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Louise L. Hill

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SYMPOSIUM ONLINE ACTIVITIES & THEIR IMPACT ON THE LEGAL PROFESSION

ELECTRONIC COMMUNICATIONS AND THE 2002 REVISIONS TO THE MODEL RULES

LOUISE L. HILL*

In November of 1994, there were only five law firms that had websites. Within seven months time there were 500 law firms with websites and today virtually all the large law firms as well as most small firms have an Internet presence.¹

* Louise L. Hill is a Professor of Law at Widener University School of Law. She received a bachelor's degree from Pennsylvania State University, a master's degree from Boston University and a law degree from Suffolk University Law School. Professor Hill is currently a member of the Advisory Council of the American Bar Association Commission on Responsibility in Client Development.

¹ See Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785, 787-88 (2000) (noting growing use of internet by law firms); Adam Katz-Stone, *Law Firms Wade Further into*

The Internet has been around for decades, but it wasn't until the mid-1990's that we started to see the legal profession begin to make use of this emerging technology. In essence, a number of things that made this happen came together in the mid-1990's. Commercial sites were permitted, content became visually attractive and hardware became affordable to businesses as well as to home users.² People were able to easily communicate and access information on the Internet and the legal profession took advantage of this asset. However, as law firms began to communicate on the Internet and have a presence on the Web, many questions faced lawyers regarding applicable legal ethics rules. In particular, what were considered to be permissible practices? The rules that governed our legal profession were primarily written in the early 1980's³ and consequently, were not targeted towards these new ways of communicating electronically in a boundary-less medium.

Unsure of how to conduct themselves, lawyers began to seek guidance from their state ethics committees. Lawyers would pose specific factual questions to their state committees and ask these committees for advice on whether or not they were permitted to engage in a particular practice. Since the law is a self-regulated profession in the United States, each state has rules that control and dictate the conduct of lawyers within its jurisdiction.⁴ States undertook the task of defining which rules were applicable and how they should be interpreted.

Advertising Waters, WASH. BUS. J., Apr. 20, 1998, at 35; Elizabeth Wasserman, *Lawyers File Few Objections to Advertising on the Net*, SAN JOSE MERCURY NEWS, July 17, 1995, at 1A (discussing advertising on net).

² See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS*, 100 (3d. ed. 2000); Jeff Ubois, *What is acceptable Internet use? Academic-Corporate Balance Changing*, MACWEEK, Sept. 28, 1992, at 30 (noting rapid change in internet from a research and governmental information database to commercial enterprise); see also Gary H. Anthes, *Commercial users move onto Internet*, COMPUTERWORLD, Nov. 25, 1991, at 50 (discussing evolution of internet and move toward commercializing internet).

³ See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 1-26 (3d. ed. 2001); Leslie C. Levin, *The Emperor's Clothes and Other Tales About The Standards For Imposing Lawyer Discipline Sanction*, 48 AM. U. L. REV. 1, 2-5 (1998) (discussing development of legal discipline rules which were promulgated in 1980's). See generally MODEL RULES OF PROF'L CONDUCT (1983) (outlining ethical rules which ABA suggests should be applied to legal profession).

⁴ See LOUISE L. HILL, *LAWYER ADVERTISING* 44 (1993); STEPHEN RUBIN, *THE LEGAL WEB OF PROFESSIONAL REGULATION, IN REGULATING THE PROFESSION* 29, 31-32 (Roger D. Blair & Stephen Rubin eds. 1980); see also STEVEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* xxvi (Aspen Law and Business, 2002) (noting states which have adopted Model Rules "have deviated from text in many ways").

Typically, states follow the legal ethics rules that the American Bar Association (ABA) promulgates. The Model Rules of Professional Conduct, originally promulgated by the ABA in 1983, have been adopted in 43 states.⁵ This does not provide lawyers with a uniform standard, however, since of those 43 states, there are only 9 jurisdictions that have rules on lawyer communications that are identical to the rules in the Model Rules.⁶ Making the matter more complicated, of those 9 jurisdictions, each state has interpretive differences when it comes to implementing these standards. It was recently said that there are no two jurisdictions that have the same rules.

When we address lawyers' communications on the Internet, we consider these communications as falling within six general categories: (1) advertising and solicitation; (2) unauthorized practice of law; (3) confidentiality; (4) competence; (5) conflicts; and (6) contact with unrepresented and represented persons. The advent of electronic communications in the 1990's found the profession struggling to define which rules were applicable to these matters and how they should be interpreted in light of this emerging technology.

In 1997, the ABA Commission on Evaluation of the Rules of Professional Conduct (ETHICS 2000) was established to study and to evaluate the Model Rules. The "impact of technology and globalization" were among the things that motivated ETHICS 2000's inquiry, as was the promotion of "national uniformity and consistency."⁷ In November of 2000, ETHICS 2000 issued a report that proposed significant changes to the rules, along with

⁵ See HAZARD & HODES, *supra* note 3, at 100; *Vermont Adopts New Ethics Code Based Largely on ABA Model Rules*, 15 LAWYER'S MANUAL ON PROF'L CONDUCT No.22, at 561 (ABA/BNA, Nov. 24, 1999); see also Gregory C. Sisk, *Iowa's Legal Ethic's Rules, Its Time to Join the Crowd*, 47 DRAKE L. REV. 279, 280-282 (1999) (noting only a few states have not adopted model rules as their own).

⁶ See Hill, *supra* note 1, at 811 n.137; H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 90 (1997) (discussing process and controversy behind model rules); see also Sisk *supra* note 5, at 284 (recognizing that states which have adopted model rules have modified them to some extent).

⁷ See Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, at <http://www.abanet.org/mlove061400.html> (last visited Sept. 3, 2002); see also Sheara Gelman, *Ethics Year In Review* 40 SANTA CLARA L. REV. 1219, 1244 (2000) (discussing Ethics 2000 and technological advances affecting attorneys); Matthew Garner 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, 728 (2001) (analyzing changes to ethics rules which were prompted by development of new technology).

some stylistic changes that were aimed at clarification. To this end, changes were recommended to over two-thirds of the existing Model Rules, along with a proposition that four new rules be added.⁸ Subsequently, ETHICS 2000 drafted proposed changes to these proposed changes in response to feedback from lawyers and information gathered at hearings that were held at the February, 2001 ABA mid-year meeting.⁹ Within these comprehensive proposed revisions, there are a number of changes that relate to lawyer communications on the Internet, several of which give helpful guidance to lawyers regarding what is a permissible practice. In February 2002, the ABA House of Delegates voted to adopt many of ETHICS 2000's recommended changes. At the time of the writing of this article, at least sixteen states are reevaluating their rules in light of the ABA's decision to revise the Model Rules.¹⁰

Chapter 7 of the Model Rules contains the directives that address communications about lawyers and the services of lawyers. Model Rule 7.1 governs all communications about a lawyer's services, not just those that would be considered advertising and solicitation. Until the recent amendment to the Model Rules, 7.1 prohibited false or misleading communications and then set forth some categorical prohibitions that constituted such prohibited communications. The recent revisions to 7.1 retain the condemnation of false or misleading communications, but delete those categorical prohibitions from the text of the rule, relocating some of them to the commentary. False or misleading communications are couched in terms of what would be materially misrepresentative or misleading.¹¹

⁸ See *Ethics 2000 Commission Releases Its Report with Recommended Changes to Model Rules*, 69 U.S.L.W., Dec. 12, 2000, at 2339; see also Tamara Loomis, *Lawyer Ethics: ABA Is About to Consider a Major Overhaul* N.Y.L.J., Aug. 2, 2001, at 5; Molly McDonough, *Caution is the keynote at ABA gathering*, NAT'L L.J., Aug. 20, 2001, at A1 (reporting on the August 2001 ABA meeting and debate over Ethics 2000).

