Duquesne University

Duquesne Scholarship Collection

Law Faculty Publications

School of Law

2020

# Something Wicked This Way Thumbs: Personal Contact Concerns of Text-Based Attorney Marketing

Ashley M. London
*Duquesne Kline School of Law*, londona@duq.edu

Follow this and additional works at: https://dsc.duq.edu/law-faculty-scholarship

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
London, Ashley, Something Wicked This Way Thumbs: Personal Contact Concerns of Text-Based Attorney Marketing (November 12, 2020). Houston Law Review, Vol. 58, No. 99, 2020, Duquesne University School of Law Research Paper 2020-16, Available at SSRN: https://ssrn.com/abstract=3729535

This Article is brought to you for free and open access by the School of Law at Duquesne Scholarship Collection. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of Duquesne Scholarship Collection. For more information, please contact beharyr@duq.edu.

DUQUESNE UNIVERSITY
SCHOOL OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

# *Something Wicked This Way Thumbs: Personal Contact Concerns of Text-Based Attorney Marketing*

**Ashley M. London**
Associate Director of Bar Studies and Assistant Professor of Legal Skills

2020

Duquesne University School of Law Research Paper
No. 2020-16

Originally published in: 58 HOUSTON LAW REVIEW 99-149 (2020)

Electronic copy available at: https://ssrn.com/abstract=3729535

# ARTICLE

## SOMETHING WICKED THIS WAY THUMBS: PERSONAL CONTACT CONCERNS OF TEXT-BASED ATTORNEY MARKETING

*Ashley M. London*[*]

ABSTRACT

When the American Bar Association (ABA) announced its latest revisions to Model Rules 7.1–7.5, governing attorney advertising, solicitation, and information about legal services in general, the organization may have unintentionally created a way for attorneys to hack directly into the brains of potential clients for purposes of pecuniary gain.

Brushing aside decades of precedent, the rule on Solicitation of Clients now allows real-time electronic solicitation, including text messaging and tweets. These developments beg the question of whether or not the ABA committee charged with redefining this rule actually understands the power and pervasiveness of cell

* Assistant Professor of Legal Skills and Associate Director of Bar Preparation, Duquesne University School of Law. Thank you to the members of the 2020 Association of American Law Schools (AALS) Section on Professional Responsibility for selecting this work for presentation at the Professional Responsibility Junior Scholars Works in Progress program, and for providing thoughtful and thorough comments that helped me further develop this Article. Thank you to my colleagues and supportive scholarship group, Duquesne University School of Law Professors Ann Schiavone, Maryann Herman, Katherine Norton, and Associate Dean for Strategy and Administration Tara Wilke. I am also grateful for the guidance and expertise generously provided by Duquesne's Professional Responsibility and Constitutional Law faculty including professors Jane Moriarty, Agnieszka McPeak, Mark Yochum, Jalila Jefferson-Bullock, and Bruce Ledewitz. And, to my research assistant Madeline Sheerer, you are going to be one amazing attorney! Thank you for all of your hard work on this project. Last, but absolutely not least, a heartfelt thank you to my family without whom none of this would be possible.



Electronic copy available at: https://ssrn.com/abstract=3729535

phones, or how the use of this technology is changing our cognitive capacity and consumer behaviors.

Recent studies of cognition suggest signals from one's own cellular device—whether the ping of a text message or a tweet from an attorney seeking to advertise their services—activates the same attention system as the sound of one's own name. The mere sending and receiving of text messages releases dopamine in the brain, which sets up a cycle similar to an addiction leading to more texting. Around the world, 23 billion text messages are sent every day—that's 270,000 text messages per second. Out of these 23 billion, 6 billion text messages are sent in the United States. Text messages have an incredible 98% open rate and 90% of those are read within three minutes of receipt, which means each is virtually impossible for the recipient not to open immediately and most likely respond.

This Article will explore the newly amended rules for attorney advertising while connecting them to the most up-to-date cognitive studies on the impact of smartphone use on the consumer brain with a particular focus on text messaging, or short message service (SMS). It will also demonstrate how the revised rules allowing attorney advertising via text message could have an even more dramatic impact than the ABA intended.

Ironically, it may be a look back at the past that provides the ABA with the simple model for moving forward to create a rule that covers technology and its advancements, while also protecting the public from the overreach of attorneys seeking to solicit clients. This Article will show that an increasingly tortuous interpretation of Rule 7.3 simply cannot be revised fast enough, or thoroughly enough, to compete with technology and its impact on human cognition.

I. INTRODUCTION ............................................................ 102
   A. *Revised Model Rule 7.3 Expands Personal Contact for Attorneys, Condenses Sections on Specialization and Eliminates the Requirement of "Advertising Material" Label* ............................ 103
   B. *Smartphone Technology: A Superior Attention-Grabbing Magnet* .................................................. 106

II. RULE HISTORY—POWERFUL PERSONAL CONTACT PROHIBITED ................................................................. 111

Electronic copy available at: https://ssrn.com/abstract=3729535

A. *Attorney Advertising and Solicitation Often Conflated, Only Advertising Has Evolved, Rules 7.1–7.5* .......... 113
B. *Solicitation, Providing Information About Legal Services, and Pecuniary Gain in a New Age of Technology, Revising Rule 7.3* .......... 119

III. WHAT IS SO SPECIAL ABOUT TEXT (SMS) MESSAGES? .......... 122
A. *Ancient Technology Embraced and Made Popular by Generation "C"* .......... 124
B. *Research on the Power of Text Messaging and How the Results Demonstrate that Technology Produces Dramatic Effects on Our Brains and Behaviors* .......... 127
C. *Smartphone Technology as an Extension of Self* .......... 130
D. *Real Time Person-to-Person Communication Is the Basis for the Prohibition Against Solicitation, and Texting Is More Powerful, Persuasive, and Attention-Securing than Other Forms of Written Communication* .......... 132
E. *Ohio and Florida Allowed Text Message Advertising by Attorneys Ahead of the ABA, but Treat It like Advertising and Not Solicitation* .......... 134

IV. REWORKING SOLICITATION (AND ADVERTISING) RULES TO PROHIBIT FALSE, MISLEADING, OR CHAMPERTOUS KINDS—LOOKING TO THE PAST TO CREATE A TECH-FRIENDLY PATH FORWARD .......... 137
A. *The Tech-Knows, and the Tech-Knows-Not, New Rules Highlight Struggle, and Continued Professional Dissonance* .......... 139
B. *Jurisdictions May Still Decide for Themselves, but a Cleaner Rule Would Yield More Predictable Results as Technology Advances* .......... 142
C. *Justice Thurgood Marshall Had the Right Idea Back in 1977—Simple and Least Restrictive Rules Work Best to Address Solicitation and Advertising Concerns* .......... 145

V. CONCLUSION .......... 148

Electronic copy available at: https://ssrn.com/abstract=3729535

## I. INTRODUCTION

Proper old-school legal ethicist Henry S. Drinker[1] must be spinning in his grave with the American Bar Association's (ABA) August 2018 promulgation of revised Model Rules 7.1–7.5.[2] These changes not only expand the list of people attorneys may approach directly to solicit business, but may have also unintentionally created a way for attorneys to hack directly into the brains of unsuspecting potential clients. New business is now just an irresistibly persuasive text message or tweet away.

Previously, Model Rules 7.1–7.5 contained a suite of rules governing the practices of attorney advertising, solicitation, and information about legal services in general, and enforcement of these rules by state bar associations has long been interpreted by the courts as proper safeguards for the public to protect from the overreach of powerful and persuasive attorneys.[3] In 1978, the Supreme Court of the United States upheld as constitutional the right of the states to impose a ban on attorneys soliciting clients in person for pecuniary gain.[4] In fact, the court in *Ohralik* details

---

1. Henry S. Drinker was a prominent member of the Philadelphia Bar and former lecturer on legal ethics at the University of Pennsylvania Law School, who worked with the William Nelson Cromwell Foundation to write a new and updated book on legal ethics published in 1953. Drinker also served as the Chairman of the Standing Committee on Professional Ethics and Grievances Committee of the American Bar Association (ABA). *See generally* HENRY S. DRINKER, LEGAL ETHICS, at vii–viii (1953). He opens the book with a portion of the following quote from The Right Honorable Lord John Fletcher Moulton: "[T]rue civilization, is measured by the extent of this land of Obedience to the Unenforceable." *Id.* at 4 (quoting The Right Honorable Lord Moulton, *Law and Manners*, ATL. MONTHLY, July 1924, at 2). It is an overarching commentary on the status of the professional rules of conduct that govern the noble legal profession, which is characterized by fairness, candor, and an "unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their clients." *Id.* at 4–6.

2. AM. BAR ASS'N, STANDING COMM. ON ETHICS & PRO. RESP., REPORT TO THE HOUSE OF DELEGATES 1, 7 (2018) [hereinafter RULES 7.1–7.5 REPORT]; *see also* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2020).

3. Edenfield v. Fane, 507 U.S. 761, 774–75 (1993) (explaining that lawyers are professionals who are "trained in the art of persuasion," thus, applying this skill to unsuspecting or unsophisticated laypersons could prove a danger due to its unduly and improperly coercive effects on the unwary (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978))).

4. *Ohralik*, 436 U.S. at 460 ("[T]he state bears a special responsibility for maintaining standards among members of the licensed professions."); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of

Electronic copy available at: https://ssrn.com/abstract=3729535

what it famously labels the "substantive evils of solicitation," including: "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, . . . overreaching, overcharging, underrepresentation, and misrepresentation."[5] At the time, in its amicus curiae, the ABA gave three broad grounds as the basis for its rule prohibiting solicitation[6]: (1) the prohibitions "reduce the likelihood of overreaching and exertion of undue influence on lay persons"; (2) "protect the privacy of individuals"; and (3) "avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by pecuniary self-interest."[7] This is why the dramatic change in the rules, especially regarding their interplay with technology, allowing real-time contact via the electronic mediums of text messaging and tweets matters and merits closer scrutiny. Few modern trappings are more personal, more subject to privacy issues and concerns, or more immediately accessible and persuasive to potential clients than a handheld cellular smartphone.

### A. *Revised Model Rule 7.3 Expands Personal Contact for Attorneys, Condenses Sections on Specialization and Eliminates the Requirement of "Advertising Material" Label*

Revised Model Rule 7.3, Solicitation of Clients, now solely prohibits direct, live, in-person solicitation and expands on the exceptions.[8] Most surprisingly, "[t]he [r]ule no longer prohibits real-time electronic solicitation," which includes text messages

business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 611 (1935) (holding that the state of Oregon may regulate the practice of dentistry by prescribing the qualifications reasonably necessary, such as requiring licenses and supervision by an administrative board). *Ohralik* stands as the seminal case on attorney solicitation and represents one of the most egregious forms of in-person solicitation by an attorney who approached an 18-year-old accident victim while she was hospitalized and another at her home the day she was released from the hospital. *Ohralik*, 436 U.S. at 449–51, 467.

5. *Ohralik*, 436 U.S. at 461.

6. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR ASS'N 2016) (defining "solicitation" as "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").

7. *Ohralik*, 436 U.S. at 461.

8. RULES 7.1–7.5 REPORT, *supra* note 2, at 7–11; *see also* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2020).

Electronic copy available at: https://ssrn.com/abstract=3729535

and tweets.[9] Attorneys may now solicit clients via chat rooms, text messages, or "any other written communications to which recipients would not feel undue pressure to respond."[10] The scope of permitted personal contact by an attorney has been slightly broadened, as Rule 7.3(b)(3) now allows live person-to-person contact by an attorney to a "person who routinely uses for business purposes the type of legal services offered by the lawyer" instead of the prior friends, family, and former clients exception.[11] Previously, the terms used were "experienced users of the type of legal services involved for business matters."[12] The Committee explained the potential for overreach was less of a concern when the solicitation is directed at experienced users of legal services in a business context.[13]

The same baseline prohibition against a lawyer soliciting professional employment using "coercion, duress, or harassment" exists in the new rule under 7.3(c), as well as continued prohibition of contact if a prospective client has made known that solicitation is unwelcome.[14] Rule 7.4, governing communication of fields of practice and specialization, has been eliminated with the specific provisions of the appropriate use of "certified specialist" having been rolled into Rule 7.2(c).[15] Finally, Rule 7.5 governing firm names and letterhead has been struck entirely from the suite of former advertising and solicitation rules.[16]

---

9. RULES 7.1–7.5 REPORT, *supra* note 2, at 6. The Standing Committee on Ethics and Professional Responsibility (SCEPR) explained that texts and tweets differ from direct interpersonal encounters in that they are more like written communications, "which allow[] the reader to pause before responding and create[] less pressure to immediately respond or to respond at all." *Id.*

10. *Id.* (contrasting text messages and other electronic communication that may be read and "set aside" as less influential than an in-person solicitation by an attorney to a potential client). However, there is no supporting research to bolster this assertion by SCEPR. *See generally id.*

11. MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2020).

12. RULES 7.1–7.5 REPORT, *supra* note 2, at 6; *see also* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2020).

13. RULES 7.1–7.5 REPORT, *supra* note 2, at 6.

14. MODEL RULES OF PRO. CONDUCT r. 7.3(c) (AM. BAR ASS'N 2020). The new rule defines the elderly, disabled, and those whose first language is not English as populations for whom in-person solicitation is "ordinarily not appropriate." *Id.* r. 7.3 cmt. 6. But, it does not clearly define coercion, duress, or harassment. *Id.*

15. *Id.* r. 7.2(c) (providing guidance for the appropriate use of the term, "certified specialist").

16. AM. BAR ASS'N, *Ad It Up: Model Rule 7.1-7.5* (July 2018), http://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/ad-it-up/ [https://perma.cc/3UBH-GMBE].

Electronic copy available at: https://ssrn.com/abstract=3729535

The amendments to the rules were developed over a two-year period by the Standing Committee on Ethics and Professional Responsibility (SCEPR) in response to a proposal made in 2016 by the Association of Professional Responsibility Lawyers (APRL) after it conducted a study of U.S. lawyer regulatory authorities in 2014.[17] The APRL survey primarily focused on the issue of advertising. Most of the arguments for revision centered around either the lack of complaints about lawyer's advertising or the fact that any complaints that did occur were handled informally, and, because of that, few states actively engaged in monitoring this aspect of attorney conduct.[18] Solicitation was mentioned briefly during the ABA's SCEPR public forum, which was held on February 3, 2017, in Miami, Florida, and only in the context of a single suggestion that the prohibition against solicitation be eliminated entirely and enforcement fall under the prohibition against attorneys engaging in false and misleading behaviors as described in Rule 8.4.[19] Rule 8.4(c) specifies attorneys shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[20] However, that simple suggestion did not make it into the ABA's red-lined version of the rules.[21]

It is clear from the preliminary reports, letters, and other communications provided throughout the amendment process that the ABA SCEPR sought to modernize and streamline these critically important rules.[22] While many supporters lauded the

17. RULES 7.1–7.5 REPORT, *supra* note 2, at 7–8.

18. *See* ASS'N OF PRO. RESP. LAWS., 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE 27–28 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.pdf [https://perma.cc/5MGP-58NL] [hereinafter APRL REPORT]; ASS'N OF PRO. RESP. LAWS., REGULATION OF LAWYER ADVERTISING COMMITTEE SUPPLEMENTAL REPORT 1 (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.pdf [https://perma.cc/NAR7-PR38].

