itself, and she directed the teenagers not to communicate personally about the brochure. “Just deliver them and leave,” Sarah instructed.

**Analysis.** Even though Sarah's accurate and non-misleading communications conformed to Rule 7.1, her marketing plans implicated Rule 7.3. Sarah is responsible for the actions of the teenagers she hired.<sup>12</sup> The brochure further constituted a solicitation because it was a "targeted communication initiated by the lawyer that [was] directed to a specific person and that offer[ed] to provide ... legal services."<sup>13</sup> Delivery of the brochure to businesses or even home mailboxes nevertheless likely did not violate Rule 7.3(a) if the teenagers did not contact anyone in person.<sup>14</sup> But Sarah directed the teenagers to ring doorbells and enter businesses to deliver the brochure personally. Sarah thus improperly instructed the teenagers to violate Rule 7.3(a)'s direct solicitation prohibition, which permitted Sarah to violate Rule 7.3(a) through the acts of another person.<sup>15</sup> The fact that Sarah directed the teenagers not to communicate about her practice beyond delivering her brochures does not change the character of the prohibited solicitation, because Rule 7.3(a) prohibits inperson solicitation and Sarah's communication did not fall within any of the limited exceptions.

The rapidly developing landscape of communication technology will present lawyers with some of the greatest opportunities, but also challenges, in the area of solicitation. Social media, blogs, and other online communication portals can connect lawyers to previously inaccessible potential clients and raise lawyers' profiles in a market.<sup>16</sup> But these portals also permit lawyers to initiate professional contact in manners that Rule 7.3 does not entirely clarify as constituting either prohibited direct solicitation, a proper solicitation, or no solicitation at all.<sup>17</sup>

This challenge in applying the Rules of Professional Conduct to the moving target of technology is illustrated by the seemingly simple question of whether the definition of a prohibited "real-time electronic contact" includes something as ubiquitous as a text message. Rule 7.3 and its comments do not answer this question

explicitly, even though people may text message nowadays more than they talk.<sup>18</sup> Rather, jurisdictions, and therefore lawyers, are left to judge whether a text message is more analogous to a permissible email message,<sup>19</sup> or instead to an impermissible chat room communication.<sup>20</sup>

One jurisdiction's Supreme Court has concluded that a text message is more analogous to an email and therefore does not constitute a prohibited real-time electronic contact.<sup>21</sup> The opinion, however, cautioned lawyers against using "voice-texting apps" that would allow lawyers to combine live voice and text messages<sup>22</sup>—evinced the technological limitations of this kind of opinion, as the nature of a "text message" evolves. But for the moment, so long as lawyers follow the other ethics rules applicable to lawyer advertising, lawyers in this jurisdiction ethically may "cull accident or police reports for the cell phone numbers of prospective clients and send text messages that 'contain direct solicitations for professional employment.'"<sup>23</sup> Lawyers in other jurisdictions nevertheless would be well-advised to remain cautious before engaging in this kind of solicitation with confidence that text messages definitively do not constitute real-time electronic contact under Rule 7.3(a).

Consider whether Lawyer Sarah again crossed any lines established by Rule 7.3 in her effort to use social media technology to market her legal practice:

**Example.** Lawyer Sarah maintained a combined personal and professional page on Facebook. On this Facebook page, in addition to posting about personal matters, Sarah posted blog-style updates about her law practice, and included information about her legal services. This information was accurate and not misleading. Sarah had over 500 "friends" on Facebook, so when Sarah updated her Facebook status, her posts automatically would populate numerous individuals' news feed. In several of Sarah's Facebook

posts about her practice and legal services, Sarah invited friends to “Call or email me for more information!” Do Sarah’s marketing plans violate Rule 7.3?

**Analysis.** Sarah’s Facebook page likely implicated the Rules of Professional Conduct. Although Sarah used Facebook in part for personal purposes, Sarah also posted about her availability and qualifications for professional employment. Sarah’s Facebook posts about her practice and legal services thus likely constituted a communication subject to regulation under the Rules of Professional Conduct.<sup>24</sup>