⁹ See *Ethics 2000 Commission Unveils Late Changes to Recommendations*, 69 U.S.L.W., June 19, 2001, at 2780; see also Anthony E. Davis, *The ABA Ethics 2000 Commission Report*, N.Y.L.J., Mar. 5, 2001 (examining ABA's proposal); James Podgers, *Ethics on the Agenda: Hearings at ABA Midyear Meeting will address Model Rules 87* A.B.A.J. 85, 85 (Feb. 2001) (updating ABA members about upcoming February meeting and Ethics 2000 Commission).

¹⁰ See Mark Hansen, *Hot Off the Press, Revised Model Ethics Rules are Nearly Ready for State Scrutiny*, 88 A.B.A.J. 37, 38 (June 2002).

¹¹ Revised Model Rule 7.1 provides as follows:

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

What constitutes a misleading communication differs significantly from state to state. There are some states that find it impermissible for a lawyer to use certain types of superlative language.¹² Other states prohibit the use of testimonials or client endorsements. Some states permit testimonials or endorsements,¹³ while other jurisdictions require that there be a disclosure with their use.¹⁴ These disparate standards create problems for lawyers who are communicating in a boundary-less medium.

In December of 2000, an Ohio committee determined that with client consent, a law firm could list client names on its website, and provide a link from an attorney's biography to published opinions of cases in which the lawyer had participated. The opinion noted, however, it was impermissible for a firm to use client quotations on its website, which would be general statements from existing clients about the firm's services, responsiveness and style.¹⁵ The Ohio rules specifically prohibit testimonials, but the committee went on to say that the same result would be reached under the Model Rules, since the then commentary to 7.1 indicated that the rule's prohibition against statements that create "unjustified expectations" would preclude

material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

MODEL RULES OF PROF'L CONDUCT R. 7.1 (2002). *See Focus—Technology: Law Firm Websites: Hey – Watch Your Language! Advisory Ethics Opinion 2000-4*, 26 VER. B. J. & L. DIG. 29, 32-3 (2000) (stating information on website is to give clear understanding of firm); Amy Haywood & Melissa Jones, *Navigating a Sea of Uncertainty: How Existing Ethical Guidelines Pertain to the Marketing of Legal Services over the Internet*, 14 GEO. J. LEGAL ETHICS 1099, 1107 (2001) (specifying material misrepresentations of fact or law as false or misleading statements).

¹² In Pennsylvania the use of terms such as "expert" or "competent" have been found to be materially misleading. Arguably, a Pennsylvania lawyer using a domain name or e-mail address containing these terms would be subject to discipline under Rule 7.1. *See* Pa. Bar Ass'n, Comm. on Legal Ethics and Prof'l Resp., Op. 85-170 [1986 Transfer Vol.] 5 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) Pa: opinions 8 (1985); *see also id.*, at Op. 93-183B (1993); Philadelphia Bar Ass'n, Prof. Guidance Comm. Op. 87-27, [1989 Transfer Vol. 4] 4 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) Pa: opinions 46 (1987); Ass'n of the Bar of the City of N.Y., Comm. on Prof'l & Judicial Ethics, Op. No. 1988-6, June 14, 1988.

¹³ *See e.g.*, FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1)(E) (2000); IND. RULES OF PROF'L CONDUCT R. 7.1(d)(3) (1999); NEV. RULES OF PROF'L CONDUCT R. 195(4) (1999); N.M. RULES OF PROF'L CONDUCT R. 16-701(A)(2) (2000); OHIO CODE OF PROF'L RESPONSIBILITY, DR 2-101(A)(3) (2000).

¹⁴ *See e.g.*, CAL. RULES OF PROF'L CONDUCT R. 1-400, Standard 2 (1999); LA. RULES OF PROF'L CONDUCT R. 7.1(a)(vi) (1999); MO. RULES OF PROF'L CONDUCT R. 7.1(g) (1999); OR. CODE OF PROF'L RESPONSIBILITY, DR 2-101(A)(b) (1999); PA. RULES OF PROF'L CONDUCT R. 7.2(e) (2000); VA. RULES OF PROF'L CONDUCT R. 7.1(4) (2000); WIS. RULES OF PROF'L CONDUCT R. 7.1(a)(4) (1999).

¹⁵ Ohio Op. 2000-6 (2000).

an advertisement that contained a client endorsement.¹⁶

The position of the Ohio Committee regarding Model Rule 7.1 is not necessarily correct because the comment to the then rule said that client endorsement "may" create an unjustified expectation about the results the lawyer can achieve.¹⁷ Interestingly, the revisions to Model Rule 7.1 revise this commentary to delete the specific reference to client endorsements. Also deleted are specific references to the amount of a damage award or to a lawyer's record in obtaining favorable verdicts, as possibly creating unjustified expectations. Instead, the revised commentary to Model Rule 7.1 more generally addresses when truthful reports about a lawyer's achievement on behalf of a client may be misleading.¹⁸

¹⁶ Ohio Op. 2000-6 (2000). The comment to Rule 7.1 in 2000 provided "statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements." MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. (1983). OH CPR Canon 2, DR 2-101 provides:

Publicity: (A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that: (3) Contains any testimonial of past or present clients pertaining to lawyer's capability. OHIO CODE OF PROF'L RESPONSIBILITY, DR 2-101(A)(3) (2000).

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. (1983); *cf.* Ohio Op. 2000-6 (2000) (stating "Rule 7.1 similarly prohibits client testimonials").

¹⁸ Commentary to revised Rule 7.1 provides as follows:

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it would lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is not reasonable factual foundation. [3] An advertisement that truthfully reports a lawyer's achievement on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. . .

MODEL RULE OF PROF'L CONDUCT R. 7.1 cmt. 2 & 3 (2002); *See* A White Paper Presented for the Purpose of Discussion 'By the American Bar Association Commission on Advertising: A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies 11 (July 1998) (stating Rule's philosophy allows information conveyance not promotion) available at <http://www.abanet.org/legalservices/clientdevelopment/ethicswhitepaper.html> (Last visited Sept. 2002) [hereinafter "White Paper"]; *see e.g.* Legal Ethics Opinion 1750: Advertising Issues (Mar. 20, 2001) (addressing whether it is misleading for attorneys to

Because many states require and encourage the use of disclaimers, the revised commentary to Model Rule 7.1 also indicates that disclaimers may reduce the likelihood that a statement about the lawyer or the lawyer's services will be misleading.¹⁹ What is not present, however, is explicit direction relating to what constitutes a misleading practice. We do not have specific directives addressing misleading communications within the recent changes.

Firm names and letterheads are addressed in Model Rule 7.5 and since the inception of Model Rule 7.5, lawyers have not been permitted to "use a firm name, letterhead or other professional designation that violates rule 7.1."²⁰ A question that lawyers have faced in this regard is whether or not a domain name constitutes a law firm name.