19. Standing Comm. on Ethics & Resp., *Public Forum Report*, AM. BAR ASS'N 10–11 (Feb. 3, 2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_public_forum_transcript.pdf [https://perma.cc/8PNR-457V] (regarding amendments to ABA Model Rules of Professional Conduct 7.1, 7.2, 7.3, and 7.4 proposed by the APRL).

20. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2019).

21. Letter from Brian B. Staines, Chief Disciplinary Couns., Connecticut Jud. Branch, to Joseph Del Ciampo, Couns. to the Rules Comm. of the Superior Ct. (Mar. 11, 2019), http://www.ctbar.org/docs/default-source/rules-committee/march-2019/item-07-09-(031819)-prop-7-1-7-5-ct-rpc-conform-w-aba-amend-model-rpc-lawyer-advertise.pdf?sfvrsn=ad9e99f8_2 [https://perma.cc/BM9Z-3YNU]; RULES 7.1–7.5 REPORT, *supra* note 2, at 7.

22. Barbara S. Gillers, Chair Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp., et al., *Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer*

Electronic copy available at: https://ssrn.com/abstract=3729535

attempt, others clearly did not.[23] This Article will address how the ABA, in attempting to streamline old rules to fit a new era of technology, may have unintentionally gone further than intended and instead created a six-lane highway of solicitation for attorneys to exploit at will with almost no meaningful oversight.

### *B. Smartphone Technology: A Superior Attention-Grabbing Magnet*

These new developments in the Model Rules beg the question of whether the ABA committee charged with redefining this rule actually understands the power and pervasiveness of the use of cell phones, or how cell phone use changes our cognitive capacity and consumer behaviors.[24] Recent studies of cognition suggest

---

*Advertising* (Mar. 28, 2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.pdf [https://perma.cc/4ZBL-5RJ4] (setting forth the following goals to bring the rules into the twenty-first century: "Encourage national uniformity and simplify the rules . . . . Accommodate changes in the legal profession from technology, competition and cross-border practice. Protect the public from false and misleading communications and overreaching. Relieve regulators of unnecessary burdens").

23. *See generally Model Rule 7.1–7.5 Comments*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments/ [https://perma.cc/Z7AF-5EBL] (last visited Jan. 27, 2020). This webpage archives all comments received by the ABA during its work on the draft of the new rules. Some, like the Legal Marketing Association, are enthusiastically supportive. Letter from M. Ashraf Lakhani, President, and Betsi Roach, Exec. Dir., Legal Mktg. Ass'n, to ABA Standing Comm. on Ethics & Pro. Resp. (Apr. 25, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lma_comments_march_proposal.pdf [https://perma.cc/92S3-Q7QX]. Others, like Professor Timothy Chinaris, Associate Dean for Academic Affairs at Belmont University College of Law in Nashville, Tennessee, are decidedly on the same page as Drinker. Letter from Timothy Chinaris, Assoc. Dean for Acad. Affs., Belmont Univ. Coll. of L., to ABA Standing Comm. on Ethics & Pro. Resp. (Jan. 31, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chinaris_comment.pdf [https://perma.cc/69TJ-YTXN]; *see also* DRINKER, *supra* note 1, at 212 (agreeing with Professor Chinaris in that solicitation would negatively impact the reputation of the legal profession and undermine the administration of justice).

24. Two experiments have been conducted which "test the hypothesis that the mere presence of one's smartphone" occupies cognitive resources of the human brain, thus "reduc[ing] available cognitive capacity" (i.e., the "brain drain" hypothesis). Adrian F. Ward et al., *Brain Drain: The Mere Presence of One's Own Smartphone Reduces Available Cognitive Capacity*, 2 J. ASS'N FOR CONSUMER RSCH. 140, 143 (2017). Cognitive capacity is the total amount of information our brain is capable of retaining at any point in time. *See id.* at 141. The results showed that a smartphone reduces one's available cognitive capacity by its mere presence alone, even when it is not in use. *Id.* at 146. Ultimately, this reduces the amount of power we can apply to other tasks, such as taking a test or driving a car. *Id.* at 142, 146, 151. It also showed that even when participants in the test were not using their phones, they were using brain energy to think about them, which divided their attention.

Electronic copy available at: https://ssrn.com/abstract=3729535

signals from one's own cellular device—such as the ping of a text message or tweet from an attorney seeking to advertise his or her services—activates the same involuntary attention and memory system that responds to the sound of one's own name as a priority stimulus requiring an answer.[25]

To say the 2018 revision represents a giant leap forward in the historically fixed rules concerning attorneys advertising services and soliciting clients is an understatement. The landmark case deciding the profession could place a simple, fact-based "tombstone" advertisement in a newspaper was decided just over forty years ago, in 1977. In *Bates v. State Bar of Arizona*, the Supreme Court held a state's blanket prohibition on all attorney advertising unconstitutional and that truthful attorney advertisements were protected by the First Amendment as commercial speech.[26] Prior to *Bates*, Drinker himself decried attorneys advertising as if such behavior lowered the legal profession into the realm of mere merchants such as milkmen,

---

*Id.* at 142; *see also* Henry H. Wilmer et al., *Smartphones and Cognition: A Review of Research Exploring the Links Between Mobile Technology Habits and Cognitive Functioning*, FRONTIERS PSYCH., Apr. 25, 2017, at 3, 5. A historical review of cognition studies established that while research investing the relationships between smartphone technology habits and the impact on human cognitive function is limited due to the relative youth and rapid change of the technology platforms, there are some available findings that suggest use habits can be detrimental to mnemonic, or memory, function. *Id.* at 2, 9, 12. The results in relation to human cognition studies shows incomplete and sometimes contradictory information, but the authors emphasize the need to continue to gather detailed usage metrics to understand how these technologies are necessarily shaping our brains. *Id.* at 12–13.

25. Anja Roye et al., *Personal Significance Is Encoded Automatically by the Human Brain: An Event-Related Potential Study with Ringtones*, 26 EUR. J. NEUROSCIENCE 784, 784–89 (2007). The results of this study established that the use of mobile phone and text message technology strongly impacts the formation of memories in individuals. *Id.* at 788–89. Quick adaptation to change in our environment is critical to our survival, including the creation of an auditory sensory memory that registers changes that do not fit the model we have memorialized in our memories. *Id.* at 784. The study showed a connection with the ringtones on the participants' involuntary attention systems. *Id.* at 788–89. The study tested the impact and personal significance of a personalized ringtone on the system that automatically detects same or different environmental sounds on the brainwaves of participants. *Id.* at 785. The ringing of our phone asks for some behavior response from us, and the more personally significant the sound, the more distinct the involuntary attention reaction in the brain. *Id.* at 788–89; *see also* Ward et al., *supra* note 24, at 142.

26. Bates v. State Bar of Ariz., 433 U.S. 350, 383–84 (1977). The Court classified attorney advertising as protected, with some limits, under the First Amendment as commercial speech, but avoided the issue of advertising claims as to the quality of services being offered. *Id.* at 363–66. It did, however, suggest that advertising claims might also be misleading and warrant restraints on in-person solicitation. *Id.* at 366. The Court also noted that the local state bar associations would have a "special role" to play in assuring attorney advertising "flows both freely and cleanly." *Id.* at 384.

Electronic copy available at: https://ssrn.com/abstract=3729535

liquor dealers, or the tobacconist.[27] "[E]xtensive advertising would doubtless increase litigation, this has always been considered as against public policy,"[28] Drinker wrote in 1953, an argument mirrored by the Arizona State Bar in *Bates*.[29]

As for solicitation, Drinker saved his finest vitriol for that particular practice. "Also, in so much as lawyers are officers of the court, advertising and solicitation by them would lower the whole tone of the administration of justice."[30] What would Drinker say about attorneys who are now emboldened by the revisions of the rules of professional conduct to tweet or text about their respective law practices?[31] What would he say about such messaging reaching a person by the use of a tiny electronic device so potent it lights up your brain upon the mere receipt of a ring or a ding?[32] Or about attorneys advertising directly to a device that the owner checks 80 times a day, or nearly 30,000 times in a single year?[33]

Researchers call the smartphone an "attention magnet unlike any our minds have had to grapple with before,"[34] the power of which is only now beginning to be understood, with researchers saying it will take even more time and greater study to fully comprehend the impact of the smartphone's propensity for good or evil.[35] Even with research in flux, but definitely pointing to detriments to memory and cognition caused by a reliance on

27. DRINKER, *supra* note 1, at 210–12.

28. *Id.* at 212.

29. *Bates*, 433 U.S. at 375–76. An argument that the Court rejected because "[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376.

30. DRINKER, *supra* note 1, at 212.

31. Twitter is a free platform used increasingly by attorneys to avoid the expense of advertising, learn about cases on the rise, network with other attorneys, and directly solicit business from potential clients. Virginia Mayo, *How Twitter and Twitter Hashtags Can Promote a Law Firm*, BIGGER L. FIRM (Aug. 2, 2019), http://www.biggerlawfirm.com/how-twitter-and-twitter-hashtags-can-promote-a-law-firm/ [https://perma.cc/LR98-ZUVS]. Most notably, for those uninterested in posting photos and using hashtags, it is a powerful news and data-filtering tool for gathering information about the market and potential clients. Elizabeth H. Munnell, *Twitter for the Reluctant Lawyer*, LAW PRAC. TODAY (Mar. 14, 2018), http://www.lawpracticetoday.org/article/twitter-reluctant-lawyer/ [https://perma.cc/7ZB8-VT4K].

32. *See* Roye et al., *supra* note 25, at 788–89.

33. Nicholas Carr, *How Smartphones Hijack Our Minds*, WALL ST. J. (Oct. 6, 2017, 12:36 PM), http://www.wsj.com/articles/how-smartphones-hijack-our-minds-1507307811 [https://perma.cc/2RY3-WVWS]. The author cited data collected by Apple, Inc., in this essay for the Wall Street Journal.

34. *Id.*

35. *See* Wilmer et al., *supra* note 24, at 1, 12–13.

Electronic copy available at: https://ssrn.com/abstract=3729535

smartphones and other electronic devices,[36] the ABA's new solicitation rules could allow attorneys to hotwire the solicitation of legal services through this powerful medium. The only check on this is a vague assertion by the Committee contained in the resolution that states texts and tweets are "more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter."[37]

However, modern research tells us the rules for advertising on a billboard, where an immediate responsive action from the observer is unlikely to occur, simply do not apply to the powerful handheld devices that interrupt our cognition and impact our attention spans.[38] Despite the oft-heralded "dangers" of in-person contact with a potential client, a text message may be more impactful. For example, recent psychological research (and frankly our own human experiences) show we forget another person's name shortly after ending a face-to-face conversation because our brains are not designed to recall names as much as they are designed to recall faces.[39] Our digital interactions do not permit such easy forgetfulness. All of our texting, tweets, and other electronic messaging is preserved by our devices for reference at any time. If the messaging is conducted on Facebook, the company's "Memories" section will provide the user with recaps of

36. *Id.* at 9.

37. RULES 7.1–7.5 REPORT, *supra* note 2, at 6 (noting that the Committee provides no research to support this assertion in the report or on its online resources portal).

38. *See* Wilmer et al., *supra* note 24, at 4–5 (citing to several studies showing children and adolescents are developing increasingly shorter attention spans and tendencies to act scatterbrained due to increased contact with smartphones and other electronic devices); Peter Nikken & Marjon Schols, *How and Why Parents Guide the Media Use of Young Children*, 24 J. CHILD & FAM. STUD. 3159, 3423–35 (2015).

39. Lise Abrams & Danielle K. Davis, *Competitors or Teammates: How Proper Names Influence Each Other*, 26 CURRENT DIRECTIONS PSYCH. SCI. 87, 87–88 (2017) (stating that the ability to learn and remember proper names is notoriously more difficult than other types of words, because names are arbitrary and do not have an immediate connection to their referent); *see also* Serge Bredart & Tim Valentine, *Descriptiveness and Proper Name Retrieval*, 6 MEMORY 199, 199 (1998) ("Results unequivocally showed that retrieval blocks occurred more often in naming characters bearing arbitrary names than in naming characters bearing descriptive names."); Carlo Semenza, *Retrieval Pathways for Common and Proper Names*, 42 CORTEX 884, 884 (2006) ("The proper name specific retrieval process is shown, in keeping with current philosophical and linguistic theories, to be intrinsically fragile and source-consuming."); Jamie Ducharme, *Why You Forget Names Immediately—And How to Remember Them*, TIME (July 26, 2018, 2:20 PM), http://time.com/5348486/why-do-you-forget-names/ [https://perma.cc/4DB5-RXY3]; Tom Stafford, *Why It Is Easier to Recognise Faces than Recall Names*, BBC (Feb. 21, 2012), http://www.bbc.com/future/article/20120209-why-names-and-faces-are-so-vexing [https://perma.cc/Z3VQ-KGC9].

Electronic copy available at: https://ssrn.com/abstract=3729535

seasonal or monthly reminders of their previously posted content.[40]

In addition to our devices acting as an easily accessible warehouse for our memories, thoughts, and data, the mere sending and receiving of text messages releases dopamine in the brain, which sets up a "vicious circle of constant craving that leads to more texting, more craving."[41] This impact is especially powerful on the younger generation that has simply never known life without the text message, using it to substitute for conventional face-to-face social contact.[42] The total number of text messages sent in 2017 was a mind-blowing 9.3 trillion, or about 781 million text messages each month, each virtually impossible for the sender not to open immediately and most likely respond.[43]

This Article will explore the newly amended rules for attorney advertising while connecting them to the most up-to-date cognitive studies on the impact of smartphone use on the consumer brain, with a particular focus on text messaging, or short message service (SMS). It will also suggest the revised rules allowing for attorney advertising via text messaging have a potential impact so dramatic that the next step in the evolution of the rules governing attorney advertising should simply be discarding Rule 7.3 altogether, a move that would mirror suggestions by the APRL that the suite of advertising rules could bear a rewrite.[44] The

---

40. Amit Chowdhry, *Facebook Memories: A Central Place to View 'On This Day' Posts*, FORBES (June 12, 2018, 1:39 AM), http://www.forbes.com/sites/amitchowdhry/2018/06/12/facebook-memories/ [https://perma.cc/8FFY-LXDR] (explaining the features of the Memories section on Facebook, which launched in June 2018). However, Facebook has utilized various forms of digital reminding since it launched "On this Day" feature in March 2015. *Id.*

41. Anthony Patterson, *Digital Youth, Mobile Phones and Text Messaging: Assessing the Profound Impact of a Technological Afterthought*, *in* THE ROUTLEDGE COMPANION TO DIGITAL CONSUMPTION 83, 84 (Russell W. Belk & Rosa Llamas eds., 2013) (citing GARY SMALL & GIGI VORGAN, IBRAIN: SURVIVING THE TECHNOLOGICAL ALTERATION OF THE MODERN MIND (2008)). "To lose one's phone would amount to a piece of the self being shorn away." *Id.* at 83 (citing DAVID M. BERRY, THE PHILOSOPHY OF SOFTWARE: CODE AND MEDIATION IN THE DIGITAL AGE 141 (2011)).