Sarah’s Facebook posts, however, likely were not real-time contacts in violation of Rule 7.3(a). Even though Sarah’s “call me” posts automatically populated friends’ news feeds,<sup>25</sup> the posts were more analogous to an email message,<sup>26</sup> or to a newsreader to which someone subscribes to follow blogs or other media. As in the e-mail and newsreader contexts, Facebook users can control both when they receive posted information and whether and how to respond to it. Moreover, although Sarah’s Facebook page was not directed to the general public,<sup>27</sup> followers subscribed to her dedicated professional page on their own volition. To the extent anyone friended Sarah because of her professional identity, Rule 7.3 does not apply when the lawyer responds to inquiries about the lawyer or the lawyer’s services. Alternatively, Sarah’s Facebook friends conceivably could constitute individuals with a “close personal ... relationship” to Sarah.<sup>28</sup> Sarah, however, would need to be careful to remain within the Rules of Professional Conduct when using Facebook professionally. For instance, Sarah could violate Rule 7.3 if she instant-messaged friends with whom she had a more tenuous personal or professional relationship, or if she communicated at all about professional employment with someone who expressed a desire not to be contacted for legal business.<sup>29</sup>

Rule 7.3(a)'s prohibition on direct solicitation, moreover, applies only when the lawyer's solicitation is significantly motivated by pecuniary gain. In the view of the Rules of Professional Conduct, lawyers will be less likely to engage in abusive practices when motivated by interests other than pecuniary gain.<sup>30</sup> This exception also accounts for the *In re Primus* case,<sup>31</sup> which held that solicitation for political advocacy constitutes protected political speech under the First Amendment.<sup>32</sup> A State therefore may discipline this kind of solicitation only when the individual solicitation presents a compelling justification for regulation, such as when a lawyer solicits with untruthful or misleading information.<sup>33</sup>

The precise line where pecuniary gain significantly motivates a lawyer's direct solicitation of a consumer is not defined by the Rules of Professional Conduct. Judge whether this lawyer was ambulance-chasing or engaging in a protected solicitation for political advocacy:

**Example.** Lawyer Anders learned that Joanne Jetta, an immigrant farm worker, had been severely injured at work. Anders specialized in immigrant worker advocacy, and used both litigation and public education strategies to improve unsafe working conditions for immigrant workers. Anders believed that Jetta's case would be a great test case for this cause, because Jetta's employer was notorious for short-changing worker safety in the name of profit. Jetta's employer also was a deep pocket, however, so Jetta's injury also could offer a big payday to whoever represented Jetta. Concerned that the personal injury bar might get to Jetta first, Anders visited Jetta in the hospital to pitch himself as her lawyer. Is Anders subject to discipline?

**Analysis.** Anders solicited Jetta in person for professional employment. Anders had no preexisting personal or professional relationship with Jetta, so Anders' solicitation seemingly violated Rule 7.3(a). Anders, however, was motivated to solicit Jetta for reasons other than pecuniary gain: Anders' desire to advocate for immigrant worker rights. Rule 7.3(a) does not apply unless pecuniary gain was a "significant motive" for Anders' solicitation of Jetta. Indeed, Anders' motive relating to immigrant worker advocacy may have brought his solicitation into the First Amendment protections of the *Primus* case.<sup>34</sup> Yet, at the same



time, Anders knew of the potential payday in representing Jetta, which also may have motivated Anders' solicitation. The issue will turn on the factual question of whether the payday was a "significant" motive for Anders' solicitation. Unfortunately, neither Rule 7.3 nor Rule 1.0 defines "significant."<sup>35</sup> If, however, the payday significantly motivated Anders, he is subject to discipline. If pecuniary gain did not significantly motivate Anders, he is not subject to discipline, so long as Anders' solicitation was truthful and not misleading,<sup>36</sup> Jetta did not make known to Anders her desire not to be solicited,<sup>37</sup> and Anders' solicitation did not involve coercion, duress, or harassment.<sup>38</sup>

## 2. Abusive Solicitations

The second part of the Rule extends the prohibition in subsection (a) to all solicitations where the lawyer's communication proves abusive by ignoring a request to desist, or by harassing or coercing anyone:

### THE RULE

### Rule 7.3

#### Solicitation of Clients

- (c) A lawyer shall not solicit professional employment 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 target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
  - (2) the solicitation involves coercion, duress, or harassment;

Rule 7.3(b) precludes even otherwise permissible solicitations if the lawyer in fact employs abusive practices. The Rules divide these abusive practices into two categories: (1) where the target of the solicitation communicates a desire not to be solicited by the lawyer,<sup>39</sup> and (2) where the solicitation involves coercion, duress,

or harassment.<sup>40</sup> Importantly, this Rule does not apply only to direct solicitations. Rather, this Rule can apply to *any* lawyer communication—including otherwise permissible advertising under Rule 7.2—that overreaches or ignores a request that the lawyer desist.<sup>41</sup>