An Arizona committee was asked whether a Web site could use a trade name as a law firm name. The committee responded negatively, since Arizona prohibits the use of trade names for law firms. The opinion went on to state "[d]omain names, however, are not firm names and thus are not subject to this limitation."²¹ An Ohio committee also determined that domain names are not subject to regulation as firm names, since domain names actually represent site addresses. The Ohio Committee did go on to say, however, that domain names are subject to the rules that prohibit false or misleading communications and the rules that govern specialization claims.²²

The revisions to the Model Rules address the domain name

advertise specific case results) available at <http://www.vacle.org/opinions/1750.htm> (last visited Sept. 2002).

¹⁹ Commentary to Rule 7.1 provides as follows:

"The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a perspective client."

MODEL RULE OF PROF'L CONDUCT Rule 7.1 cmt. 3 (2002); See John Doody, *On Your (Trade)Mark: Ethics and Lawyer Web Success*, 38 ARIZ. ATT'Y 38, 42 (Dec. 2001); cf. Mercer, *supra* note 7, at 730-31 (stating disclaimers are insufficient to "counter consumer confusion").

²⁰ See MODEL RULES OF PROF'L CONDUCT R. 7.5(a) (1983), available at http://www.abanet.org/cpr/e2k-report_home.html (last visited Sept. 3, 2002).

²¹ See Arizona Op. 97-04 (1997); see also G. Peter Albert, *Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names*, 15 J. MARSHALL J. COMPUTER & INFO. L. 277, 278 (1997) (explaining factual background of this case). See generally Jefferson F. Scher, *Enabling Electronic Commerce: Trademark, Privacy & Internet Business*, 21 HASTINGS COMM. & ENT. L. J. 545 (1999) (giving detailed explanation of "domains").

²² Ohio Op. 99-4 (1999).

situation, amending the commentary to Rule 7.5 to include: “[a] lawyer or law firm may also be designated by a distinctive website address or comparable professional designation.”²³ If a law firm’s website is recognized as a professional designation under Model Rule 7.5, then the website address must comply with the requirements of 7.1,²⁴ as must any communication about the lawyer or the lawyer services. The revisions to the Model Rules confirm that it is impermissible for a lawyer to use a domain name or an e-mail address that contains language that the lawyer’s jurisdiction has judged to be misleading.

The matter of advertising is specifically addressed at Model Rule 7.2. A number of revisions have been made to Rule 7.2 that significantly impact lawyers who market their services electronically. The changes begin by specifically including “electronic communication” as a permissible vehicle for advertising.²⁵ Revisions to the commentary of Rule 7.2 recognize the lawful use of electronic mail as a permissible practice, and that the Internet is “an important source of information about legal services.”²⁶

The revisions addressing electronic mail clarify an issue that had come into question initially with widespread Internet use. An early Tennessee opinion likens promotional e-mail to a telephone call, which triggered the prohibition against telephone contact in Rule 7.3.²⁷ In contrast, a Michigan ethics opinion found the use of e-mail to be permissible, likening it to a facsimile transmission or postcard.²⁸ The commentary to Rule

²³ MODEL RULES OF PROF’L. CONDUCT R. 7.5 cmt. 1 (2002), available at http://www.abanet.org/cpr/e2k-report_home.html (last visited Sept. 3, 2002). See generally, Hill, *supra* note 1, at 785 (discussing various elements involved in this debate).

²⁴ MODEL RULES OF PROF’L. CONDUCT Proposed R. 7.5 Reporter’s Explanation of Changes (Nov. 27, 2000); see also MODEL RULES OF PROF’L. CONDUCT R. 7.5 (2002) (showing web access and additional information).

²⁵ MODEL RULES OF PROF’L CONDUCT R. 7.2(a) (2002), available at http://www.abanet.org/cpr/e2k-report_home.html (last visited Sept. 3, 2002); see also Mercer, *supra* note 7, at 737-738 (providing explanation of proposed changes to MR 7.2); J. Clayton Athey, *The Ethics of Attorney Web Sites: Updating the Model Rules to Better Deal with Emerging Technologies*, 13 GEO. J. LEGAL ETHICS 499, 515-516 (2000) (explaining proposed changes).

²⁶ MODEL RULES OF PROF’L CONDUCT R. 7.2.cmt. 3 (2002).

²⁷ Tennessee Adv. Op. 95-A-570 (1995). See generally, Athey, *supra* note 25, at 517 (discussing proposed changes to MR 7.3); Jesse H. Sweet, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. LEGAL PROF. 201, 204 (1999) (providing overview of MR 7.3 and its qualifications).

²⁸ Michigan Op. RI 276 (1996); see also Sweet, *supra* note 27, at 217 (including Michigan in a list of states applying their ethical rules to internet); J. T. Westermeier,

7.2, however, distinguishes the lawful use of electronic mail from its unlawful use. In doing this, attention is drawn to Model Rule 7.3(a) for the prohibition against solicitation of a prospective client through real-time electronic exchange that is not initiated by the prospective client.²⁹ According to the Reporter's Explanation of Changes, lawful use of e-mail is also "included to require lawyers to comply with any law that might prohibit 'spamming'," which is mass e-mailing of commercial messages.³⁰

As currently constituted, Rule 7.2 prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services, with limited exceptions, one of which is the payment of reasonable costs of advertising. The commentary, which is renumbered No. 5, is modified to more accurately reflect the current state of client development activities in law firms. It states that non-lawyers can be paid for client development services, such as website design. A lawyer can pay the costs of domain name registrations, banner ads and similar expenses. This list was expanded to include on-line directory listings and group advertising by subsequent proposed changes to the commentary.³¹ Attention in the Rule 7.2 commentary is drawn to Model Rule 5.3, where lawyers with managerial authority within law firms, have direct responsibility to assure ethical conduct by these non-lawyers.³²

Ethical Issues for Lawyers on the Internet and World Wide Web, 24 RICH. J. L. & TECH. 5, n. 57 (1999).

²⁹ Commentary to revised Rule 7.2 provides as follows:

Similarly, electronic mail, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by the Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (2002); *see also* Hill, *supra* note 1, at 785, n. 201 (explaining that Michigan committee distinguished e-mail messages from letters, stating there is no guarantee e-mail will reach its intended recipient). *But cf* Mercer, *supra* note 7, at 737 (arguing proposed rule still does not adequately deal with issue of technology, proposing rule which specifically deals with e-mail and other media).

³⁰ MODEL RULES OF PROF'L CONDUCT Proposed R. 7.2, Reporter's Explanation of Changes (Nov. 27, 2000). *See* David Loundy, *Lawyers' Electronic Ads Leave Bad Taste*, CHI. DAILY L. BULL., Mar. 9, 1995, at 6 (explaining "spamming" on internet and "Green Card Incident," including negative connotations and ethical problems associated with its use); *see also* Mark E. Wojcik, *Article: Lawyers Who Lie On-Line: How Should the Legal Profession Respond to E-Bay Ethics?*, 18 J. MARSHALL J. COMPUTER & INFO. L. 875, 910-12 (describing same incident and ethical faults the Disciplinary Board of the Tennessee Supreme Court found in spamming).

³¹ MODEL RULES OF PROF'L CONDUCT Proposed R. 7.2 cmt. 5 (Mar. 27, 2001).