42. Patterson, *supra* note 41, at 84, 88.

43. *Text Message Statistics–United States,* STAT. BRAIN RSCH. INST., http://www.statisticbrain.com/text-message-statistics/ [https://perma.cc/LY45-JQKP] (last visited Aug. 28, 2020); *see also* Kenneth Burke, *107 Texting Statistics That Answer All Your Questions*, TEXT REQUEST, http://www.textrequest.com/blog/texting-statistics-answer-questions/ [https://perma.cc/5BES-24EU] (Jan. 24, 2019).

44. *See* APRL REPORT, *supra* note 18, at 29–31. The APRL reasoned that the focus should be on the following two goals: (1) standardizing the disciplinary rules on lawyer advertising and (2) focusing on the prohibition of false or misleading advertisements. *Id.* at 29. These goals "best balance[] the important interests of access to justice, protection of the

Electronic copy available at: https://ssrn.com/abstract=3729535

Model Rules already contains a variety of other protections against attorney overreach, such as the prohibition against false or misleading communications in Rule 7.1,[45] the detailed rules for communication found in Rule 7.2,[46] and the blanket prohibitions against a litany of attorney malfeasance found in Rule 8.4.[47]

While an attorney's ability for powerful persuasion above that of other mere mortals can never be in doubt,[48] an increasingly tortuous interpretation of Rule 7.3 simply cannot be revised fast enough, or thoroughly enough, to compete with technology and its impact on human cognition.[49]

## II. RULE HISTORY—POWERFUL PERSONAL CONTACT PROHIBITED

Solicitation and the prohibition against certain forms of advertising of legal services comes down to one simple concept: personal contact between a lawyer and a potential client is powerfully persuasive with the balance tilted in favor of the highly trained advocate who must therefore be stringently regulated.[50]

Using that logic, the attorney, like Count Dracula, must be "invited to meet the fresh client on whom he feeds."[51] This is one of many famous rules promulgated by Professor Abraham Van Helsing, the fictional vampire hunter that appears in Bram

---

public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct." *Id.* at 30.

45. Rule 7.1 prohibits lawyers from making false or misleading communications about the lawyer or the lawyer's services. MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS'N 2020). "This rule governs all communications about a lawyer's services, including advertising." *Id.* r. 7.1 cmt. 1.

46. "A lawyer may communicate information regarding the lawyer's services through any media." *Id.* r. 7.2(a). A lawyer, however, is prohibited from stating or implying that he or she is certified as a specialist in a particular field of law unless the lawyer has been certified by an appropriate agency, and the accrediting agency is clearly identified. *Id.* r. 7.2(c).

47. *Id.* r. 8.4 (defining misconduct for attorneys, such as committing a criminal act, engaging in dishonesty, fraud, deceit, or misrepresentation, engaging in conduct prejudicial to the administration of justice, etc.).

48. *See* DRINKER, *supra,* note 1, at 4; Bates v. State Bar of Ariz., 433 U.S. 350, 383–84 (1977) (Burger, C.J., concurring); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464–65 (1978).

49. From 2016 to 2020, supercomputers grew to be approximately thirty times more powerful. Declan Butler, *A World Where Everyone Has a Robot: Why 2040 Could Blow Your Mind*, 530 NATURE 399, 399–401 (2016) (compiling statistics across technology disciplines). The amount of data worldwide is predicted to reach forty-four zettabytes by 2020, which is nearly as many digital bits as there are stars as in the universe. *Id.* at 401.

50. Mark Yochum, Professor, DUQUESNE U. SCH. OF L., *CLE Presentation: The Personal Contact Rule: No Draculas Allowed* (2013).

51. *Id.*

Electronic copy available at: https://ssrn.com/abstract=3729535

Stoker's 1897 gothic horror novel *Dracula*—that Dracula cannot enter into a place in-person unless invited[52]—and the same is true for attorneys under both the old Rule 7.3 and the recently revised version. Under both versions of the rule, *physical* (i.e., face-to-face, bedside chats in the hospital with the injured,[53] etc.) personal contact is forbidden because the "situation is fraught with the possibility of undue influence, intimidation, and over-reaching."[54] Yet now, the rule has been parsed further to allow contact through texting, chat rooms, or other "written communications that recipients may easily disregard."[55] Unfortunately, this logic passed its sell-by date due to the cognitive implications of the use of text messaging.[56] After all, the prohibitions against both attorney advertising and solicitation did not begin as something to be concerned with in terms of its effects on the potential client(s). The prohibition began as an unflattering reflection on the character of the profession as a whole.[57] In fact, the ABA banned attorney advertising in 1908, and that ban continued until 1976 when the Supreme Court overturned it in the seminal *Bates* case.[58] Since *Bates*, the Supreme Court has revealed a tendency to reject rules inhibiting attorney advertisement and infringing upon the

---

52. *See generally* BRAM STOKER, DRACULA 231–42 (1897).

53. *See Ohralik*, 436 U.S. at 447, 464–65.

54. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2020) (defining "live person-to-person contact" as "in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection").

55. *Id.*

56. Patterson, *supra* note 41, at 84 (citing Richard Benson, *The Joy of Text*, GUARDIAN (June 2, 2000), http://www.theguardian.com/theguardian/2000/jun/03/weekend7.weekend1 [https://perma.cc/ZW46-JNZ2] (likening text messages to "little sugar-rushes of contact")).

57. Christopher R. Lavoie, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 416 (1997) (citing AM. BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 75 (1967) (providing text of original Canon 27 of the ABA Canons of Professional Ethics)). Canon 27 originally read:

> The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and trust . . . But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.

MODEL CODE OF PRO. RESP. Canon 27 (AM. BAR ASS'N 1908).

58. Lavoie, *supra* note 57, at 415–16 (citing LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (1980) (discussing the history of attorneys in the United States)); *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 382–83 (1977) (holding that the blanket ban on attorney advertising was unconstitutional because it is protected commercial speech).

Electronic copy available at: https://ssrn.com/abstract=3729535

First Amendment right to freedom of speech so long as the communications being made are not false or misleading.[59]

Prior to *Bates*, many attorneys felt, like Drinker, that the ABA rules proscribing attorney advertising and solicitation were in place to prevent the commercialization of the profession.[60] The solicitation of business was decried as beneath the dignity of the self-respecting lawyer, and worse, an unwholesome result of self-aggrandizement.[61] The Model Rules governing legal advertising have come a long way over the past four decades, but still lag behind changes in technology and changes in consumer awareness, and have far surpassed the original laundry-list approach previously taken in the rules telling attorneys exactly what could and could not be included in any advertising format.[62] In-person solicitation, however, continues to be banned outright with the limited exceptions of contact with a lawyer, a family member, a prior business or professional contact, and now an additional exception: a person who routinely uses, for business purposes, the type of legal services offered by the lawyer.[63] A continual problem exists, however, in determining where solicitation begins and the advertising ends.[64]

### *A. Attorney Advertising and Solicitation Often Conflated, Only Advertising Has Evolved, Rules 7.1–7.5*

The myth of the attorney as a seductive and persuasive "vampire" in need of rules governing personal contact restraints begins anecdotally in the literature with Abraham Lincoln. Every year, students enrolled in Professional Responsibility courses in

59. Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?*, 15 LOY. L.A. ENT. L.J. 1, 11 (1994); *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 471, 479 (1988) (under the First and Fourteenth Amendments, a state cannot categorically prohibit a lawyer from soliciting business by sending truthful and nondeceptive letters to potential clients facing legal issues); Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 646–47 (1985) (under the First Amendment, an attorney did not violate the state professional responsibility code by advertising in a newspaper truthful statements including nondeceptive information and legal advice, however, attorney could not advertise misleading contingent fee information); *In re* R.M.J., 455 U.S. 191, 207–08 (1982) (the state could not restrict attorney's First Amendment right to advertise truthfully by placing newspaper advertisements and advertising in the yellow pages).

60. DRINKER, *supra* note 1, at 219 (citing Frank J. Loesch, *The Acquisition & Retention of a Clientage*, 1 ILL. L. REV. 455, 468 (1906)).

61. *Id.*

62. Brooks, *supra* note 59, at 10.

63. MODEL RULES OF PRO. CONDUCT r. 7.3(b) cmt. 1 (AM. BAR ASS'N 2020).

64. Lavoie, *supra* note 57, at 427.

Electronic copy available at: https://ssrn.com/abstract=3729535

law schools across the country learn about the advertisement placed by Abraham Lincoln in the Daily Indiana State Journal in 1858–1859, announcing the opening of his new law firm, Lincoln & Herndon in Springfield, Illinois.[65] Such a demure advertisement designed to solicit new clients appears prim compared to today's blockbuster theatricals produced by the likes of Georgia-based personal injury attorney, Jamie Casino, who placed his scripted and elaborately produced advertisement in the 2014 Super Bowl[66] or Texas-based DUI attorney, Bryan Wilson, aka the "Texas Law Hawk,"[67] who runs screaming through the forest waving an American flag and blowing things up in a bid to assure potential clients of his vigor in representing their rights with his "talons of justice."[68] The surprisingly high-production value videos by both attorneys have reached millions of viewers on YouTube.[69]

Are these examples of solicitation? No, because they are not live, in-person contact, but are, instead, notifications directed to the general public in an effort to create an opportunity for permissible personal contact between an attorney and a new client by drawing attention to the lawyer's available services.[70] The arguable impact of such advertising by attorneys is rather enormous and capable of large-scale repetition. These videos can be watched at any time, at any place, by anyone. Their creators, who spend big money,[71] hope to sway a potential client into

---

65. Ross Fishman, *Abe Lincoln's 25-Cent Marketing Speech*, NAT'L L. REV. (Sept. 2, 2014), http://www.natlawreview.com/article/abe-lincoln-s-25-cent-marketing-speech [https ://perma.cc/VE69-GZSW].

66. Lee Moran & Joel Landau, *Georgia Attorney Uses Incredible Super Bowl Ad to Clear Brother's Name*, N.Y. DAILY NEWS (Feb. 4, 2014, 1:00 PM), http://www.nydailynews.c om/news/national/story-behind-ga-attorney-incredible-super-bowl-ad-article-1.1601747 [ht tps://perma.cc/R39X-K6L9].

67. *Bryan Wilson: The Texas Law Hawk*, LAW HAWK, http://www.texaslawhawk.com/ [https://perma.cc/YZ7Z-99WV] (last visited Jan. 29, 2020).

68. Bryan Wilson, *Bryan Wilson, the Texas Law Hawk: Commercial 3*, YOUTUBE (Oct. 20, 2015) https://www.youtube.com/watch?v=HL3MxAH-kDI&t=15s [https://perma.cc/8ZP R-5GV5].

69. Bryan Wilson's YouTube advertisement reached more than two million views as of the time of this publication. *Id.* Similarly, Jamie Casino's 2018 Super Bowl commercial reached more than one million views as of the time of this publication. Jamie Casino, *2018 Jamie Casino–Super Bowl Commercial*, YOUTUBE (Feb. 2, 2018), http://www.youtube.co m/watch?v=BUXRnmv9_hk [https://perma.cc/4QBB-FHFE].

70. Advertising is "the action of drawing the public's attention to something to promote its sale." *Advertising*, BLACK'S LAW DICTIONARY (8th ed. 2004).

71. Jamie Casino reportedly spent over $120,000 for his 2015 Super Bowl attorney advertisement. Michelle Castillo, *How to Get National Attention with a $100,000 Local Super Bowl Ad*, ADWEEK (Feb. 3, 2015), http://www.adweek.com/brand-marketing/how-get-national-attention-100000-local-super-bowl-ad-162742/ [permalink unavailable].

Electronic copy available at: https://ssrn.com/abstract=3729535

choosing their law firms for a pressing legal matter. Model Rules 7.1 and 7.2 still govern this expanded concept of attorney advertising by preventing these creative attorneys from making false or misleading communications, and by prohibiting misrepresentations of facts or law.[72] In several of his videos, Wilson even gives a nod to these rule constrictions by delivering carefully worded statements of the law throughout the production so consumers will not be misled by incorrect interpretations of the law.[73]

In fact, the recent revisions to these rules show the ABA can readily adapt at least some of these rules to meet the evolving needs of attorneys who must compete for business. The title to Rule 7.2 was given an overhaul with a name change, from "Advertising," to the more general and all-encompassing, "Communications Concerning Lawyer's Services: Specific Rules."[74] According to the Committee, this was done specifically to accommodate attorneys who are using newer technologies to advertise, such as blogging, Facebook, Twitter, and more, in an attempt to reach "out to a public that has become social media savvy."[75] This is also a nod to the fact that such speech by attorneys is still determined to be constitutionally protected commercial speech in such modern cases as *Alexander v. Cahill*.[76] Complete bans on attorney advertising have been overturned under the *Central Hudson*[77] test as recently as 2011, when the Fifth Circuit ruled that some of Louisiana's attorney advertising rules were unconstitutional because they attempted to impose an

72. *See* MODEL RULES OF PRO. CONDUCT r. 7.1, 7.2 (AM. BAR ASS'N 2020).

73. Wilson, *supra* note 68 (featuring an actor portraying a police officer who gives bad advice to arrestees regarding a DUI arrest, with the real facts about the Texas law governing DUI cases flashed on the screen after every false statement by the actor).

74. RULES 7.1–7.5 REPORT, *supra* note 2, at 2.

75. *Id.* at 11.

76. Alexander v. Cahill, 598 F.3d 79, 86–89 (2d Cir. 2010). The court held that special effects such as "wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead." *Id.* at 94. In essence, the court was saying that consumers are not likely to abandon all common sense upon viewing a hopped-up attorney advertisement. *Id.* Rather, consumers are capable of discerning the truth from clear advertising ploys, such as depicting an attorney as a giant "towering above local buildings." *Id.* Attorneys are still only human, after all.

77. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 571–72 (1980) (holding that the First and Fourteenth Amendments require that restrictions on commercially protected speech be no more extensive than necessary to serve the state interest).

Electronic copy available at: https://ssrn.com/abstract=3729535

absolute ban on this form of commercial speech.[78] The Committee cites to these cases and examples to bolster its assertion that the newly revised rules are needed to address the changing needs of the profession and clients as technology continues to advance. "Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century."[79]

In another example of a tweak that reflects modern sensibilities, previous Comment 3 to Rule 7.2, stating that "questions of effectiveness and taste in advertising are matters of speculation and subjective judgment," has been eliminated entirely in the newly promulgated version, presumably to alleviate any concerns about good taste or professionalism that might arise from any of these large-scale production advertisements.[80] The newly revised advertising rules appear to further remove any impediment of the free flow of legitimate, nonfraudulent information by attorneys about their services through various media once deemed "undignified."[81] Simplicity, it seems, will be the mother of reinvention for at least several of these rules regarding attorney advertising, but not solicitation.