### 3. Disclaimers and Vulnerable Consumers

Rule 7.3(c) recognizes that some communications by lawyers that solicit business remain outside the direct solicitation prohibition, but nevertheless target potentially vulnerable individuals. The Rule therefore imposes a disclaimer requirement with any solicitation targeting persons with a known legal need who are not lawyers or who do not have a family, close personal, or professional relationship with the lawyer:

- (d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, or at the beginning and the ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

This part of Rule 7.3 is limited in scope to solicited persons “known to be in need of legal services in a particular matter.”<sup>42</sup> Notice that the Rule does not categorically prohibit lawyers from communicating with these individuals. Rather, the Rule merely requires lawyers to include the disclaimer “Advertising Material” with every written, recorded, or electronic communication targeting these individuals, unless the targeted individual is a lawyer or has a close personal or professional relationship with the soliciting lawyer. This disclaimer helps to ensure that individuals targeted for a known legal need do not misperceive the solicitation as something other than a lawyer’s pitch for business.

With targeted solicitations sent by traditional mail, the disclaimer must appear on the outside of the envelope.<sup>43</sup> With recorded solicitations, like a voicemail message,

or electronic solicitations, such as an email, the disclaimer must appear at the beginning and ending of the communication.<sup>44</sup>

This Rule of Professional Conduct does not define with laser-beam precision who is a person “known to be in need of legal services in a particular matter.” Evaluate whether this lawyer communicated with persons who fell under this Rule, and whether the disclaimer requirement applied at all in light of the *nature* of the lawyer’s communication:

**Example.** Lawyer Mauricio recently moved his law practice from an old, rundown office space to a spiffy new location in the center of downtown. Eager to parley the new work digs into some business, Mauricio prepared an elegant printed announcement, including professional photos of the new office and location information. At the same time, Mauricio purchased a mailing list from a debt counseling service. Mauricio believed the people on this mailing list might be interested in his practice in mortgage protection, foreclosure, and consumer protection. Mauricio mailed the announcement to his existing clients and to the individuals on the mailing list he purchased. Did Mauricio’s announcement violate Rule 7.3?

**Analysis.** Mauricio’s announcement likely constituted a solicitation under Rule 7.3, because it communicated to specific persons in a manner that reasonably could be understood to offer legal services.<sup>45</sup> Yet, the announcement did not solicit business directly, because Mauricio sent it by mail.<sup>46</sup> In any event, the announcement to existing clients likely would have fallen outside Rule 7.3(a) altogether, because Mauricio already had a professional relationship with those individuals. Not so, however, with the individuals on the debt counseling mailing list. Moreover, Mauricio targeted these individuals due to their potential need for specific legal services. In that circumstance, Mauricio typically would need to include the disclaimer “Advertising Material” on the envelope containing the announcement.<sup>47</sup> But, the comments to Rule 7.3 note that “[g]eneral 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.”<sup>48</sup> Therefore, Mauricio’s announcement was proper both as to his existing clients and as to the individuals on the mailing list, so long as no one made known to Mauricio a desire not to be solicited,<sup>49</sup> and Mauricio’s announcement did not involve coercion, duress, or harassment.<sup>50</sup>

The lesson from Rule 7.3 is that while the Rules of Professional Conduct permit lawyer advertising generally, lawyers must remain very careful when that advertising involves what the Rules characterize as a “solicitation.” Direct solicitations are verboten, and targeted solicitations require a disclaimer.

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## Quick Summary



**Rule 7.3(a)** restricts a lawyer’s ability to advertise, even when otherwise proper under Rules 7.1 and 7.2, if the lawyer solicits business directly by in person, live telephone, or real-time electronic contact. The rapid pace of technology development will test this Rule in coming years, but lawyers must exercise care when new modes of communication bring lawyers into direct contact with persons they are soliciting. Rule 7.3(a)’s prohibition on direct solicitation importantly does not apply to solicitations of other lawyers or persons with whom the lawyer has a family, close personal, or professional relationship. But any solicitation remains improper if the lawyer coerces or harasses the person being solicited, or ignores a request to desist.