³² *Id.* at Rule 7.2 cmt. 5 (2002). The November 27, 2000 proposed revisions to the

Because advertising is often disseminated in areas where a lawyer does not maintain an office, communications under Model Rule 7.2 have to include an office address for the lawyer or law firm.³³ This is particularly helpful to people communicating on the Internet where it is just as easy to access a lawyer next-door, as a lawyer who is thousands of miles away. As Model Rule 7.2 was formerly constituted, only the name of a lawyer responsible for an advertisement's content had to be included in the communication.³⁴

Model Rule 7.2 previously provided that lawyers must keep a copy or recording of any advertisement for two years along with a record of when and where it was disseminated.³⁵ This created a significant burden, as well as confusion, for lawyers engaging in electronic marketing. The first question lawyers faced in this regard related to rule applicability. Then questions arose relating to what type of record must be retained and what changes to a site had to be documented.

A North Carolina opinion held that compliance with the retention requirements of Rule 7.2 was necessary for law firm websites, which "may be achieved by printing a hard copy of all screens on the website as launched and subsequently printing hard copies of any material changes in format or content of the website."³⁶ Additionally "these hard copies should be retained for two years together with a record of when the screens were used

Model Rules called for making the law firm, not just individual lawyers, responsible for the conduct of non-lawyers in client developmental activities. *Id.* at Proposed Rule 5.3 (Nov. 27, 200). Ethics 2000 dropped this recommendation, however, in that "law firm discipline might undermine the principle of individual responsibility that runs through the Model Rules," *Ethics 2000 Commission Unveils Late Changes to Recommendations*, 69 U.S.L.W. June 19, 2001, at 2780.

³³ MODEL RULES OF PROF'L CONDUCT R. 7.2(c) (2002); *see also* Loundy, *supra* note 30, at 6 (explaining how mass e-mail sent through newsgroups was seen in 140 different countries, raising serious ethical questions and citing German commentators that have concluded such advertisement would result in sanctions if sent by attorney in Germany). *But cf. id.* (describing how including such information could amount to solicitation).

³⁴ MODEL RULES OF PROF'L CONDUCT R. 7.2(d) (1983). *Cf.* Gail A. Forman, *Note and Comment: To Infinity and Beyond: The ABA Re-Examines the Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, 1 J. LEGAL ADVOC. & PRAC. 96, 107 (stating lawyer whose name appears in ad as per Rule 7.2(d) should not create liability for that lawyer while other lawyers in firm are not liable). *Cf.* Tonia S. Goolsby, *Case Note: Florida Bar v. Went For It, Inc.: Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?*, 49 ARK. L. REV. 795, n. 143, (explaining how in Arkansas proposal was made in 1993 to amend its version of Rule 7.2 to include geographic area in which attorney would perform service).

³⁵ MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (1983).

³⁶ North Carolina Proposed Op. RPC 239 (1996).

on the Internet.”³⁷ Realizing that the archiving requirement had become increasingly burdensome for lawyers, and that such records were rarely used for disciplinary purposes, ETHICS 2000 suggested that it be deleted.³⁸ Thus problems relating to what type of a record of a Web site has to be retained, or what constitutes a material change that must be documented, are eliminated.

As formerly constituted, Rule 7.2 said a lawyer may pay the usual charges of a not-for-profit lawyer referral service or legal service organization.³⁹ In November of 2000, ETHICS 2000 stated that it was deferring its consideration of whether to revise the Rule so as to permit lawyers to pay the usual charge of for-profit lawyer referral services.⁴⁰ This had become a more significant issue than in the past due to the advent of electronic marketing and electronic communications. The fact of the matter is the Internet is being used as a means for the public to find lawyers.

A subsequent draft of the Rules, which was ultimately adopted by the ABA, called for allowing what amounts to for-profit lawyer referral services, provided they are approved by an appropriate regulatory authority.⁴¹ The term actually used is, a qualified lawyer referral service, which is “one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients.”⁴²

Direct contact with prospective clients is addressed in Model

³⁷ *Id.*

³⁸ See ABA COMM. ON EVALUATION OF THE RULES OF PROF'L CONDUCT, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES R. 7.2 (Aug. 2001) [hereinafter EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, Aug. 2001]; see also Jeffrey E. Kirkey, *Legal Ethics in Cyberspace: Keeping Lawyers and their Computers Out of Trouble*, 18 T.M. COOLEY L. REV. 37, 49 (2001) (remarking requirement that firm hold copies of all advertisements for two years may be extremely difficult for law firms which constantly update their Web pages); Athey, *supra* note 25, at 513 (stating, “[p]roblem with applying this requirement to Web sites is that, unlike yellow pages advertisements or television commercials, Web sites are a dynamic medium that require frequent updating to ensure the currency and accuracy of information.”); Forman, *supra* note 34, at 107 (noting difficulty of what determines “copy” on Internet).

³⁹ MODEL RULES OF PROF'L CONDUCT R. 7.2 (c)(2) (2000) (stating “[a] lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the usual charges of a not-for-profit lawyer referral service or legal service organization.”).

⁴⁰ See ABA CENTER FOR PROF'L RESPONSIBILITY, COMM. ON EVALUATION OF THE RULES OF PROF'L CONDUCT R. 7.2 (Sept. 2000).

⁴¹ MODEL RULES OF PROF'L CONDUCT Proposed R. 7.2 (b)(2) (Mar. 27, 2001). See EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, Aug. 2001, *supra* note 38.

⁴² MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 6 (2002).

Rule 7.3. As it was formerly constituted, Rule 7.3 prohibited solicitation of professional employment by in-person and live telephone contact from a prospective client with whom the lawyer had no family or prior professional relationship, when pecuniary gain was a significant motive of the lawyer.⁴³ With the growing use of the Internet as a means of communication, lawyers faced questions concerning whether contacting perspective clients electronically was permissible. More troubling than the issue surrounding the use of promotional e-mail by lawyers,⁴⁴ was engaging in uninvited interactive communication that was initiated by lawyers, such as Internet chat groups.

Michigan, along with Utah, Virginia, West Virginia and most recently Florida, viewed these uninvited interactive conversations by lawyers as direct solicitation, which was outside the activity permitted by 7.3.⁴⁵ A committee in Arizona, however, determined that communicating with a potential client in a chat room should not be considered a prohibited telephone or in-person contact, because the potential client "has the option of not

⁴³ MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2000) (stating "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer doing so is the lawyer's pecuniary gain.").

⁴⁴ See Tenn. Advisory Op. 95-A-570 (1995) available at <http://www.legalethics.com/ethics.law?state=Tennessee> (last visited Sept. 2002) (noting "E-mail to one or more e-mail addresses must follow rules relating to general and direct mail solicitation."); see also Mich. Op. RI-276 (1996) at <http://www.legalethics.com/ethics.law?state=Michigan> (last visited Sept. 2002) (commenting "Newsgroup postings are a form of improper solicitation similar to unsolicited phone contacts.").