Glorious excess in attorney advertising is nothing if not a modern marvel, and the lines between advertising and solicitation may only continue to blur if the rules governing solicitation fail to keep up with technology. First adopted in 1908 and in place until September 30, 1937, when major revisions began, the Canons of Professional Ethics set forth the American Bar Association's Code of Ethics prescribing professional conduct for attorneys. In particular, Canon 27 banned solicitation and advertisements by "circulars or advertisements or by personal communications, or interviews" and branded such activities as unprofessional at best,

---

78. Pub. Citizen Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 219, 223–29 (5th Cir. 2011) (overturning a Louisiana rule which prohibited attorney advertisements that included the portrayal of a judge or jury and required specific font size and speed of speech for disclaimers, but upholding that portion of the rule which prohibited attorney advertising that promised certain results and/or included the portrayal of a client by a non-client without a disclaimer).

79. RULES 7.1–7.5 REPORT, *supra* note 2, at 11–13.

80. *Id.* at 4–5.

81. *Id.*

Electronic copy available at: https://ssrn.com/abstract=3729535

unsavory, and money-grubbing at worst.[82] Over the decades, incremental changes were made to these canons to allow attorneys to produce basic identification business cards and write advice articles for publication in newspapers (1928), to allow business cards to appear on "reputable law lists" and to feature a brief notice of specialized legal services available (1933), and finally, to provide the right to appear only on ABA-approved law lists (1937).[83]

Of course, Lincoln could advertise because, at the time the former president was practicing law, prior to the Civil War, there were no blanket prohibitions issued by a governing body of licensed professional attorneys.[84] Lincoln himself became a lawyer through the apprenticeship model of legal training, not through Christopher Columbus Langdell's later-adopted Harvard method that helped recognize the study of law not as a trade, but as an educated man's game played at the university. "Before Langdell, 'legal education . . . amounted to an undemanding, gentlemanly acculturation into the profession.'"[85] Arguably, after Langdell,[86] the culture of the profession began to change as attorneys began to think of themselves as a "group of men pursuing a learned art as a common calling in a spirit of public service—no less a public service because it may incidentally be a means of livelihood."[87] For

82. MODEL CODE OF PRO. RESP. Canon 27 (AM. BAR ASS'N 1908). Canon 27 was part of the first rules promulgated by the ABA. The canons are the precursor to the model rules we know today. *Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/88FK-KY5B] (last visited Aug. 16, 2020); DRINKER, *supra* note 1, at 215, 249.

83. DRINKER, *supra* note 1, at 216–18.

84. Brooks, *supra* note 59, at 6–7 (citing DRINKER, *supra* note 1, at 19–20) (noting that "[b]y 1860, only nine out of thirty-nine states required a definite, though nominal, period of preparation for the bar," and that associations were viewed with a gimlet eye as exclusive and potentially anti-American).

85. MARGARET Z. JOHNS & REX R. PERSCHBACHER, THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION 10–11 (4th ed. 2016) (citing Bruce A. Kimball, *Students' Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School, 1876–1882*, 55 J. LEGAL EDUC. 163, 164 (2005)).

86. Langdell served as the dean of Harvard Law School from 1870–1895. *Deans of Harvard Law School*, HARV. L. SCH., http://hls.harvard.edu/about/history/hls-deans/ [https://perma.cc/J5Z4-64YF] (last visited June 22, 2020).

87. Roscoe Pound, *What Is a Profession? The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203, 203 (1944).

Electronic copy available at: https://ssrn.com/abstract=3729535

most new attorneys in the twenty-first century, burdened by law school debt,[88] earning a livelihood is far from an incidental pursuit.

In 1953, Drinker opined deeply on the evils of personal contact by an attorney trained in the art of persuasion, or the "evil effect on the ignorant of alluring assurances by the solicitors, as well as the temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducements."[89] In short, Drinker thought personal contact should be banned and not expanded.[90] And, apparently, so did the ABA for decades, until the recent change allowing personal contact via text messaging.[91]

The legal profession and its attitude toward advertising as a quasi-evil had moved slowly with varying degrees of differences between jurisdictions until 1973 and 1974. At that time, the ABA, in a joint project with the American Bar Foundation, conducted a survey in thirty-three states to assess the public's knowledge about lawyers, legal services, and the legal process.[92] The survey revealed the public had almost no knowledge about how to find an attorney or access legal services. Worse, many people were doing without legal advice simply because they were unable to find a lawyer.[93] Enter two attorneys based in Phoenix, Arizona, who opened a practice with the stated aim of providing affordable legal services "to persons of moderate income who did not qualify for governmental legal aid."[94] In 1976, John R. Bates and Van O'Steen placed their advertisement in a Phoenix daily newspaper and incurred the wrath of the Arizona State Bar for violating its rule against attorneys publicizing themselves or their firm in newspapers or through other means of commercial publicity,[95] and

---

88. *Law School Costs*, LAW SCH. TRANSPARENCY DATA DASHBOARD, http://data.lawschooltransparency.com/costs/debt/ [https://perma.cc/G5VQ-NJTB] (last visited Jan. 30, 2020) (noting that the national average for law school debt in 2018 is $115,481 per graduate).

89. DRINKER, *supra* note 1, at 212.

90. Yochum, *supra* note 50.

91. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2020).

92. Roger P. Brosnahan & Lori B. Andrews, *Regulation of Lawyer Advertising: In the Public Interest?*, 46 BROOK. L. REV. 423, 423 (1980).

93. *Id.* at 423–24.

94. Bates v. State Bar of Ariz., 433 U.S. 350, 353–54 (1977).

95. *Id.* at 354–55 (quoting Ariz. Sup. Ct. r. 29(a) (1978)) ("A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.").

Electronic copy available at: https://ssrn.com/abstract=3729535

the rest is history. The Supreme Court eventually decided that, although lawyer advertising could potentially be misleading to a public unfamiliar with the law, this concern was outweighed by the need for the public to access information on the availability of legal services.[96] Although attorney advertising finally received tacit approval, the ban on personal contact (solicitation) remained firmly in place, because of the potential damage face-to-face persuasion by an attorney exercising his or her powers over a vulnerable, or injured, party could cause.[97]

In 1980, shortly after the *Bates* decision approving attorney advertising, "twelve jurisdictions allow[ed] print advertisements only, two allow[ed] print and radio advertisements, and thirty-two allow[ed] advertisements in print, on radio, and on television."[98] From 1983 to1998, the Model Rules underwent eighteen revisions; one-third of those changes were suggested and applied to the Advertising Rules—all prior to the age of the smartphone and the ubiquitous use of the Internet.[99] Neither the original rules nor the subsequent revisions contemplated a tool enabling personal contact between lawyers and potential clients 24 hours a day, 7 days a week, 365 days per year. How, then, does one separate the rules for advertising and solicitation when personal contact is a click away?

### *B. Solicitation, Providing Information About Legal Services, and Pecuniary Gain in a New Age of Technology, Revising Rule 7.3*

Today, websites, search engines, banners, videos, hyperlinks, optimization and manipulation of metadata, social media, and more are all part of the arsenal of cyberspace advertising options for savvy attorneys nationwide.[100] In 1998, the ABA's Commission

---

96. *Id.* at 366–72.

97. *See generally* Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 449–50 (1978) (telling the story of an ambulance-chasing attorney signs clients while in traction in the hospital—a legendary cautionary tale).

98. Brosnahan & Andrews, *supra* note 92, at 429.

99. Matthew Mercer, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel*, 39 BRANDEIS L.J. 713, 718 (2001).

100. Stephani Francis Ward, *50 Simple Ways You Can Market Your Practice*, AM. BAR ASS'N J. (July 1, 2013, 10:19 AM), http://www.abajournal.com/magazine/article/50_simple_ways_you_can_market_your_practice [https://perma.cc/TXD2-TGJP]; Ana Gotter, *5 Effective Law Firm Advertising Strategies to Grow Your Firm*, DISRUPTIVE ADVERT. (Mar.

Electronic copy available at: https://ssrn.com/abstract=3729535

on Advertising published a white paper calculated to examine the advertising rules in light of the emergence of new technology.[101] While the paper does a thorough job outlining the construction of the Internet and acknowledging caselaw on the issues that produces results that are "illogical" and inconsistent with the very nature of the operation of the platform, it stops short of making concrete and actionable decisions on the matter.[102] It certainly never suggests disposing of the oft-revised Model Rule 7.3 to instead rely on the broader rules such as Model Rule 7.1: Information about Legal Services, or Model Rule 7.2: Communications Concerning a Lawyer's Services, or even Model Rule 4.1: Truthfulness in Statements to Others, all of which prohibit attorneys from making false statements or misleading communications with clients, regardless of the medium used or personal contacts made.[103]

After that, the topic of attorney advertising did not make another splash until the ABA published a lofty list of "Aspirational Goals for Lawyer Advertising."[104] The list exhorts attorneys to advertise with dignity and good taste, and states, "The use of inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings in advertising does not instill confidence in the lawyer or the legal profession and undermines the serious purpose of legal services and the judicial system."[105] Solicitation did not even merit a mention at that time, which makes the significant changes adopted just seven years later that much more surprising.

Two years later, the Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct reviewed the white paper and decided to develop its own proposed revisions to

---

29, 2018), http://www.disruptiveadvertising.com/marketing/law-firm-advertising/ [https://perma.cc/DH8E-LCPC] (detailing new and highlighting old ways to build and market a law firm in the internet age).

101. Mercer, *supra* note 99, at 727.

102. *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, AM. BAR ASS'N (July 1998), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper/ [https://perma.cc/4SAJ-RZWQ].

103. *Id. See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

104. *Aspirational Goals for Lawyer Advertising*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/abaaspirationalgoals/ [https://perma.cc/3W38-Z7SJ] (last visited Jan. 31, 2020).

105. *Id.*

Electronic copy available at: https://ssrn.com/abstract=3729535

the rules under Information about Legal Services.[106] The Ethics 2000 Commission focused on Rule 7.3; the ban on personal contact remained firmly in place, even with the proposed changes to Rules 7.1 and 7.2 that expanded the rule to cover technological developments. At that time, Rule 7.3 prohibited a lawyer from making in-person live or telephone contact to solicit business where monetary gain is involved, and the proposed changes appeared to double-down on this prohibition.[107] The focus of the Model Rules has long been on prohibiting the in-person solicitation of clients when a "significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain."[108] From the beginning, the Model Rules seemed to have an issue determining what was advertising and what constituted solicitation. Initially, the Model Rules classified targeted mailings as solicitation, but after *Shapero* the ABA reclassified them as advertising materials.[109] In the 1996 version of the Model Rules, targeted mailings were defined as particularized "mailings discussing specific types of legal services to people known to need those services."[110] At the same time, the rule equated live telephone contact with in-person solicitation rather than with advertising or targeted mail.[111] In fact, the rule baldly stated, "This potential for abuse inherent in direct in-person or live telephone 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."[112] In its most recent form, the Model Rules appears to yet again draw a line on shifting sands between advertising and solicitation by allowing real-time text and tweets, but still

---

106. Mercer, *supra* note 99, at 728.

107. RULES 7.1–7.5 REPORT, *supra* note 2, at 7–8.

108. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR ASS'N 2020); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464–67 (1978) (determining that when contact by an attorney is motived by pecuniary gain, restrictions on in-person solicitation are justified).

109. Lavoie, *supra* note 57, at 427 (citing Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 486 (1988)).

110. ANN. MODEL RULES OF PRO. CONDUCT 505 (AM. BAR ASS'N, 3 ed. 1996).

111. Lavoie, *supra* note 57, at 428 n.117 (citing MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR ASS'N 1996) ("There is the potential for abuse inherent in direct in-person or live telephone 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.")).

112. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 1996).

Electronic copy available at: https://ssrn.com/abstract=3729535

attempting to classify these communications received on smartphones in real time as permissible advertising rather than impermissible solicitation.[113]

The recommended change to Rule 7.3 brought forth in 2000, supported by the ABA Commission on Responsibility in Client Development, extended the personal conduct prohibition to include real-time solicitation by electronic communication (e.g., an internet chatroom).[114] The Commission "concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact."[115] Suggested changes to Rules 7.1, 7.2, and 7.3 were adopted in February 2002 by the ABA House of Delegates.[116]

The new revisions illustrate that the ABA has revised and streamlined the rules governing advertisements to meet the Internet where it is and how attorneys use it but stops short of examining the implications of the effect of technology itself and its widespread use among both attorneys and clients. Perhaps now is the time to apply the same logic to Rule 7.3 and rely on already existing broader rules of professional conduct to supply the answers, restrictions, and guidance for attorneys seeking to engage in personal contact with potential clients: Make no false or misleading communications, no material misrepresentations, and communicate nothing fraudulent or unsubstantiated. After all, law is a self-governing profession.

## III. WHAT IS SO SPECIAL ABOUT TEXT (SMS) MESSAGES?

After decades of prohibition on in-person solicitation by attorneys for pecuniary gain, with relatively minor and confusing attempts at revision, the new Rule 7.3 allows attorneys to figuratively tap into a potential client's involuntary attention system like the fictional protagonist Neo "jacking into" the Matrix via a data probe inserted directly into his skull.[117] New research is

---

113. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2020).

114. *Model Rule 7.3: Reporter's Explanation of Changes*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule73rem/ [https://perma.cc/JQN3-AZR2] (last visited Sept. 30, 2020).

115. *Id.*

116. *Evaluation of Rules of Professional Conduct (Report No. 401)*, AM. BAR ASS'N (Feb. 4–5, 2002), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_022002.pdf [https://perma.cc/5Z27-8YY3].

117. *See* THE MATRIX (Warner Bros. 1999).

Electronic copy available at: https://ssrn.com/abstract=3729535

beginning to show that the mere sending and receiving of text messages releases dopamine in the brain, which sets up a "vicious circle of constant craving that leads to more texting, more craving."[118] Each ding of the phone lights up the "pleasure systems of the brain," making the tiny electronic notifications harder and harder to resist because the dopamine it releases causes seeking behaviors.[119] Nothing is more stimulating to the release of dopamine in the human brain than the unpredictability of the receipt of any text message coupled with attention-getting cues such as a ding or your phone lighting up, which is why when text messages pop up on our phones we are nearly powerless to resist them.[120] Now, this power belongs to attorneys looking for business by sending text messages to a freshly expanded list of potential clients under the amended ABA rules. Potential clients who—like all of us—check their mobile devices up to eighty times per day, or nearly 30,000 times in a single year.[121] More than 70% of Americans even keep these devices by their bedsides and feel so connected to them that the occurrence of "phantom vibration syndrome" is on the rise.[122] That is akin to the phantom-limb syndrome amputees report feeling, however this is the feeling that an absent smartphone is vibrating with the receipt of a message.[123] There has even been a new term coined for our collective cellphone dependency: nomophobia, the fear and discomfort that comes from not having access to one's mobile device.[124]

---

118. Patterson, *supra* note 41, at 84.

119. Susan Weinschenk, *Why We're All Addicted to Texts, Twitter, and Google*, PSYCH. TODAY (Sept. 11, 2012), http://www.psychologytoday.com/us/blog/brain-wise/201209/why-were-all-addicted-texts-twitter-and-google [https://perma.cc/8H5D-UKEH]. Weinschenk discusses new research showing dopamine causes "seeking behavior," meaning the chemical produced in our brains causes us to "want, desire, seek out, and search." *Id.* It also increases our general level of goal-directed behavior, which in turn triggers the opioid system that allows us to feel pleasure, creating a loop of feelings of satisfaction. *Id.* (citing Kent C. Berridge & Terry E. Robinson, *What Is the Role of Dopamine in Reward: Hedonic Impact, Reward Learning, or Incentive Salience*?, 28 BRAIN RSCH. REVS. 309, 313 (1998) (discussing how research on the brain shows more electrical activity when a person is anticipating a reward rather than receiving one)).

