

**ATTORNEY ADVERTISING ON THE INTERNET**

With the proliferation of personal computers and internet access, attorneys have struggled to apply ethical standards to advertising and solicitation by computer. The most common form of attorney advertising is a Web site. Other potential means include sending e-mail to individual users or "spamming", which is a form of unsolicited electronic mass mailing annoying to users; leaving messages in news groups and participating in "chat rooms", where users communicate in written form back and forth in real time.

After studying various resources, including a comprehensive White Paper by the American Bar Association Commission on Advertising, (currently accessible at <http://www.abanet.org/legalserv/advertising.html>), the Lawyer Disciplinary Board determined that (1) the Rules of Professional Conduct should be amended to address computer advertising explicitly; and (2) the current Rules of Professional Conduct provide some guidance in the interim as set forth below.

The Board is of the opinion that web sites, news groups and e-mail are potential forms of attorney advertising and/or solicitation which are governed by the prevailing ethical standards in each jurisdiction. West Virginia's Rules of Professional Conduct apply to electronic communications about the services of any attorney who practices in West Virginia, regardless of where the communication originates. If a web site promotes a West Virginia

law firm, for example, it does not matter where web site is maintained. If the firm is a multistate firm, it must adhere to the most restrictive standards among those jurisdictions. The firm must also be careful that any other web sites to which it is expressly linked does not contain false or misleading information.

The Board is further of the opinion that West Virginia's Rules of Professional Conduct apply to electronic communications from lawyers not licensed in West Virginia sent or directed to West Virginia residents specifically. *See Lawyer Disciplinary Board v. Allen*, 198 W. Va. 18, 479 S.E.2d 317 (1996).

West Virginia's Rules of Professional Conduct currently separate advertising and solicitation into two groups: (1) in-person and telephonic contacts; and (2) public media and written or recorded communication. The first type of solicitation is banned absolutely with respect to those individuals with whom a lawyer has no family or prior professional relationship.<sup>1</sup> The second type is permitted under Rule 7.3(b) and (c) with certain caveats:

- i. The solicitation cannot involve coercion, duress or harassment.
- ii. The prospective client has not already made known to a lawyer a desire not to be solicited.
- iii. Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising

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<sup>1</sup> **Rule 7.3. Direct Contact with prospective clients.**

(a) A lawyer shall not by in-person or telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a motive for the lawyer's doing so is the lawyer's pecuniary gain.

Material" on the outside envelope and at the beginning and ending of any recorded communication. A copy of said communication must be kept for two years.

Web sites are obviously a form of advertising through the public media. Because users must affirmatively go to a Web site, there is no possibility of coercion or harassment, and a user understands that a Web site is a form of advertising, similar to a brochure or promotional video. Lawyers must make sure, however, that the material contained therein conforms to the other advertising and solicitations rules in the Rules of Professional Conduct, such as Rules 7.1(misleading communications), 7.2 (d) (responsible attorney requirement) and 7.5 (firm names and letterheads).

The Lawyer Disciplinary Board also finds that e-mail and messages left in news groups can be a form of written solicitation governed by Rule 7.3(b) and (c).<sup>2</sup> This would require an attorney who is soliciting professional employment from a prospective client to include the words "ADVERTISING MATERIAL" in the heading for an e-mail or news group communication. That way, when the e-mail message or news group posting comes up,

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2

(b) A lawyer shall not solicit professional employment from a prospective client by written, or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client know to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication and shall be maintained as required by Rule 7.2(b).

the receiver has the option of opening it or putting in the electronic trash without reading it, just like the recipient of mail has.

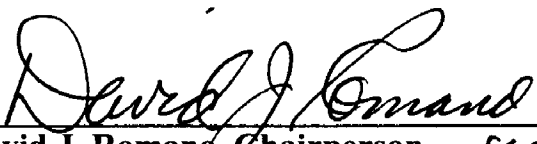
In the past, the Lawyer Disciplinary Board has interpreted the Rules of Professional Conduct to permit an attorney to omit the words "ADVERTISING MATERIAL" on the outside of an envelope if the attorney is mailing to a market not necessarily known to be in need of legal services, such as a geographic area or a legally obtained list of customers. Because of the ease and low cost of sending e-mail, the Board has concerns about recipients being inundated with solicitations and being forced to review them all to make sure that a lawyer is not trying to communicate personally with the user on a current matter. The Board therefore strongly recommends that all e-mail messages and news group postings have the "ADVERTISING MATERIAL" designation as part of the heading.

The Board is also of the opinion that "spamming" can be a form of solicitation involving harassment. It is important to remember that the user may incur costs in retrieving e-mail messages or news group postings, such as time spent on the internet and space on a hard drive. Moreover, news groups usually focus on a particular topic, and a blanket marketing of one's services in numerous news groups simultaneously, regardless of the relevancy, generally interferes with the ongoing discussion.

The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney

to pressure or coerce a potential client than do telephone or in-person solicitations, real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.

**APPROVED** by the Lawyer Disciplinary Board on the 16th day of October, 1998.

  
David J. Romano, Chairperson signed 10/26/98  
Lawyer Disciplinary Board  
State of West Virginia