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## Test Your Knowledge



To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

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<sup>1</sup> See generally *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457–461 (1978) (discussing these legitimate interests of the State in regulating lawyer solicitations).

<sup>2</sup> DLRPC 7.3, comment 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

- 6 Cf. DLRPC Rule 7.3, comment 4.
- 7 See DLRPC Rule 7.3, comment 3.
- 8 DLRPC Rule 7.3, comment 1.
- 9 See DLRPC Rule 7.3(a)(1) and (a)(2).
- 10 See DLRPC Rule 7.3, comment 5.
- 11 See DLRPC Rule 7.3(d) and comment 9.
- 12 See DLRPC Rules 5.3 and 8.4(a).
- 13 DLRPC Rule 7.3, comment 1.
- 14 Cf. WA Advisory Op'n 2193 (2008).
- 15 See *id.*; DLRPC 5.3(a) and 8.4(a).
- 16 See generally e.g., Kevin O'Keefe, *Four Reasons Google+ Is Important for Blogging Lawyers*, Real Lawyers Have Blogs, available at <http://kevin.lexblog.com/2014/02/17/three-reasons-google-is-important-for-blogging-lawyers/> (last visited March 20, 2014).
- 17 Cf. James Podgers, *Legal Ethicists Are Playing Catch-Up to Create Social Media Guidelines for Lawyers, Judges*, A.B.A. Journal (Aug. 10, 2013).
- 18 See Jeffrey Kluger, *We Never Talk Anymore: The Problem with Messaging*, Time Tech (Aug. 16, 2012), available at <http://techland.time.com/2012/08/16/we-never-talk-anymore-the-problem-with-text-messaging/> (last visited March 20, 2014).
- 19 See DLRPC Rule 7.3, comment 3 (approving of email as not real-time electronic contact).
- 20 See Samson Habte, *Lawyers May Solicit Clients by Text Messages if Specific Rules on Advertising Are Followed*, Bloomberg BNA (April 24, 2013) available at <http://www.bna.com/lawyers-may-solicit-n17179873553/> (collecting state authorities holding that chat room communications violate the real-time electronic contact prohibition) (last visited March 20, 2014).
- 21 See Ohio Ethics Opinion 2013-2, at 4-5 (2013).
- 22 See *id.* at 5.
- 23 Habte, *Lawyers May Solicit Clients by Text Messages if Specific Rules on Advertising Are Followed*, *supra* note 20; see also Mark Williams, *Personal Injury Lawyers Can Now Pitch Accident Victims Services Via Text Message*, The Columbus Dispatch (Dec. 22, 2013).
- 24 See The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Aug. 16, 2013); CA Formal Op'n 2012-186 (2012).
- 25 Cf. Dean R. Deitrich, *Ethics: Rules for Marketing with Social Media*, 84 Wisc. Lawyer (May 2011) (opining that "[a] posting to a Facebook page likely would not constitute real-time electronic contact").
- 26 See DLRPC Rule 7.2, comment 3 (commenting that email does not constitute real-time electronic contact).
- 27 Cf. DLRPC Rule 7.3, comment 1.
- 28 See DLRPC 7.3(a)(2).
- 29 Sarah's use of Facebook for professional purposes also could implicate other Model Rules, such as the Duty of Confidentiality. These issues relating to the use of social media and other online technology are addressed in Chapter 32 of this textbook.
- 30 DLRPC Rule 7.3, comment 5.
- 31 See *In re Primus*, 436 U.S. 412 (1978).
- 32 See Chapter 8 *supra*.
- 33 See DLRPC Rule 7.1.
- 34 See *In re Primus*, 436 U.S. 412.

35 Compare DLRPC 1.0(l) (defining “substantial” to “denote[] a material matter of clear and weighty importance”).

36 See DLRPC Rule 7.1.

37 See DLRPC Rule 7.3(b)(1).

38 See DLRPC Rule 7.3(b)(2).

39 See DLRPC Rule 7.3(b)(1).

40 See DLRPC 7.3(b)(2).

41 See DLRPC 7.3, comment 6.

42 DLRPC Rule 7.3(c).

43 See *id.*

44 See *id.*

45 See DLRPC 7.3 comment 1.

46 See DLRPC 7.3 comment 3.

47 See DLRPC 7.3(c).

48 DLRPC 7.3 comment 8.

49 See DLRPC 7.3(b)(1).

50 See DLRPC Rule 7.3(b)(2).