120. Weinschenk, *supra* note 119.

121. Carr, *supra* note 33.

122. *See* Wilmer et al., *supra* note 24, at 11.

123. *See generally* Vera J. Sauer et al., *The Phantom in My Pocket: Determinants of Phantom Phone Sensations*, 3 MOBILE MEDIA & COMM. 293, 293–316 (2015); Carla Williams, *'Phantom' Cell Phone Sensations: Mind Over Matter*, ABC NEWS (Oct. 17, 2007), http://abcnews.go.com/Health/story?id=3740984&page=1 [https://perma.cc/QFG6-GHT4].

124. Jessica S. Mendoza et al., *The Effect of Cellphones on Attention and Learning: The Influences of Time, Distraction, and Nomophobia*, 86 COMPUTS. HUM. BEHAV. 52, 53 (2018)

Electronic copy available at: https://ssrn.com/abstract=3729535

Members of the SCEPR stated that these Model Rule revisions and amendments were going to streamline the outdated "patchwork of complex and burdensome lawyer advertising rules,"[125] and bring them into the twenty-first century. But do the new rules governing solicitation really best serve the bar and members of the public by allowing this new and powerful form of personal contact?

### *A. Ancient Technology Embraced and Made Popular by Generation "C"*

Researchers call the smartphone an "attention magnet unlike any our minds have had to grapple with before."[126] But the technology that created the text messaging system itself is practically ancient in light of the rapid pace of innovative advances in smartphone technologies. Text messaging itself is simply not seen by anyone as a cutting-edge technology anymore, which is perhaps why the Committee swept it up into the revised Rule 7.3 as seemingly an afterthought. Short Message Service (SMS), or text messaging as we now know it, was introduced in 1991 and heralded more as a by-product of the new cellular telephone technology at the time.[127] Interestingly, the world has the European Union to thank for the innovation, as the SMS grew out of the need for a way to communicate across national boundaries.[128] Texting itself was developed almost entirely by accident by anonymous developers who noticed unused capacity in the system, thinking it might become more useful as the technology continued to evolve.[129] The first SMS message was sent

(citing Anna Lucia Spear King et al., *Nomophobia: Impact of Cellphone Use Interfering with Symptoms and Emotions of Individuals with Panic Disorder Compared with a Control Group*, 10 CLINICAL PRAC. & EPIDEMIOLOGY MENTAL HEALTH 28, 32–33 (2014)); Caglar Yildirim & Ana-Paula Correia, *Exploring the Dimensions of Nomophobia: Development and Validation of a Self-Reported Questionnaire*, 49 COMPUTS. HUM. BEHAV. 130, 136 (2015). These studies suggest that although the phenomenon of nomophobia is not recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), it should be because the condition appears to meet clinical characteristics that have been described in other mental disorders such as anxiety, addiction, and obsessive compulsiveness.

125. RULES 7.1–7.5 REPORT, *supra* note 2, at 13.

126. Carr, *supra* note 33.

127. Patterson, *supra* note 41, at 83–85 (detailing the history of the development of short message service (SMS) technology).

128. Benson, *supra* note 56.

129. *See* Patterson, *supra* note 41, at 85 (citing BRUNO GIUSSANI, ROAM: MAKING SENSE OF THE WIRELESS INTERNET 2–5 (2001) (detailing how mobile phone technology

Electronic copy available at: https://ssrn.com/abstract=3729535

from a PC to a mobile phone in Britain on the Vodafone network in 1992, but it took until 1999 for a group of companies to collaborate so that users could communicate across corporate platforms, allowing the technology to catch on.[130] Each message consists of up to 160 characters of text and may be delivered to mobile phones from other mobile phones, or from computers.[131] Recipients can store these messages for a limited, or unlimited, amount of time depending on the data plans being used.[132] But, unlike email, text messages generally do not come with an informational subject line that would allow you to ignore the message. Instead, each message must be opened to be read.[133] The messages may then be immediately forwarded to others or included in a group text.[134] SMS developers underestimated the technology's potency; no one could have foreseen the way the simple text message would begin to change not only consumer behaviors, but alter the development of language, communication, and even our cognitive development.[135] Today, there are more than

began and developed)). *See generally* Roman Friedrich et al., *The Rise of Generation C*, 62 STRATEGY+BUSINESS 1 (2011).

130. Benson, *supra* note 56.

131. Ruth Rettie et al., Kingston Univ., Text Message Advertising: Dramatic Effect on Purchase Intentions at the Academy of Marketing Conference (July 6–9, 2004), https://eprints.kingston.ac.uk/id/eprint/2099/1/Text_Message_Advertising_Dramatic_Effect_on_Purchase.pdf [https://perma.cc/5DRZ-4JKD].

132. *See* Jennifer Hord, *How SMS Works*, HOW STUFF WORKS, http://computer.howstuffworks.com/e-mail-messaging/sms.htm#pt0 [https://perma.cc/72J8-A32Y] (last visited July 31, 2020) (explaining how SMS messages are little data packets sent from one phone to another); Kim Komando, *3 Things That Can Devour Your Data Plan*, USA TODAY (Sept. 12, 2014, 7:00 AM), http://www.usatoday.com/story/tech/columnist/komando/2014/09/12/3-things-that-devour-your-data-plan/15265115/ [https://perma.cc/XCT5-94VK] (stating that larger SMS messages, such as ones that include video and photo, and the presence of more SMS messages will take up large amounts of data on a phone); Christopher Neiger, *Does Keeping Texts on My Phone Slow Its Performance?*, HOW STUFF WORKS, http://electronics.howstuffworks.com/keeping-texts-on-phone-slow-performance.htm [https://perma.cc/CYC7-YVCU] (last visited July 31, 2020) (describing how texts store data on a phone, that storing too much will slow down the phone, and that the best way to remedy this is to delete the text messages); *Data Usage FAQs*, VERIZON, https://www.verizon.com/support/data-usage-faqs/ [https://perma.cc/5E74-P3AX] (last visited July 19, 2020); *Unlimited Plans*, VERIZON, https://www.verizon.com/plans/unlimited/?adobe_mc=MCMID%3D4534301194769167943 36285045974189730 44%7CMCORGID%3D843F02BE53271A1A0A490D4C%2540AdobeOrg%7CTS%3D1595184533&mboxSession=370a5a4c71754e1cae4fe8ed0725a233&wireless_gn_exp= 1-128556 [https://perma.cc/3BSP-UNYR] (last visited July 19, 2020) (detailing the multiple types of unlimited plans available, including unlimited text and data that may or may not avoid overage fees).

133. Ruth Rettie et al., *Text Message Advertising: Response Rates and Branding Effects*, 13 J. TARGETING MEASUREMENT & ANALYSIS FOR MKTG. 304, 305 (2005).

134. *Id.* at 306.

135. *See* Patterson, *supra* note 41, at 85–86, 89.

Electronic copy available at: https://ssrn.com/abstract=3729535

5,035,000,000 (5.035 billion) text users worldwide, with Americans alone sending roughly 26 billion text messages every single day.[136] According to a report by the Pew Research Center, at least 97% of smartphone owners text regularly.[137] On average, each American sends and receives 94 text messages per day, with more than 301,000 texts sent every second.[138] As jurisdictions begin to adopt the recent amendments to the advertising and solicitation rules, some of those texts may be coming from an attorney near you, and like Pavlov's dog salivating in response to the ringing of a bell in anticipation of receiving a treat, you will be well-conditioned by your own brain chemistry not to resist.[139]

None of us is immune from the impact of the meteoric rise of the use of this technology, but perhaps no generation has been as profoundly impacted as today's teenagers and young adults,[140] those students occupying our campuses and law schools, hunched over their cell phones with thumbs bouncing up and down sending messages to their compatriots right now. By 2009, "texting had become the most popular form of communication among teenagers, surpassing email, instant messaging, social networking, and face-to-face communication."[141] Mobile network companies agree that the driver behind the success of the SMS messaging system was the early and enthusiastic adoption by young customers.[142] For most, the day begins with a text message pulling them from slumber,[143] which continues throughout the day and into the night.

These users have been dubbed "Generation C" because they have always been "connected, communicating, content-centric,

---

136. Press Release, GSMA, Number of Unique Mobile Subscribers Worldwide Hits Five Billion (June 13, 2017), http://www.gsma.com/newsroom/press-release/number-mobile-subscribers-worldwide-hits-5-billion/ [https://perma.cc/KHK9-NKR8]; *see also Text Message Statistics—United States*, STAT. BRAIN RSCH. INST. (Sept. 17, 2017), http://www.statisticbrain.com/text-message-statistics/ [https://perma.cc/T5L8-NW94].

137. *See* Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RSCH. CTR. (Apr. 1, 2015), http://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/ [https://perma.cc/U45D-6MQY].

138. Burke, *supra* note 43.

139. *See* Roye et al., *supra* note 25, at 785, 789.

140. Patterson, *supra* note 41, at 85. Generation "C" was born after 1990, and became the generation known for pioneering the extensive use of the text message for communication. *Id.* at 85. They are even developing lingo and emoticons to express themselves through this tech medium. *Id.* at 84–85.

141. *Id.* at 84.

142. Benson, *supra* note 56.

143. Patterson, *supra* note 41, at 86.

Electronic copy available at: https://ssrn.com/abstract=3729535

computerized, community-oriented, [and] always clicking."[144] According to one study, 42% of this generation claim to be so expert at texting that they can do it blindfolded.[145] This dependence on text messaging among younger users who have never known the joys of a rotary dial phone also raises questions about how the medium is changing human behaviors. A 2008 study revealed that many young users would actually prefer to receive a text message rather than have an in-person discussion.[146] One researcher suggests that the medium of texting facilitates the telling of "little white lies," because it is more difficult to discern nuance, tone, and truthfulness in a text message rather than a face-to-face encounter.[147] This is problematic on many levels for attorneys who choose to message potential clients using text and sharpens the focus again on the more general prohibitions found under Rule 7.1 and Rule 8.4 against producing false or misleading content and sending it out into the text-universe.[148] The downsides of the ubiquity of this form of communication are only now being investigated as the fundamental changes in human behavior are being exposed.

### *B. Research on the Power of Text Messaging and How the Results Demonstrate that Technology Produces Dramatic Effects on Our Brains and Behaviors*

Although scientific research has only begun to delve into the impact on our brains of text messaging as part of the ubiquitous use of smartphone technology, the preliminary results tend to show that our ability to interact with the world around us is dramatically affected by the use of our phones and the notifications we receive from them. For example, a 2015 study by the *Journal of Experimental Psychology* found that when a person's phone rings, beeps, buzzes, or dings when they are in the middle of a challenging mental or physical task, it interferes with

144. *See* Friedrich et al., *supra* note 129. Generation C is a term coined for the generation of young people who have grown up as digital natives without knowledge of a world without the Internet and other technological devices. *Id.* C stands for "connected, communicating, content-centric, computerized, community-oriented, always clicking." *Id.*

145. Alex Mindin, *Letting Our Fingers Do the Talking*, N.Y. TIMES (Sept. 28, 2008), http://www.nytimes.com/2008/09/29/technology/29drill.html [https://perma.cc/4YFF-E9BN].

146. Patterson, *supra* note 41, at 88.

147. *Id.*

148. MODEL RULES OF PRO. CONDUCT r. 7.1, 8.4 (AM. BAR ASS'N 2020).

Electronic copy available at: https://ssrn.com/abstract=3729535

focused attention even when the user attempts to ignore it.[149] "The magnitude of observed distraction effects was comparable in magnitude to those seen when users actively used a mobile phone, either for voice calls or text messaging."[150] In fact, the study goes on to suggest that as the user continues to integrate his or her mobile phone into daily life, it may become increasingly difficult for people to set the phone aside to concentrate on a task not involving the device.[151] This distraction becomes even more problematic when the user is engaged in high-intensity tasks such as driving.[152] When the act of writing and even reading text messages leads to decreased attention to the road, it results in slower response time to hazards, greater instances of lane crossings, and more crashes.[153] It also suggested that "the persistence of problematic mobile phone use is driven, at least in part, by the distracting effect of notifications."[154] The ABA's casual assertion that solicitation via a text message is somehow less distracting or impactful than an in-person interaction with a predatory attorney may not be well-founded.

Other studies suggest that as our minds grow ever more dependent on technology, our intellect weakens and our attention becomes focused on that electronic object of our obsession.[155] Other parts of our bodies begin to react negatively when we are forcibly separated from our ringing, buzzing, or vibrating devices. Studies have shown an increased heart rate, increased anxiety, and

149. Cary Stothart et al., *The Attentional Cost of Receiving a Cell Phone Notification*, 41 J. EXPERIMENTAL PSYCH. 893, 896 (2015) ("[C]ellular phone notifications alone significantly disrupted performance on an attention-demanding task . . . ."); *see also* Mendoza et al., *supra* note 124, at 54 (investigating if cellphones impair learning during lectures, and finding that participants who kept their cellphones nearby while taking a quiz performed worse than those without their cell phones).

150. Stothart et al., *supra* note 149, at 893.

151. *Id.* at 896–97.

152. *Id.* at 896.

153. *See* Radoslaw Zajdel et al., *Cell Phone Ringtone, but Not Landline Ringtone, Affects Complex Reaction Time*, 26 INT'L J. OCCUPATIONAL MED. & ENV'T HEALTH 102, 109–10 (2013) (finding that the "specific 'bond'" between a person and his or her private cell phone can significantly disrupt attention and affect attention demanding activities such as driving); Marcia Irwin et al., *Effect of the Intensity of Wireless Telephone Conversations on Reaction Time in a Braking Response*, 90 PERCEPTUAL & MOTOR SKILLS 1130, 1133 (2000); William Consiglio et al., *Effect of Cellular Telephone Conversations and Other Potential Interference on Reaction Time in a Braking Response*, 35 ACCIDENT ANALYSIS & PREVENTION 495, 499 (2003).