⁴⁵ See Fla. Advisory Op. A-00-1 (2000) available at <http://www.legalethics.com/ethics.law?state=Florida> (last visited Sept. 2002) (commenting "An attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users."); Mich. Op. RI-276 (1996) available at <http://www.legalethics.com/ethics.law?state=Michigan> (last visited Sept. 2002) (concluding "A chat room interactive communication is like a direct solicitation and outside the activity permitted by Rule 7.3."); Utah Op. 97-10 (1997) available at <http://www.utahbar.org/opinions/html/97-10.html> (last visited Sept. 2002) (holding "Attorneys' participation in 'chat groups' is considered to be an 'in person' communication and subject to the restrictions of rule 7.3(a)."); Va. Advisory Op. A-0110 (1998) available at <http://www.legalethics.com/ethics.law?state=Virginia> (last visited Sept. 2002) (announcing "A lawyer who solicits employment in a 'real time' chat room may not solicit employment in personal injury or wrongful death cases by communicating with the victim or their immediate family."); W.Va. Op. 98-03 (1998) available at <http://www.wvbar.org/BARINFO/wvlegalresearch/ethics/le98/98-03.htm> (last visited Sept. 2002) (positing that "The Board is of the opinion that web sites, news groups and e-mail are potential forms of attorney advertising and/or solicitation which are governed by the prevailing ethical standards in each jurisdiction.").

responding to unwanted solicitations.”⁴⁶ The Arizona opinion further stated, however, that if the lawyer initiates contact and the potential client has a known legal need for a particular matter, the lawyer must comply with disclosure obligations that are associated with targeted mailings.⁴⁷ Concluding that “the interactivity and the immediacy of response in real-time communication presents the same dangers as those involved in live telephone contact,”⁴⁸ revisions to Model Rule 7.3 specifically prohibit lawyers from soliciting employment via real-time electronic contacts, such as Internet chat rooms.⁴⁹

Model 7.3 formerly contained a labeling requirement for targeted solicitations, which are solicitations to a perspective client known to have a legal need in a particular matter. As the rule was previously constituted, such communications soliciting professional employment have to be labeled “advertising material.”⁵⁰ Recent changes to Rule 7.3 apply the same labeling requirement to electronic communications.⁵¹ While lawyers

⁴⁶ See Ariz. Op. 97-04 (1997) available at <http://www.legalethics.com/ethics.law?state=Arizona> (last visited Sept. 2002) (noting that “If it is solicitation, then specific disclosure must be made and copy must be sent to Clerk of Supreme Court”).

⁴⁷ See Az. Comm. On The Rules of Prof'l Conduct, Formal Op. 97-04 (1997) (opining on ethical obligations of Arizona lawyers using Internet in legal communications); see also Philadelphia Bar Ass'n Comm., Op. 98-6 (1998) (determining Pennsylvania lawyers generally may communicate in chat rooms with non-clients about subjects of pending or contemplated litigation, but warned that while “conversation interactions with persons on the Internet do not constitute improper solicitation, . . . in any one particular case the interaction may evolve in such a way that it could be characterized as such.”). See generally Mark Hansen, *Look Who's Chatting: Pennsylvania Lawyers Had Better Introduce Themselves on the Internet*, 84 A.B.A.J. 20, 20 (1998) (discussing Philadelphia Bar Association Committee's Opinion cautioning lawyers to abide by rules of client solicitation when using internet).

⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 7.3 (proposed Nov. 27, 2000) *Reporter's Explanations of Changes*.

⁴⁹ See MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2002) (stating real-time electronic contact is equivalent of solicitation by telephone or in-person); see also Haywood & Jones, *supra* note 11, at 1106 (positing that chat rooms being in real time are more like in-person solicitation than written e-mail communications). See generally Mark Hansen, *The New Rule Models: The ABA's Ethics Rules Have Been Pondered, Debated, Rewritten and Debated Some More, Soon the Controversy Will Move to The Association's House of Delegates*, 87 A.B.A.J. 50, 50 (discussing numerous proposals of Ethics 2000 Committee).

⁵⁰ See MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (1983) (amended 1990) (providing that the label “Advertising Material” appear at beginning and ending of any written or recorded messages); see also Forman, *supra* note 34, at 97-98 (discussing reasons for prohibitions on marketing of legal services); Mercer, *supra* note 7, at 740 (stating rules on lawyer advertisements aid public in making informed decisions about choosing attorneys).

⁵¹ See MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (2002) (adding labeling requirements to internet communications); see also Athey, *supra* note 25, at 517 (explaining Ethics 2000 Committee's proposed changes to Rule 7.3); Mercer, *supra* note 7, at 743 (explaining that proposed Rule 7.3 will require attorneys to add words “advertising

soliciting employment under the amended Rules have to label e-mails sent to a person known to have a specific legal need as "advertising material" at the beginning and end, it is unclear exactly where the label must be. Must it be in the subject portion of the standard electronic mail format or can it simply be at the beginning and ending of the communication itself? Nor are lawyers told if labeling is applicable to linked material.

Among the matters that ETHICS 2000 did not address is linking. It is unclear whether lawyers are responsible for labeling linked material or for overall compliance of material to which they link. If lawyers are responsible for seeing that linked material complies with applicable state ethics rules, then "lawyers would be able to provide their potential clients with information, through the links, that would be impermissible for them to do directly."⁵² However the burden on the lawyer to monitor the linked material would be an onerous one. If such material on the web can be updated and changed with relative ease, the obligation on the lawyer to keep abreast of changes to linked material could effectively eliminate the ability of a lawyer to link. It has been suggested that with links to web pages, compliance with state ethics rules should be applicable only when the linked material is under the control of the lawyer.⁵³ An alternative test for applicability of the rule is "whether linked material is primarily concerned with obtaining clients."⁵⁴ Rules recently promulgated in Florida address the issue of linking, noting that these rules related to computer-accessed communications do not apply simply because someone links material to a lawyer's site.⁵⁵ What was not addressed, however, is

materials" to email solicitations).

⁵² White Paper, *supra* note 18, at 14-15 (discussing inadequacies of advertising rules in protecting consumers from new technological forms of solicitation).

⁵³ See 12 LAWYER'S MANUAL ON PROF'L CONDUCT No. 169, at 81:555 (ABA/BNA, Sept. 18, 1996) (pointing out there is definite guidance on linking from Securities and Exchange Commission, in that if you imbed a hyperlink in a file document, you are responsible for what appears at other end of link, irrespective of whether you have control, and further noting it is not good idea to link to sites you do not control); see also Athey, *supra* note 25, at 510 (commenting that proposed rules do not contemplate problems that will arise in trying to regulate linked material). See generally Forman, *supra* note 34, at 102-03 (discussing problems that may arise if lawyer's are responsible for linked materials).

⁵⁴ See 12 LAWYER'S MANUAL ON PROF'L CONDUCT No. 169, at 81:555 (ABA/BNA, Sept. 18, 1996) (noting lawyers should not provide links to sites they do not control).