154. Stothart et al., *supra* note 149, at 897.

155. Carr, *supra* note 33.

Electronic copy available at: https://ssrn.com/abstract=3729535

decreased cognitive performance.[156] In one recent ground-breaking study published in 2017, researchers showed that the mere presence of the smartphone occupies limited cognitive resources, thereby undercutting cognitive performance.[157] Test subjects with a higher smartphone dependence were affected even more strongly and benefited the most at a cognitive level when completely separated from their smartphones.[158] Another study, published three years earlier with a smaller sample size, showed that people who had their phones in view, but turned off, during two tests requiring a high level of attention made more errors than a control group whose phones remained out of sight.[159] In addition, the more a consumer uses a smartphone, the more that device and its attendant features become integrated in assisting the owner to achieve his or her goals in daily life and the more powerful the groundwork that is laid for automatic attention to that device.[160] In other words, the more integrated the technology becomes into our daily lives (and who has not felt a stab of panic upon realizing you left your cell phone at home when you arrive at work) the more it will exert its "gravitational pull" on the orientation of our attention.[161] When our cell phones dominate our conscious or subconscious thoughts and focus, and that is coupled with our pattern of behavior and preoccupation with checking our phones (eighty times a day),[162] these are the "primary symptoms of

156. Russell B. Clayton et al., *The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion, and Physiology*, 20 J. COMPUT.-MEDIATED COMMC'N 119, 132 (2015). "This study . . . examined the effects on self, cognition, anxiety, and physiology when iPhone users are unable to answer" their smartphones while performing tasks like word search puzzles. *Id.* at 119, 132. The findings suggest that negative psychological and physiological effects occur when a person is separated from their iPhone that is giving off a notification demanding a response. *Id.* at 132.

157. Ward et al., *supra* note 24, at 143, 145–46, 149.

158. *Id.* at 149.

159. Bill Thornton et al., *The Mere Presence of a Cell Phone May Be Distracting: Implications for Attention and Task Performance*, 45 SOC. PSYCH. 479, 479–81, 484–85 (2014) (finding that the active use of cell phones—talking, texting, searching the Internet—or "constant connectivity," diminishes performance when multitasking).

160. Ward et al., *supra* note 24, at 142.

161. *Id.*; Carr, *supra* note 33.

162. Carr, *supra* note 33; *see also* Ward et al., *supra* note 24, at 140, 142.

Electronic copy available at: https://ssrn.com/abstract=3729535

behavioral addiction."[163] Aside from calling, the most ubiquitous use of the cell phone today? Texting.[164]

### *C. Smartphone Technology as an Extension of Self*

The ability of our pocket-sized supercomputers to keep us constantly connected to our friends, family, and work has changed modern life as we know it to an almost incomprehensible degree compared to generations past.[165] In addition to the cellphone's impact on human cognition and emotions, researchers have begun to explore the theory that cellphones become part of a user's personal identity, under the theory of "extended self."[166] This theory has been advanced to help explain exactly why it is that users feel anxiety, or "nomophobia," when separated from their devices: because they have become part of our extended selves.[167] The idea of the extended self was first proposed in 1988 as a study in human consumer behavior.[168] The degree to which we can control objects for personal use is proportional to the degree that we will see that possession as an extension of self.[169] Therefore, any "unintentional loss of [the] possession [w]ould be regarded as a loss or lessening of self."[170] Studies show that today people are very rarely separated from their smartphone devices, checking them upon waking, before going to bed, while stuck in traffic, and even when engaging in conversation with others.[171] It is not difficult to conclude that these devices are becoming part of the

---

163. Thornton et al., *supra* note 159, at 479 (citation omitted) (citing Shari P. Walsh et al., *Over-Connected? A Qualitative Exploration of the Relationship Between Australian Youth and Their Mobile Phones*, 31 J. ADOLESCENCE 77, 88 (2008)).

164. *Id.*; Corilyn Shropshire, *Americans Prefer Texting to Talking, Report Says*, CHI. TRIB. (Mar. 26, 2015, 1:40PM), http://www.chicagotribune.com/business/ct-americans-texting-00327-biz-20150326-story.html [https://perma.cc/UK65-53JJ].

165. *See* Thornton et al., *supra* note 159, at 479–80.

166. Clayton et al., *supra* note 156, at 120–21.

167. *Id.*

168. Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RSCH. 139, 139–40 (1988) [hereinafter Belk, *Possessions and the Extended Self*]. Belk, the N. Eldon Tanner Professor of Business Administration, Graduate School of Business, University of Utah, proposed the idea that our possessions are a significant contributor and a reflection of our personal identities. *Id.* at 139–40, 142. He coined the "Extended Self" theory but has since expanded on this theory as our world becomes increasingly digital. *Id.* at 140; *see also* Russell W. Belk, *Extended Self in a Digital World*, 40 J. CONSUMER RSCH. 477, 477–80 (2013). It is on this research that Clayton and his colleagues are building the theory of the cell phone as an extension of self. Clayton et al., *supra* note 156, at 121, 132.

169. Belk, *Possessions and the Extended Self*, *supra* note 168, at 140.

170. Clayton et al., *supra* note 156, at 121.

171. Ward et al., *supra* note 24, at 140; Carr, *supra* note 33.

Electronic copy available at: https://ssrn.com/abstract=3729535

selfhood of the modern human, not just figuratively but also literally, in that our body chemistries can be affected by the presence or absence of the smartphone.[172]

When placed in a position where an iPhone owner was prohibited from answering a notification from his or her cell phone, researchers noted that physiological levels of anxiety increased and were measurable as increases in blood pressure and levels of self-reported anxiety and feelings of discomfort.[173] The testing supported Belk's theory of the "extended self" in that the iPhone users reported feeling negatively impacted, or a lessening of the self, when separated from the phones.[174]

Applying this theory of the cell phone as an "extended self" to the new Model Rule 7.3, receiving a text message should also be prohibited conduct. The Rule defines "live person-to-person contact" as being limited to real time personal contact whether via the telephone, teleconference, live streaming conversations over the Internet, or any other situation where there is a direct personal encounter between a lawyer and a potential client.[175] Communications made through the medium of our cellphones generally, and text messaging specifically, are not quite so easily disregarded.[176] And if our cell phones are becoming literal extensions of ourselves, at what point can the Model Rules honestly distinguish between prohibited in-person contact and contact made directly from a lawyer's cell phone-self to a potential client's cell phone-self? It becomes a distinction without a difference.

Researchers in this newly emerging area are careful to note that while this data does begin to offer real evidence of the psychological hold digital technology has over us, it needs more time to develop before we can begin to take steps necessary to either mitigate the potential negative consequences or capitalize on any potential positive consequences.[177] By comparison to attorneys contacting potential clients through text messages that are received on these irresistible devices, the old Dracula of

172. *See* Clayton et al., *supra* note 156, at 121–22, 132. *See generally* Mendoza et al., *supra* note 124.

173. Clayton et al., *supra* note 156, at 132.

174. *Id.*

175. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2020).

176. *See generally* Ward et al., *supra* note 24; Roye, *supra* note 25; Clayton et al., *supra* note 156.

177. Wilmer et al., *supra* note 24, at 2, 4–5.

Electronic copy available at: https://ssrn.com/abstract=3729535

"personal contact," a predatory attorney hovering by the bedside of an injured potential client, may not, in fact, have been quite the danger the revised rules of professional conduct purport to address.

### *D. Real Time Person-to-Person Communication Is the Basis for the Prohibition Against Solicitation, and Texting Is More Powerful, Persuasive, and Attention-Securing than Other Forms of Written Communication*

Tasting the forbidden fruits of solicitation, or the pecuniary gain sought by attorney from the personal contact with a new client, begins simply enough with the lawyer gaining the attention of the potential client. As shown above, using text messaging is almost a guaranteed attention-getter, whether consciously or subconsciously.[178] Once attention has been gained, the attorney's persuasive power is unleashed on the unwary and easily coerced.[179]

American psychologist and Purdue University Professor Alan H. Monroe[180] pioneered a famous sequence for organizing persuasive speeches that are now known as Monroe's "Motivat[ional] Sequence."[181] The first step in influencing a decision-maker is securing the person's attention.[182] Once a person's attention has been gained, the attorney is free to engage in the act of persuading a potential client to choose his or her services to solve a legal issue.

The comments provided in Revision 101 state that real-time communication like text messaging and tweets is not so different from written communication, "which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter."[183] The committee provides no further justification for

178. *See supra* notes 25, 156 and accompanying text.

179. *See* Edenfield v. Fane, 507 U.S. 761, 774–75 (1993) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465–66 (1978)).

180. *See* ALAN H. MONROE, MONROE'S PRINCIPLES OF SPEECH, at i–iv (rev. brief ed. 1951).

181. *Id.* at 200–01. The Motivational Sequence is as follows: (1) Attention, (2) Need, (3) Satisfaction, (4) Visualization, and (5) Action. *Id.* These steps emphasize the action a person can take in addressing a situation or solving a problem. *Id.* at 200–03, 205, 209.

182. *Id. See generally* Daniel J. O'Keefe, *Trends and Prospects in Persuasion Theory and Research*, *in* PERSPECTIVES ON PERSUASION, SOCIAL INFLUENCE, AND COMPLIANCE GAINING 31 (John S. Seter & Robert H. Gass eds., 2004).

183. RULES 7.1–7.5 REPORT, *supra* note 2, at 6.

Electronic copy available at: https://ssrn.com/abstract=3729535

the validity of such a statement, and it does not appear in prior versions of the rules as promulgated by the ABA.[184] The committee simply adds this justification to revised Comment 2, apparently in an attempt to further define what "[l]ive person-to-person contact" should mean in our modern world. A previously redlined edition of the proposed changes to the rules reveals an attempt to include Skype or FaceTime as impermissible examples of "modern" ways technology could induce prohibited in-person contact, but those terms were removed prior to the adoption of the revision.[185]

Although no official justification of removal is provided, the ABA Standing Committee on Professional Discipline weighed in during the comment period with a letter written on April 24, 2018, by chair Paula J. Frederick, and very specifically referenced Comment 2 and the inclusion of the technology-based communication tools Skype and FaceTime.[186] In the letter, Frederick stated that her committee had some questions about the inclusion of those two tools because they anticipated arguments that recipients of such requests to connect from those two services did not allow "necessary time for reflection before establishing the connection."[187] This is because when a request is issued by either service, the end user has the option to connect or not to connect, and also identifies to the end user the caller's identity. The letter further suggests that "the Ethics Committee may wish to find a more 'technology agnostic' way to address this in the Comment,

---

184. *See id.*

185. *Id.* at 8, 13.

186. Letter from Paula J. Frederick, Chair of the Standing Comm. on Pro. Discipline, Am. Bar. Ass'n, to Barbara S. Gillers, Chair of the Standing Comm. on Ethics & Pro. Resp., Am. Bar. Ass'n (Apr. 24, 2018). Skype was released in August 2003 as a Voice over Internet Protocol, or "VoIP," and now provides video chat, voice calls, and instant messaging services. Amit Chowdhry, *Skype's Group Video Calling Service Is Now Free*, FORBES (Apr. 29, 2014, 1:44 AM), http://www.forbes.com/sites/amitchowdhry/2014/04/29/skypes-group-video-calling-service-is-now-free/#7f9781524426 [https://perma.cc/HEW4-XCWX]. It was created by a group of five programmers (Priit Kasesalu, Ahti Heinla, Jaan Tallinn, Janus Friis, and Niklas Zennström), and it was acquired by eBay in 2005 and by Microsoft in 2011. Jijo Jacob, *The Rise and Growth of Skype: A Baltic Success Saga*, INT'L BUS. TIMES (May 11, 2011, 1:15 AM), http://www.ibtimes.com/rise-growth-skype-baltic-success-saga-283209 [https://perma.cc/QD4T-AUW5]. FaceTime is a videotelephony program developed and owned by Apple, Inc. In 2010, Apple purchased the naming rights from FaceTime Communications. *See* Sara Tibken, *FaceTime Creator Details Its History, Including Code Name*, CNET (Apr. 22, 2014, 10:46 AM), http://www.cnet.com/news/apple-engineer-details-facetimes-history-including-original-codename/ [https://perma.cc/VY78-2VMM]; Robin Wauters, *Apple Now Owns FaceTime.com (But Still Doesn't Own iPad.com)*, TECHCRUNCH (Mar. 2, 2011, 10:46 AM), http://techcrunch.com/2011/03/02/apple-now-owns-facetime-com-but-still-doesnt-own-ipad-com/ [https://perma.cc/2PH9-NKAL].

187. Letter from Paula J. Frederick to Barbara S. Gillers, *supra* note 186.

Electronic copy available at: https://ssrn.com/abstract=3729535

rather than identifying specific technology tools" due to the "rapid rate" at which technology evolves.[188]

By stopping short of conducting a full investigation into the effects of technology on human cognition and attention, and practically ignoring the impact of an attorney's direct electronic contact with a potential client in relation, the Committee erred in its attempt to circumscribe exact methods of technology-enhanced communication as solicitation rather than just categorize it as advertising in a different format.

### *E. Ohio and Florida Allowed Text Message Advertising by Attorneys Ahead of the ABA, but Treat It like Advertising and Not Solicitation*

In July 2015, three years earlier than the ABA, the Florida Bar Board of Governors performed a seemingly abrupt about-face in its interpretation of the rules regarding attorney advertising and solicitation and began allowing attorneys to text message potential clients.[189] To effectuate this change, the Board reversed a June 2015 ruling by the Florida Bar Standing Committee on Advertising that found texting to be analogous with impermissible telephone communications.[190] Petitioning the committee was Jacob Stuart Jr., of the Traffic Knights law firm based in Orlando, Florida.[191] Stuart argued the phone number is more like an email address and that any communications sent via text should be looked at in the same light as a written communication that can be read and set aside, an argument similar to that made by the

188. *Id.*

189. *Bar Board Finds Texting Is Not Prohibited Solicitation*, FLA. BAR (Aug. 15, 2015), http://www.floridabar.org/the-florida-bar-news/bar-board-finds-texting-is-not-prohibited-solicitation/ [https://perma.cc/U6ED-SAKJ] (reporting the reversal of a previous decision which determined that text messaging was a prohibited form of attorney solicitation).

190. Gary Blankenship, *Ad Panel Equates Texts with Prohibited Direct Solicitations*, FLA. BAR (June 1, 2015), http://www.floridabar.org/the-florida-bar-news/ad-panel-equates-texts-with-prohibited-direct-solicitations/ [https://perma.cc/F2DT-9TU2].

191. Julie Kay, *Why Bother with Mailers When Attorney Can Text Solicitations to Get Clients?*, LAW.COM: DAILY BUS. REV. (Sept. 1, 2015, 11:15 AM), http://www.law.com/dailybusinessreview/almID/1202736048700/Why-Bother-With-Mailers-%20When-Attorney-Can-Text-Solicitations-to-Get-Clients/ [https://perma.cc/BY92-5SRK]. Perhaps not coincidentally, Stuart is also the owner of an Orlando-based software company he claims has developed a way to obtain the phone numbers of Florida residents who have received traffic tickets. *See* Marta Neil, *Law Firms in Florida Can Send Text-Message Ads to Prospective Clients, State Bar Says*, AM. BAR ASS'N J. (Sept. 2, 2015, 12:30 PM) http://www.abajournal.com/news/article/law_firms_in_florida_can_send_text_message_ads_to_prospective_clients [https://perma.cc/BY92-5SRK].

Electronic copy available at: https://ssrn.com/abstract=3729535

ABA Standing Committee on Professional Discipline.[192] However, it was this unsubstantiated argument coupled with evidence that text messaging is an increasingly prevalent mode of human communication that convinced the Board of Governors to allow attorneys in Florida to begin sending text messages to potential clients.[193] Opponents argued that text messaging was more like in-person solicitation than written advertisements.[194]

In the end, the Board of Governors agreed with Stuart's arguments, and the change to Rule 4-7.18(a) and (b) was approved without the assent of the Florida Supreme Court.[195] Text messages sent by attorneys must meet the requirements of Rule 4-7.18(b)(2), which governs written communications by attorneys.[196] The rule requires that the first word of the subject line of the text contains "advertisement" and that "[e]very written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm."[197] Additional guidance is provided to Florida attorneys regarding text message marketing in The Florida Bar Standing Committee on Advertising's Handbook on Lawyer Advertising and Solicitation, including that the lawyer must provide an opt-out for text message recipients; recipients are not required to pay for text messages; and the lawyer is responsible for determining compliance with all applicable laws, rules, and federal regulations.[198]

Florida was only the second jurisdiction to allow attorneys to text message potential clients, overriding initial concerns that texting was more akin to prohibited personal contact than

---

192. *Is Texting Akin to Mail Solicitation?*, FLA. BAR (May 15, 2015), http://www.floridabar.org/the-florida-bar-news/is-texting-akin-to-mail-solicitation/ [https://perma.cc/B4NA-ZKPB].

193. Kay, *supra* note 191.

194. Neil, *supra* note 191.

195. Kay, *supra* note 191; FLA. BAR, *supra* note 189. Florida Bar Spokeswoman, Francine Walker, says the change is considered an interpretation of an existing rule, and not the promulgation of a new rule, which would require Florida Supreme Court approval. Kay, *supra* note 191.

196. RULES REGULATING FLA. BAR r. 4-7.18(b)(2) (2020), http://www-media.floridabar.org/uploads/2019/09/Ch-4-from-2020_03-SEP-RRTFB-9-19-19-3.pdf [https://perma.cc/F5BU-WMRB].

197. *Id.*

198. FLA. BAR, STANDING COMM. ON ADVERT., HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION 4 (11th ed. 2018). Additionally, Florida attorneys seeking to advertise via text must follow F.S. § 817.234(8)(b), which prohibits solicitation except by general advertising to clients within sixty days after the occurrence of a motor vehicle accident. Any person who violates this commits a third-degree felony. FLA. STAT. § 817.234(8)(b) (2019).

Electronic copy available at: https://ssrn.com/abstract=3729535

advertising.[199] In an opinion issued on April 5, 2013, the Supreme Court of Ohio Board of Commissioners on Grievances & Discipline held that text messaging advertising by attorneys directed at prospective clients is generally permissible.[200] In the opinion, the Board suggests that Ohio Model Rule of Professional Conduct 7.2 allows for a broad range of marketing techniques as encompassed by the phrase, "a lawyer may advertise services through written, recorded, or electronic communication, including public media."[201]

Like both Florida and the ABA, the Ohio Board reasoned that text messages are simply written communication and not prohibited personal contact because written communications include electronic records of communication, such as email.[202] Furthermore, although electronic communication is not defined by the rule, it is "generally understood to include text messages."[203] The opinion specifically cites to Rule 7.2 Comments 1 and 3, which "demonstrate that the Rules were drafted to take into account new or nonconventional advertising methods."[204]

According to Ohio's Opinion 2013-2, Rule 7.3(c) requires the lawyer "to state how the lawyer became aware of the person and their legal needs, refrain from predetermined evaluations of the matter, and 'conspicuously' use the words 'ADVERTISING MATERIAL' or 'ADVERTISEMENT ONLY' in the text" unless the text is sent to "another lawyer, family member, or person with a close personal or prior professional relationship with the lawyer."[205] Rule 7.3(e) requires texts contain the "Understanding Your Rights" statement if they are sent to prospective clients or relatives of prospective clients within 30 days of an accident that gives rise to a potential claim.[206] Links, attachments, or photos of this statement don't comply with the rule.[207] The statement must

199. Kay, *supra* note 191.

200. Sup. Ct. Ohio, Bd. Comm'rs on Grievances & Discipline, Op. 2013-2, Opinion Letter on Direct Contact with Prospective Clients: Text Messages (Apr. 5, 2013) [hereinafter Opinion Letter on Direct Contact].

201. *Id.* (quoting OHIO RULES OF PRO. CONDUCT r. 7.2(a) (SUP. CT. OHIO 2020)). "Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or *law firm* responsible for its content." OHIO RULES OF PRO. CONDUCT r. 7.2(c) (emphasis in original). The lawyer must also plan to participate actively in the representation if he/she sends such a communication. *Id.* r. 7.2(d).

202. Opinion Letter on Direct Contact, *supra* note 200, at 2–3.

203. *Id.* at 2.

204. *Id.* at 3.

205. *Id.* at 6.

206. *Id.* at 6–7.

207. *Id.* at 7.

Electronic copy available at: https://ssrn.com/abstract=3729535

be in the body of the text.[208] In other words, text messaging appears to don the trappings of an advertisement, except that it is still directed at one recipient only—the text receiver.

Lastly, the Board identified three practical considerations for lawyers who send text message advertisements: (1) "the text message should not create a cost to the prospective client," so the lawyer should employ "Free to End User" or similar technology if they are unsure of whether a cost will be incurred; (2) lawyers should be mindful of the age of the text message recipient and should attempt to verify that phone numbers in police reports don't belong to minors (this isn't directly prohibited by Rule 7.3, but the Board "discourages" it); and (3) "lawyers must use due diligence to ensure that . . . text message advertisement[s] . . . compl[y] with the applicable federal and state telemarketing laws" (the specific laws are listed in the opinion).[209]

Upon concluding that the Ohio rules allow for text message advertising, the Board went on to directly acknowledge that "[t]ext messaging may be a novel approach to client solicitation, but our ethical review is actually a straightforward application of the Rules of Professional Conduct."[210] The opinion states that lawyers may solicit clients using text messages so long as it "does not generate a real-time or live conversation."[211] Except that is explicitly not how text messaging works. With rulings like these from Ohio, the ABA, and Florida, the line between advertising and solicitation in relation to the increased use of technology became even thinner, perhaps to the point of becoming impossible to discern.

## IV. REWORKING SOLICITATION (AND ADVERTISING) RULES TO PROHIBIT FALSE, MISLEADING, OR CHAMPERTOUS KINDS[212]—LOOKING TO THE PAST TO CREATE A TECH-FRIENDLY PATH FORWARD

Over the course of the development of the Model Rules, the bar has displayed an aversion to solicitation in theory, though not

208. *Id.* at 6–7.

209. *Id.* at 8–9.

210. *Id.* at 3.

211. *Id.* at 5.

212. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 476–77 (1978) (Marshall, J., concurring) ("While the State's interest in regulating in-person solicitation may . . . be

Electronic copy available at: https://ssrn.com/abstract=3729535

necessarily in practice.[213] Attorneys have long employed live and in-person personal contact techniques such as golfing with investment banker buddies, entertaining real estate brokers on personal yachts, and meeting with corporate executive contacts over lunch or dinner at the club,[214] activities the revised Rule 7.3 attempts to justify with the addition of 7.3(b)(3).[215] However, these attention-grabbing personal contacts do not violate the rules and indeed have been expanded upon under the new formulation, perhaps to cover an inherent hypocrisy.[216] Although prohibited by the Model Rules from "soliciting business," business entertainment remains a tax deduction for lawyers, as much as any other business person today.[217] In addition to business entertainment, lawyers often conduct free seminars or programs and participate in Continuing Legal Education programming, with the stated or unstated aim of networking with attorneys and soliciting new client referrals.[218] The newly promulgated rules continue to illustrate the inherent difficulty not just in understanding the effects of technology but also in being able to separate solicitation from advertisement to support a seemingly elusive bright-line interpretation.[219]

---

somewhat greater than its interest in regulating printed advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation. For example, the Justice Department has suggested that the disciplinary rules be reworded 'so as to *permit* all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous.'" (citation omitted)).

213. ANDREWS, *supra* note 58, at 67–68.

214. *See id.* at 67.

215. MODEL RULES OF PRO. CONDUCT r. 7.3(b)(3) (AM. BAR ASS'N 2020) ("A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is pecuniary gain, unless the contact is with a: . . . (3) person who routinely uses for business purposes the type of legal services offered by the lawyer."). This is an expansion of the previous rule section that read, "(3) with a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters." MODEL RULES OF PRO. CONDUCT r 7.3(a)(3) (AM. BAR ASS'N, Working Draft Dec. 21, 2017).

216. *See* Morley Walker, *Advertising by Lawyers: Some Pros and Cons*, 55 CHI.-KENT L. REV. 407, 418 (1979).

217. MODEL RULES OF PRO. CONDUCT r. 7.3(b) (AM. BAR ASS'N 2020); Walker, *supra* note 216, at 418.

218. *See* ANDREWS, *supra* note 58, at 61.

219. *Id.* (discussing how solicitation is virtually inseparable from the concept of advertising and how "in-person solicitation serves much the same function as the advertisement at issue in *Bates*" (quoting Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978))).

Electronic copy available at: https://ssrn.com/abstract=3729535

If the twin aims of the ABA's Rules governing advertising and solicitation are to (1) protect the vulnerable and perhaps ill-advised consumer (prospective client) from "the overreaching of a persuasive lawyer," and (2) to prevent false and misleading information about a lawyer's fees, services, abilities, or qualifications,[220] it would have been worth a deeper investigation by the ABA into the effects of technology such as tweets and text messages. The committee's time might have been better spent analyzing "solicitation" through the lens of modern means for getting an advertising message across to sophisticated users of technology in need of legal services.[221]

Ironically, a look back at Justice Thurgood Marshall's opinion in the *Ohralik* case might assist the ABA and jurisdictions like Florida and Ohio with formulating a more streamlined rule for solicitation that covers technology and its future advancements, while also protecting the public from the overreach of attorneys seeking to solicit clients for pecuniary gain.

### *A. The Tech-Knows, and the Tech-Knows-Not, New Rules Highlight Struggle, and Continued Professional Dissonance*

The ABA's attempt to retool Model Rule 7.3 seems to be a rough attempt to appease opposing camps who made their voices known during the process for comments, and it highlights a continuing struggle between old-school and new-school lawyering. Perhaps even more starkly, the final promulgated version of the revised rules highlights the potentially grave misunderstanding of modern technology by some regulators and practitioners who do not grasp its hold over and effect on the consumer today and the future generations of consumers who will never know what it was like not having a handheld computer attached to their persons at all times.[222]

Some commenters have upheld the standards set forth by Drinker, which shows that there is still a vocal section of the legal community fighting to uphold the historical standard that the solicitation of business by an attorney is inappropriate in any

220. Mercer, *supra* note 99, at 721.

221. *See* ANDREWS, *supra* note 58, at 61.

222. *See* Friedrich et al., *supra* note 129.

Electronic copy available at: https://ssrn.com/abstract=3729535

form.[223] The condemnation of solicitation developed as a principle of good taste rather than a rule setting forth ethical behavior.[224]

For example, a New Jersey State Bar Association comment suggests the amendments to the Model Rule 7.3 go "too far" in condoning unprofessional conduct and that the solicitation of non-clients must be regulated "to ensure that all act with degree [sic] of professionalism that would engender respect and integrity by the public in the legal profession."[225] New Jersey State Bar Association President Robert B. Hille suggests that while technology should be embraced, it must also "reflect the critical line between active versus aggressive pursuit of a client."[226]

Several private attorneys also commented to the effect that the old rules worked just fine and opined that the profession itself was slowly declining in respectability due to these changes to the rules of professional conduct.[227] One attorney in particular expressed himself in Drinker-esque terms. Raymond M. Blacklidge, who did not provide his missive on firm letterhead, wrote, "The majority of attorneys I know are good honest folks who enjoy helping others. However [sic] we have a small segment of

---

223. Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393, 393–94 (1991) ("Little basis exists to support the assertion that a lawyer whose incentive is financial is more likely to overreach a potential client than a lawyer who is motivated by other personal concerns. It is problematic to implement a standard which evaluates lawyer solicitation on the basis of significant motive for pecuniary gain." (footnote omitted)).

224. *Id.* at 394–97.

225. Letter from Robert B. Hille, President, N.J. State Bar Ass'n, to the Am. Bar Ass'n Standing Comm. on Ethics and Pro. Resp. (Mar. 2, 2018) (on file with the New Jersey State Bar Association).

226. *Id.*

227. *See, e.g.*, Letter from David Hanson, Att'y at L., to the Am. Bar Ass'n Standing Comm. on Pro. Resp. (undated), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/d_hanson_comment.pdf [https://perma.cc/CC7D-8FK9] ("I don't think loosening advertising restrictions has anything to do with legal access. I wouldn't change a thing. All it will do is stimulate more wasteful litigation and collateral legal work. . . . Also, the low esteem of the legal profession will plunge even lower with the likely insipid advertising that we are going to see."); Letter from Timothy Chinaris, *supra* note 23 ("The current rule is a bright line that is easily understood and enforced. In contrast, what a lawyer 'reasonably believed' in a particular situation is far less clear. The proposed changes will introduce needless ambiguity and unnecessarily expose lawyers to disciplinary danger. The public perception of lawyers and the legal system is not likely to be positively affected by making in-person solicitation more prevalent.").

Electronic copy available at: https://ssrn.com/abstract=3729535

attorneys who treat being a lawyer like a business without regard to the best interests of their clients or the general public."[228]

On the side championing modernization, the ABA's own Standing Committee on Professionalism suggested to the SCEPR that the committee remove the words "pecuniary gain" from the rule because it constituted an "outmoded vestige of the advertising ban" that existed until the *Bates* ruling in 1977.[229] However, that language was not deleted from the new rule and exists currently in the limited exceptions to the prohibition of solicitation found in Rule 7.3(b).[230]

Consumers for a Responsive Legal System, also known as "Responsive Law," a nonprofit consumer advocacy group, also wrote in urging the SCEPR to reject the proposed amendments and replace them with new rules that prohibit "false and misleading" statements rather than attempting to micromanage standards that do not provide meaningful consumer protections.[231] Tom Gordon, the group's executive director, wrote, "[c]onsumers are not stupid."[232] He asserted the new rules patronize sophisticated consumers who would not be "hoodwinked into buying something they don't need by lawyers' Svengali-like argumentative skills."[233]

In the end, it is likely the newly formulated rules will raise more questions than answers, a point made by the Illinois State Bar Association in its memo to the SCEPR dated February 28, 2018.[234] By expanding the exceptions under Rule 7.3 to include a "person who routinely uses for business purposes the type of legal services offered by the lawyer,"[235] without justification and with

---

228. Letter from Raymond M. Blacklidge, Att'y at L., to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (undated), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/r_blacklidge_comment.pdf [https://perma.cc/YNU3-C77A] ("If the ABA continues down this road our profession will most likely lose the last bit of integrity that we have left.").

229. Letter from Jayne Reardon, Chair, Am. Bar Ass'n Standing Comm. on Professionalism, to Barbara S. Gillers, Chair, Standing Comm. on Ethics & Pro. Resp. (Mar. 1, 2018) (on file with the American Bar Association).

230. MODEL RULES OF PRO. CONDUCT r. 7.3(b) (AM. BAR ASS'N 2020) ("A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain . . . .").