⁵⁵ See FLA. BAR. REG. R. 4-7.6 (2001) (promulgating rule on computer-accessed communications); see also Athey, *supra* note 25, at 512 (positing that proposed attorney advertising rules leave open possibility that lawyer's sites may link to false and

whether the rules are applicable when it is the lawyer that initiates the linking. Interesting, some lawyers are avoiding linking all together because they feel that "all it does is make it easy for users to leave a site."⁵⁶ Instead, they are "mirroring" content onto their own sites by getting permission to copy material, or if they link, "using 'frames' so that a user clicking on an off-site link never actually leaves."⁵⁷

It is also unclear whether or not it is permissible, or to what extent it would be permissible, for lawyers to use priority placement devices in an effort to direct viewers to their sites. Among the ways a web site can be accessed is direct access through a domain name, through a link from another linking site, or by implementing a search engine to identify sources that contain designated words finding matches. In a February 21, 2001 Public Discussion Draft of Model Rule 7.5 released by ETHICS 2000, the Reporter's Explanation of Changes indicated priority placement devices present "some potential for improper use."⁵⁸ While priority placement devices do not seem to be improper per se, it appears there are circumstances where using creative techniques to increase the likelihood that a law firm's website will be accessed may amount to professional misconduct.⁵⁹ Unfortunately, this matter was not addressed by ETHICS 2000 in their final draft.

misleading information, which rules sought to protect prospective clients from); Hill, *supra* note 1, at 840 (discussing new Florida rules).

⁵⁶ Kevin Lee Thomason, "Interactivity" Is a Buzzword for Web Sites, NAT'L L.J., Mar. 9, 1998, at B9, B12; *see also* Hill, *supra* note 1, at 842 (discussing problems lawyers associate with linking).

⁵⁷ *See* Thomason, *supra* note 56; *see also* Hill, *supra* note 1, at 842 (noting "mirroring" or linking using "frames" are alternatives to traditional linking).

⁵⁸ The Reporter's Explanation of Changes noted the following:

Although aware of the creative techniques that can be used to increase the likelihood that a browser will be directed to a law firm's website and that there is some potential for improper use, the Commission thinks the Model Rules should not directly address such specific issues. If abuses arise, they can be adequately resolved by an application of the general principles in Rule 7.1 or 8.4.

MODEL RULES OF PROF'L CONDUCT Proposed R. 7.5 Reporter's Explanation of Changes (Feb. 21, 2000); *see also* Hill, *supra* note 1 at 842-847 (discussing potential problems stemming from use of primary placement devices).

⁵⁹ MODEL RULES OF PROF'L CONDUCT Proposed R. 7.5, Reporter's Explanation of Changes (Feb. 21, 2000) (discussing problems associated with primary placement devices), *see also* Hill, *supra* note 1, at 842-845 (noting possible improper uses of repetitive phrases, invisible ink and meta tags); Louise L. Hill, *Change is in the Air; Lawyer Advertising and the Internet*, 36 U. RICH. L. REV. 21, 41-47 (2002) (discussing the propriety of using loop-type software, invisible links and automatic forwarding).

As lawyers disseminate information electronically, reaching people without regard to geographic boundaries, more and more questions continue to arise. One of these questions concerns the unauthorized practice of law. Since lawyers, with few exceptions, are authorized to practice law only in jurisdictions where they are licensed, certain communications on the Internet may subject lawyers to liability for unauthorized practice. When we look at these situations we often ask two questions; is the conduct the practice of law, and if so, is it unauthorized? What constitutes the practice of law is not easy to define. Traditionally, the definition of the practice of law has been left to the individual states, which have taken different approaches.⁶⁰ However, generally speaking, a lawyer expressing legal opinions or providing legal advice to an electronic-discussion participant in a chat room would be practicing law. Stepping back from a substantive chat room situation to e-mail or a website, what constitutes the practice of law is less clear. Posting information for view on a home page or website, arguably, would not be the practice of law. A Nassau County, New York ethics committee has noted that "advertising out of state is not practicing out of state."⁶¹ But e-mail postings, as contrasted with website postings, could raise practice-of-law claims, depending on the nature of the contact.

Proposed revisions to Model Rule 5.5, addressing unauthorized practice of law originally, provided four safe harbors that could be available for the lawyer engaging in multijurisdictional practice.⁶² ETHICS 2000 noted that "given the increasingly

⁶⁰ See *Report of the Comm. on Multidisciplinary Practice to the ABA House of Delegates*, PROF'L LAW., Spring 1999, at 1,6 n.2 (noting definition of practice of law has been left to states). See generally Haywood & Jones, *supra* note 11, at 1109 (noting variation of ethical rules among states); Hill, *supra* note 1, at 810 (stating ethical rules adopted by states may vary).

⁶¹ Nassau County, N.Y. OP. 99-3 (1999); see also Sweet, *supra* note 27, at 223 (stating advertising is not considered practice of law). But see Hill, *supra* note 1, at 853-854 (discussing proposed rules in Florida and Texas which would subject lawyers to discipline under some circumstances where they advertise in jurisdictions in which they are not licensed).

⁶² MODEL RULES OF PROF'L CONDUCT Proposed R. 5.5(b) (Mar. 27, 2001); see also Garret Glass & Kathleen Jackson, *The Unauthorized Practice of Law: The Internet, Alternative Dispute Resolution and Multidisciplinary Practice*, 14 GEO J. LEGAL ETHICS 1195, 1198 (2001) (discussing proposed amendments to Model Rule 5.5). See generally RESTATEMENT OF LAW (THIRD) THE LAW GOVERNING LAWYERS § 3, cmt. (e) (2000) (noting advent of new technologies increases the desirability of allowing lawyers to practice in any state).

interstate and international nature of some clients' legal matters, [it] believes that some latitude should be accorded to an out-of-state lawyer."⁶³ However, the final proposed revisions to Model Rule 5.5, released in May 2002, removed the phrase "safe harbor" from the Rule's text, in favor of a less restrictive approach.⁶⁴ The proposed changes for Model Rule 5.5 recommended in May 2002 precluded a lawyer not admitted in a jurisdiction from establishing an office or other systematic and continuous presence in that jurisdiction for the practice of law.⁶⁵ A proposed comment stated that, "presence may be systemic and continuous even if the lawyer is not physically present. . ."⁶⁶ Open to question is the role electronic communications will play as a "systematic and continuous presence." In that these proposed changes to Model Rule 5.5 were adopted by the ABA House of Delegates on August 12, 2002,⁶⁷ it is an issue that lawyers will face.

Additional new revisions to Model Rule 5.5 permit a non-admitted lawyer to provide legal services on a temporary basis in a jurisdiction. Several non-exclusive instances are set forth, one of which is when they "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."⁶⁸ New commentary at No. 21 states, however, that these rules do not authorize communications advertising legal services to prospective clients in a jurisdiction by lawyers who are admitted to practice in other jurisdictions.⁶⁹

Confidentiality of information is addressed at Model Rule 1.6. ETHICS 2000 devoted extensive consideration to the matter of confidentiality, including confidentiality of information as it could relate to electronic communications. Specifically, a new comment No.16 has been added to Model Rule 1.6 to underscore

⁶³ MODEL RULES OF PROF'L CONDUCT Proposed R. 5.5 Reporter's Explanation of Changes (Nov. 27, 2000).

⁶⁴ See *ABA Multijurisdictional Practice Commission Cuts 'Safe Harbors' Term From Final Report*, 70 U.S.L.W., May 28, 2002, at 2739 (phrase safe harbor not used to describe activity).

⁶⁵ MODEL RULES OF PROF'L CONDUCT Proposed R. 5.5 (b)(1) (May 2002).

⁶⁶ *Id.* at cmt. 4.

⁶⁷ See American Bar Association *ABA Delegates Approve Full MJD Package With Little More Than Scattered Debate*, 18 LAWYERS MANUAL ON PROF'L CONDUCT No. 17, at 477 (ABA/BNA, Aug. 14, 2002).

⁶⁸ MODEL RULES OF PROF'L CONDUCT R. 5.5 (c)(4) (Aug. 2002).

⁶⁹ *Id.* at cmt. 21.

the lawyer's duty to safeguard information against inadvertent or unauthorized disclosure.⁷⁰ New comment No. 17 has also been added to caution that a lawyer must take reasonable precautions to prevent information from coming into the hands of unintended recipients.⁷¹ However, this duty "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions."⁷² The Reporter's Explanation of Changes notes that "[a]lthough much of the current debate concerns the use of unencrypted e-mail, the comment speaks more generally in terms of special security measures and reasonable expectations of privacy."⁷³

The position taken in these revisions to Model Rule 1.6 are in line with a recent ABA opinion where an ABA Ethics Committee

⁷⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2002) (highlighting lawyer's duty to prevent inadvertent disclosures); see also Karin Mika, *Of Cell Phones and Electronic Mail: Disclosure of Confidential Information Under Disciplinary Rule 4-101 and Model Rule 1.6*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 121, 127 (1999) (purporting that integrating electronic communications includes expanding attorney's duties by imposing obligation of notifying non-attorney employees and clients of potential inadvertent disclosures of electronic communications); Linda S. Mullenix, *Multiform Federal Practice: Ethics and Erie*, 9 GEO. J. LEGAL ETHICS 89, 124-125 (1995) (discussing Michigan ruling that state decisional law relating to inadvertent disclosure of privileged documents prevailed over ABA Model Rule 1.6 because ABA's interpretations are binding only on ABA members).

⁷¹ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2002) (stating lawyer must take reasonable precautions to avoid inadvertent disclosure); see also Brett R. Harris, *What Lawyers Need to Know About the Internet: Powerful Strategies & Practical Uses: Winter 2001*, 685 PRAC. L. INST. PAT. 135, 166 (2001) (concluding sensitivity of information and extent to which privacy of information is protected by law or by confidentiality agreement are considerations for determining reasonableness of lawyer's expectation of confidentiality); David W. Raack, *The Ethics 2000 Commission's Proposed revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 241 (2001) (claiming ABA's position appears consistent with views of other authorities on the issue).

⁷² MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2002) (noting that in certain circumstances a heightened duty may apply). See Harris, *supra* note 71, at 166 (stating client may require lawyer to implement special security measures not required by this Rule); see also Robert A. Pikowsky, *Privilege and Confidentiality of Attorney-Client Communication Via Email*, 51 BAYLOR L. REV. 483, 576 (1999) (explaining some general stances of bar ethics including Iowa's more stringent standard of requiring attorney to explain risks to client and obtain written permission and Pennsylvania's requirement that attorney at least outlines risks to client).

⁷³ MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Draft 2000) (noting special security measures may be needed for certain client communications). See Harris, *supra* note 71, at 166 (clarifying that although new comment to Rule 1.6 was approved by ABA House of Delegates in August 2001, it will not become Association policy until entire Ethics 2000 Report is approved); Donald James Nettles, *Recent Ethics Opinions and Cases of Significance*, 25 J. LEGAL PROF. 265, 270 (2001) (commenting on Utah opinion that generally lawyer may use unencrypted email to transmit confidential client information without violating Rule 1.6 because there is "reasonable expectation" of privacy and rule does not require "certainty of privacy").

concluded that it is not a breach of the lawyer's duty to communicate with a client via e-mail without encryption.⁷⁴ Concluding that confidentiality would not be compromised, the committee reasoned that the expectation of privacy with e-mail is the same as that for telephone calls. Also, the unauthorized interception of an e-mail message is illegal. The Committee did note, however, that unusual circumstances involving very sensitive measures may warrant special security measures, such as encryption, just as ordinary telephone calls may be inadequate to protect confidentiality in some situations.⁷⁵

As with any representation or preliminary matter, lawyers engaging in electronic exchanges must guard against conflicts of interest. ETHICS 2000 suggested substantial revision to the conflict in interest rules, one of which is that client consent to a representation involving a conflict must be by informed consent, which is valid only if confirmed in writing.⁷⁶ In complying with this mandate, the recent revisions provide means for there to be electronic compliance. Rule 1.0(n) defines a writing as a "tangible or electronic record of a communication," specifically

⁷⁴ See ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999) (discussing use of unencrypted email to communicate with client); see also Lynn A. Epstein, *Cyber Email Negotiations v. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?*, 36 TULSA L.J. 839, 849 (2001) (claiming that notwithstanding ABA's opinion, it is likely e-mail interception will present privacy threats in future and both ABA and state bar associations must soon revisit lax policy governing security practices over distribution of confidential information by e-mail); Mitchel L. Winick, Brian Burris & Y. Dana' Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 TEX. TECH. L. REV. 1225, 1253 (2000) (noting Illinois bar's reasoning for allowing client communications over unencrypted email includes fact that unauthorized interception of Email is illegal).

⁷⁵ See ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999) (discussing use of unencrypted e-mail to communicate with client); see also Lisa A. Dolak, *Clients, Their Confidences, and Internet Communications*, 36 TORT & INS. L.J. 829, n.16 (2001) (expounding that ABA Committee noted risk of interception with cordless phone communications and fax transmissions were at least as susceptible to interception and disclosure as e-mail, yet they carry reasonable expectation of privacy); Winick et al., *supra* note 74, at 1253 (declaring that between 1996 and 1999 only Iowa and South Carolina required encryption of attorney-client e-mail communication).

⁷⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002) (exclaiming conflict of interest representations require client written informed consent); see also John S. Dzienkowski, *Lawyers As Intermediaries: The Representation Of Multiple Clients In The Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 795 (1992) (clarifying informed consent is necessary whenever lawyer represents conflicting interests, but cannot be obtained without some inquiry into situation); Gretchen L. Jankowski, *The Ethics Involved In Representing Multiple Parties In A Business Transaction: How To Avoid Being Caught Between Scylla And Charybdis Within The Confines Of The Maryland Disciplinary Rules*, 23 U. BALT. L. REV. 179, 205 (1993) (proposing by requiring written disclosure and consent in all conflict of interest and multiple representation situations, West Virginia Committee added additional requirements to Model Rules 1.7 and 2.2).

including "e-mail" in the list of appropriate media.⁷⁷ Revisions to Model Rule 1.8 require a client to give informed consent in a signed writing when entering into a business transaction with a client.⁷⁸ Rule 1.0(n) states that "signed" includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."⁷⁹

When communicating on the Internet, lawyers must be careful not to violate the mandates of Model Rules 4.2, 4.3 and 4.4. Model Rule 4.2 addresses communications with persons represented by counsel; Model Rule 4.3 addresses dealing with unrepresented persons and Model Rule 4.4 addresses respect for rights of third parties. A Philadelphia Bar Ethics Committee, that determined lawyers generally may communicate in chat rooms with non-clients about the subject of pending or contemplated litigation, warned lawyers to be mindful that the lawyer "must be truthful in all comments made"; "may not

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 1.0(n) (2002) (including e-mail as an appropriate media for communication). See Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, n.71 (2001) (announcing writing under Rule 1.0(n) includes electronic transmission); Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 FORDHAM L. REV. 2659, 2668 (1999) (exclaiming emerging technologies offer opportunities for expansion of client autonomy and informed consent in attorney-client relationship).