231. Letter from Tom Gordon, Exec. Dir., Responsive L., to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (Mar. 1, 2018) (on file with author).

232. *Id.*

233. *Id.*

234. Letter from the Ill. State Bar Ass'n to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (Feb. 28, 2018) (on file with author).

235. MODEL RULES OF PRO. CONDUCT r. 7.3(b)(3) (AM. BAR ASS'N 2020).

Electronic copy available at: https://ssrn.com/abstract=3729535

limited definitions included in the comment,[236] almost any person who has ever hired an attorney might become fair game for in-person solicitation.[237]

### *B. Jurisdictions May Still Decide for Themselves, but a Cleaner Rule Would Yield More Predictable Results as Technology Advances*

Given the unhurried speed at which the ABA moved to generate the new and updated rules governing attorney solicitation and advertising, it is little wonder that the topic has already been addressed by various jurisdictions. However, of the jurisdictions that have dealt with the issue, the tendency is toward greater simplification of Rule 7.3, due to the difficulty in determining a clear set of rules from the limited number of binding court cases that purport to cite pivotal factors in solicitation cases.[238]

The rationale provided in the rules for prohibiting "real-time" electronic or telephone contact was that already overwhelmed and vulnerable potential clients could find it difficult 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."[239] In other words, the hapless

---

236. *Id.* r. 7.3 cmt. 2, 5 (defining those who engage in business, entrepreneurs, business transactions, formation, etc.).

> There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional 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 overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) 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 their members or beneficiaries.

*Id.*

237. Letter from the Ill. State Bar Ass'n, *supra* note 234.

238. *See* ANDREWS, *supra* note 58, at 62 (citing the *Bates-Primus-Ohralik* trilogy of Supreme Court cases).

239. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2020); *see also* RULES 7.1–7.5 REPORT, *supra* note 2, at 8–9.

Electronic copy available at: https://ssrn.com/abstract=3729535

members of the public would be unduly influenced by the glamour of the vampire, a.k.a. the attorney seeking business for pecuniary gain.

The Connecticut Bar Association Standing Committee on Professional Ethics supported the ABA's suggested changes to rule 7.3 with one key exception.[240] The Connecticut Rule of Professional Conduct 7.3 already differs from the ABA Model Rules. Connecticut permits live telephone or real-time electronic contact if the target of the solicitation is a business organization, a not-for-profit organization, or a government body, and the lawyer reaching out seeks to provide services related to the organization.[241] Connecticut also allows for personal contact between the lawyer and others under the "auspices of a public or charitable legal services organization."[242]

The Supreme Court of the State of Oregon amended its rule 7.3 governing solicitation by attorneys in February 2018, months before the ABA proposal was approved, to allow lawyers to solicit clients in-person or by live telephone or real-time electronic mediums, but retained certain prohibitions on lawyers to prevent harm and overreach to members of the public.[243] The new rule prohibits solicitation only when the attorney knows, or reasonably should know, the potential client being approached is in a physical, mental, or emotional state such that the person could not exercise reasonable judgment.[244]

The Maine Rules of Professional Conduct reflect a similar, streamlined approach to attorney solicitation prohibiting only direct electronic or personal telephone contact from a noncommercial client if that contact has a "substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or

---

240. Memorandum from the Conn. Bar Ass'n Standing Comm. on Pro. Ethics to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (Feb. 21, 2018) (on file with author); *see also* CONNECTICUT RULES OF PRO. CONDUCT r. 7.3 (COMM. ON OFF. LEGAL PUBL'NS 2015).

241. CONNECTICUT RULES OF PRO. CONDUCT r. 7.3(b)(4) (COMM. ON OFF. LEGAL PUBL'NS 2015).

242. *Id.* r. 7.3(b)(2).

243. *In re* Amendment of Or. Rules of Pro. Conduct, No. 18-005 (Feb. 7, 2018) (amending Oregon Rules of Professional Conduct 7.3 and 8.3); MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2018).

244. OREGON RULES OF PRO. CONDUCT 7.3(a) (OR. STATE BAR 2018) ("A lawyer shall not solicit professional employment by any means when: (a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer . . . .").

Electronic copy available at: https://ssrn.com/abstract=3729535

unwarranted promises of benefits."[245] The rule further explains that the client's sophistication in legal matters, along with other considerations such as the sophistication and emotional state of the client, will be taken into account when evaluating any claims of improper solicitation.[246] Considerations of the sophistication of the party being solicited by an attorney has long been a factor used by courts deciding on such cases.[247] While a nod is made to this aspect in the revised Rule 7.3, the SCEPR appeared to limit this approach in the comments by focusing only on the elderly, disabled, or those whose first language is not English.[248]

By proscribing specific forms of abuse such as harassment, these modernized versions of the rules governing solicitation by attorneys put the onus where it belongs—on the conduct of the attorney, and not on tradition-laden interpretations of what constitutes the proper and so-called professional motives an attorney must put on display when seeking new clients.[249] As reflected by both Drinker and the newly promulgated Rule 7.3, it appears the legal profession's attitudes toward solicitation continue to be fueled by self-interest and seem to reflect a greater interest in the image—not the fact—of the impropriety of personal contact.[250] Unfortunately, hubris alone will provide little defense against the inexorable march of technology and its impact on the lives of both lawyers and their clients.

A simpler approach to the redevelopment of the rules governing attorney advertising and solicitation was made available to the SCEPR but was ultimately not adopted for reasons not fully explained. A more straightforward approach to the rules would better accommodate the changing needs of the public and be flexible enough to withstand the rapid pace of technological advancements.

---

245. MAINE RULES OF PRO. CONDUCT. r. 7.3(a) (2019).

246. *Id.*

247. *See* Victor P. Filippini, Jr., Note, *Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation*, 16 U. MICH. J.L. REFORM 585, 585–86, 599 (1983) (suggesting that the prohibition against solicitation should be amended to permit the solicitation of sophisticated prospective clients, or those with general knowledge of their legal needs and the tools to understand what they need from an attorney).

248. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 6 (AM. BAR ASS'N 2020).

249. Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 329–30 (1986).

250. *Id.* at 329.

Electronic copy available at: https://ssrn.com/abstract=3729535

### *C. Justice Thurgood Marshall Had the Right Idea Back in 1977—Simple and Least Restrictive Rules Work Best to Address Solicitation and Advertising Concerns*

In 1978, Justice Thurgood Marshall authored a concurring opinion for the Supreme Court for the *Ohralik* case.[251] In his opinion, he wrote the State has a substantial interest in regulating in-person solicitation "to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy."[252] And while that interest was greater in *Ohralik* due to the invasive nature of the personal contact by the attorney, the state's legitimate interests "might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation."[253]

Justice Marshall provides a further suggestion he gleaned from Lewis Bernstein, the United States Department of Justice's chief of the Antitrust Division's Special Litigation section, in a statement Bernstein made as part of the Trade Reform Act of 1974.[254] In his opinion, Justice Marshall cites Bernstein for suggesting that rules of professional conduct be reworked to permit solicitation and advertising of all kinds, except for those that "are false, misleading, undignified, or champertous."[255] Setting aside the problematic terms "undignified," which would be nearly impossible to enforce in addition to having a biased and classist connotation, and also the term "champertous,"[256] alluding primarily to contingency fees which, while criticized, are not

251. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978). Justice Marshall applies this logic to what he calls, "honest, unpressured 'commercial' solicitation," which was not the case in *Ohralik* where the attorney attempted to hustle business at the hospital bedside of teenage girls. *Id.* at 450, 476.

252. *Id.* at 476.

253. *Id.*

254. *See id.* at 476–77 (citing L. Bernstein, DEP'T OF JUST., *reprinted in* 5 CCH Trade Reg. Rep. 20, 197 (1974)).

255. *Id.*

256. *Champertous*, BLACK'S LAW DICTIONARY (8th ed. 2004). Champertous is an historical term being generally defined as sharing in the proceeds of litigation by one who agrees with the plaintiff or defendant (an officious intermeddler) to pursue the claim in consideration of receiving any part of the judgment proceeds. Today, while a contingency fee is generally allowed in many civil settings (contingency fees are prohibited in criminal proceedings), it may become champertous and therefore potentially illegal with the addition of a stipulation that the client will not settle the claim without attorney consent. *See* Arthur L. Kraut, *Contingent Fee: Champerty or Champion*, CLEV. ST. L. REV., May 1972, at 15, 20; MODEL RULES OF PRO. CONDUCT r. 1.5(d)(2) (AM. BAR ASS'N 2020). There are many modern criticisms of contingency fees, which are beyond the scope of this Article.

Electronic copy available at: https://ssrn.com/abstract=3729535

illegal, the spirit of Justice Marshall's sentiment is that the rules governing the basic human contact between lawyer and client should not be twisted into something inherently complex and unworkable.[257] What was true more than four decades ago becomes even more of an urgent consideration in today's technology-driven climate.

A less restrictive and more tech-agnostic rule governing solicitation would allow for technology to grow at its lightning fast pace without implicating prohibitions on personal contact, while also rendering the debate about the limitations of the commercial speech analysis to attorney advertising moot because all truthful statements (that are also not misleading) should pass muster.[258] As the *Bates* court noted, commercial speech is designed to inform the public,[259] and the more truthful statements are allowed to enter the market, the more informed the populace will be about the services offered by attorneys.[260] Any restrictions on the free flow sharing of truthful, informed, and non-misleading information must then be viewed as roadblocks to a free market system.[261]

The Legal Marketing Association (LMA), a not-for-profit organization founded in 1985, weighed in on behalf of its 4,000 members working in the legal industry to "applaud the goals" of the ABA Standing Committee on Ethics and Professional Responsibility to modernize, simplify, and otherwise acknowledge the "ever-changing role of technology and the challenges and expanded opportunities associated with new media and other communication channels in today's legal marketplace."[262] However, in its comment on the proposed amendments to Rule 7.3, the LMA suggested doing away with the rule all together and instead relying on the language of Rule 7.1[263] because

---

257. *See Ohralik*, 436 U.S. at 468–69.

258. Lavoie, *supra* note 57, at 436–37.

259. Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) ("[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.").

260. Lavoie, *supra* note 57, at 436.

261. *Id.*

262. Letter from M. Ashraf Lakhani, President, and Betsi Roach, Exec. Dir., Legal Mktg. Ass'n, to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (Mar. 1, 2018) (on file with author).

263. MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS'N 2020) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or

Electronic copy available at: https://ssrn.com/abstract=3729535

"[t]echnology moves too quickly."[264] The organization unequivocally wrote to encourage the Committee to avoid any language that would further list or categorize types of allowable and prohibited forms of solicitation or advertising because it would "be outdated almost immediately upon their creation and publication."[265] Such categorization would only lead to the creation of "loopholes," according to the LMA, which ended its commentary on the proposed changes to Rule 7.3 in this manner, "the language of Rule 7.1 (disallowing false or misleading communications) provides a sufficient standard when determining whether or not a solicitation, advertisement or other contact fails to comply with the standards of professional responsibility."[266] Additionally, Model Rule 8.4[267] sets forth clear terms prohibiting conduct involving dishonesty, fraud, deceit, or discrimination and harassment.[268] This rule would cover the actions of an attorney like *Ohralik*, who appeared at the bedside of a hospitalized teenage client to harass her to sign a contingency fee agreement,[269] or the actions of an attorney using text messaging to coerce a potential new client he observed slip on a banana peel at the local Wal-Mart to sign a retainer.

While the guidance in these rules prohibits a broad array of potential attorney overreach and malfeasance, specific, easily interpreted and applied rules could be added to cover any potential loopholes that would leave the public unprotected from unscrupulous attorneys. For example, Members of the Connecticut Bar Association Standing Committee on Professional Ethics proposed that the 2018 revision include a prohibition similar to that found in Connecticut Rule of Professional Conduct 7.3(b)(5).[270] This provision would forbid attorneys from soliciting

---

law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").

264. Letter from M. Ashraf Lakhani and Betsi Roach to the Am. Bar Ass'n, *supra* note 262.

265. *Id.*

266. *Id.*

267. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020) (defining misconduct for attorneys as including committing a criminal act, engaging in dishonesty, fraud, deceit, or misrepresentation, engage in conduct prejudicial to the administration of justice, etc.).

268. *Id.*

269. *Id.*

270. CONNECTICUT RULES OF PRO. CONDUCT r. 7.3(b)(5) (COMM. ON OFF. LEGAL PUBL'NS 2015) ("The written or electronic communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person

Electronic copy available at: https://ssrn.com/abstract=3729535

employment in the event of a wrongful death action or personal injury action fewer than forty days after the accident or incident occurred.[271] The reasoning behind this prohibition is found in Connecticut's broad antiharassment provision contained in 7.3(b)(3).[272]

In revising Rule 7.3 in a manner designed to appease lawyers on both sides of the issue, it appears the ABA may actually satisfy none. By appearing not to consider examples of more straightforward interpretations of the rule governing solicitation set by other jurisdictions, the ABA missed an opportunity to showcase its relevance as the "national representative of the legal profession."[273]

## V. CONCLUSION

Model Rule of Professional Conduct 7.3, as it relates to solicitation, cannot be revised quickly or comprehensively enough to stay current with technology. What was once a safeguard against attorney overreach may have just given text-messaging attorneys carte blanche to influence potential clients using an extremely powerful form of almost irresistible technology.

Instead of challenging the profession's antiquated beliefs about law as a profession rather than a business, the SCEPR attempted to modernize a rule without fully investigating the cognitive, behavioral, and attention-grabbing aspects of the technology it purports to regulate. The Model Rules already contains a variety of protections against inappropriate attorney misconduct. Adding another layer of complexity perhaps does not accomplish the goal of helping define where advertising ends and solicitation begins. Using examples from other progressive jurisdictions and its own Commission on Advertising, the SCEPR could have focused on expanding protections of less sophisticated clients or creating smaller and more directed rules to close specific loopholes.

---

to whom the communication is addressed or a relative of that person, unless the accident occurred more than forty days prior to the mailing of the communication.").

271. Memorandum from the Connecticut Bar Ass'n Standing Comm. on Pro. Ethics to the Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. (Feb. 21, 2018) (on file with author); *see also* CONNECTICUT RULES OF PRO. CONDUCT r. 7.3(b)(5).

272. CONNECTICUT RULES OF PRO. CONDUCT r. 7.3(b)(3) cmt.

273. *The American Bar Association Mission*, AM. BAR ASS'N, http://www.americanbar.org/about_the_aba/ [https://perma.cc/W79P-U3PK] (last visited Jan. 31, 2020) ("Our mission is to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.").

Electronic copy available at: https://ssrn.com/abstract=3729535

58 HOUS. L. REV. 99 (2020)



As our smartphones become extensions of ourselves, the Model Rules' attempt to distinguish between prohibited in-person contact and contact made via text from a lawyer to a potential client for the purposes of pecuniary gain becomes a distinction without a difference. An attorney bent on violating the rules need not travel to the bedside of a hospitalized client; they can simply send a text message knowing attention to the message at least is almost guaranteed—and a rapidly thumbed reply forming an attorney-client relationship may be forthcoming.

Electronic copy available at: https://ssrn.com/abstract=3729535