⁷⁸ MODEL RULES OF PROF. CONDUCT R. 1.8(a)(3) (2002). Specifically, the Commission recommended informed consent to both the terms of the transaction and the lawyer's role, including whether the lawyer is representing the client in the transaction; A.B.A. COMM. ON EVALUATION OF THE RULES OF PROF'L CONDUCT, Report with Recommendation to the House of Delegates, Proposed R. 1.8, available at http://www.abanet.org/cpr/e2k-whole_report_home.html (last visited Sept. 2002). Several states have adopted rules similar in scope to Proposed Rule 1.8(a). California, for example, requires that the business transaction be "fully disclosed and transmitted in writing to the client." CAL. RULES PROF'L CONDUCT R. 3-300 (2001). Similarly, Pennsylvania requires that the transaction and its terms be "fully disclosed" and "in writing." PENN. RULES PROF'L CONDUCT R. 1.8 (2001).

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.0(n) (2002). As the Reporter's Explanation of Changes points out, the definition of "signed" includes methods intended as the equivalent of a traditional signature. Further, the Explanation notes that the electronic signature provisions are modeled after those in the Uniform Electronic Transactions Act. A.B.A. COMM. ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, Report with Recommendation to the House of Delegates, Proposed R. 1.8, available at http://www.abanet.org/cpr/e2k-whole_report_home.html (last visited Sept. 2002). The Uniform Electronic Transactions Act defines "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." UNIFORM ELECTRONIC TRANSACTIONS ACT, § 2 (Draft Approved at Annual Conference, July 23-30, 1999) available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm> (last visited Sept. 2002). As the Comment to the Act makes clear, the "critical element" of the definition is intent. *Id.*

communicate about the subject of a representation with a party he knows to be represented by another lawyer in the matter”; “may not deal on behalf of a client with a person who is not represented while the [lawyer] is stating or implying that he or she is disinterested, or give advice to an unrepresented person whose interests are or have a reasonable possibility of being adverse to the [lawyer’s] client”; “should consider including on any communication a notice that he is a lawyer licensed in Pennsylvania, and he is not purporting to give any kind of advice other than in accordance with that status and that he is not purporting to practice law in any other jurisdiction”; and that an Internet discussion could result in the creation of an attorney-client relationship, “with all that such relationship implies including creation of potential conflicts of interest and expectations of confidentiality.”⁸⁰ An ethics opinion out of Oregon determined that visiting the website of an adversary in litigation did not violate the rule against lawyers’ communication with persons known to be represented by other counsel, so long as the lawyer avoids eliciting responses on the subject of the representation from the represented person.⁸¹

The revisions to Model Rule 4.2 and 4.3 do not target electronic communications specifically, however, an addition to Model Rule 4.4 requires a lawyer who receives an inadvertently sent document to notify the sender.⁸² The comment specifically

⁸⁰ See Philadelphia Bar Ass’n, Formal Op. 98-6 (1998); see also Hill, *supra* note 1, at 828 (noting Philadelphia Bar Ethics Committee suggested lawyers exercise caution when communicating with non-clients about subject of pending litigation); Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 245 (1999) (noting Opinion 98-6 identifies number of potential ethical concerns arising from hypothetical situation posed to Professional Guidance Committee).

⁸¹ Oregon State Bar Association, Formal Op. 2001-164 (2001); see also *In re Lewelling*, 296 Ore. 702 (1984) (prohibiting direct communication either in person or by telephone). See generally Westemeier, *supra* note 28, at 5 (discussing various ethical issues facing attorneys with respect to websites and electronic communications over Internet).

⁸² MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2002). The Rule provides that a lawyer “who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” *Id.* As the Comment to the Rule notes, whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law. *Id.* For support for argument that inadvertent disclosure of documents protected by the attorney-client privilege does not waive the privilege. See *Berg Electronics, Inc. v. Molex, Inc.*, 875 F. Supp. 261 (D.C. Del. 1995) (holding inadvertent disclosure of documents protected by attorney-client privilege in patent case did not waive the privilege); *Resolution Trust Corp. v. First of America Bank*, 868 F. Supp. 217 (W.D. Mich. 1994) (ordering attorney to destroy all copies of privileged and confidential letter that had been inadvertently received from opposing

“includes e-mail or other electronic modes of transmission subject to being read or put in readable form,” in its characterization of “document.”⁸³

Lawyers communicating on the Internet often face questions relating to what state's law is applicable, due to the boundary-less nature of the medium. Considering the significant variation in state rules, lawyers query by what standard their communications are to be judged. In this regard, proposed changes to Model Rule 8.5 on disciplinary authority and choice of laws were offered in May 2002, and approved August 12, 2002, which could affect a lawyer communicating electronically. As far as disciplinary authority is concerned, Model Rule 8.5 was modified to expand disciplinary enforcement jurisdiction over lawyers not admitted in a jurisdiction, if the lawyer “renders or offers to render any legal services” in that jurisdiction.⁸⁴ As a safeguard, the Rule provides that a lawyer will not be subject to discipline if the lawyer makes a reasonable determination about which jurisdiction's rules apply to the lawyer's conduct.⁸⁵

The recent revisions to the Model Rules provide us with guidance in a numbers of areas that are very helpful to a lawyer

counsel); *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933 (Me. 1999) (finding that counsel representing law firm and accounting firm did not waive attorney-client privilege with respect to memorandum that was inadvertently disclosed to opposing counsel); *Trilogy Communications, Inc. v. Excom Realty, Corp.*, 279 N.J. Super. 442 (1994) (holding inadvertent production of privileged document in discovery does not constitute waiver of attorney-client privilege).

⁸³ MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 2 (2002). See generally Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications Via E-Mail and the Internet - From Upjohn Co. v. United States and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553 (1998) (analyzing ethical considerations that attorney faces in using e-mail or Internet in privileged attorney-client communications); Amy M. Fulmer Stevenson, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, The Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U.L. REV. 347 (1997) (discussing duty of attorney who accidentally receives privileged e-mail communication).

⁸⁴ MODEL RULES OF PROF'L CONDUCT Rule 8.5(a) (Aug. 2002); See *ABA Delegates Approve Full MJD Package With Little More Than Scattered Dispute*, 18 LAWYERS MANUAL ON PROF'L CONDUCT No. 17, at 477-78 (ABA/BNA); see also, Glass and Jackson, *supra* note 62, at 1196 (noting Tennessee Supreme Court Board of Professional Responsibility has specifically held in unpublished opinion that lawyer may reply to e-mail asking for legal advice without violating ethical rules governing Tennessee jurisdictional issues); *Birbrower v. Superior Court*, 17 Cal. 4th 119, 124 (1998) (holding New York attorneys who performed legal work for California client primarily through internet contact were involved in unauthorized practice of law).

⁸⁵ MODEL RULES OF PROF'L CONDUCT Rule 8.5(b) (Aug. 2002). See also Glass and Jackson, *supra* note 62, at 1198 (noting safe harbor provision suggests that Commission acknowledged gray area that Internet cast upon unauthorized practice of law violations).

who communicates on the Internet. This notwithstanding, lawyers still face many questions associated with electronic communications. This situation is not likely to change in the near future, for as technology continues to evolve, new issues, along with new perspectives on old issues, will repeatedly face lawyers.

