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Matthew T. Rollins

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EXAMINATION OF THE MODEL RULES OF PROFESSIONAL CONDUCT PERTAINING TO THE MARKETING OF LEGAL SERVICES IN CYBERSPACE

MATTHEW T. ROLLINS, J.D., LL.M.†

I. INTRODUCTION

In 1440, Johannes Guttenberg started an intellectual revolution by inventing the printing press, an innovation that would forever change the course of mankind.¹ A short time thereafter, lawyers around the world undoubtedly tried to put Guttenberg's invention to use in an effort to expand business and reach new clients. Those charged with regulating the practice of law were forced to confront issues never before contemplated until the advent of mass printing. As client development began to pass from word-of-mouth recommendation to a form resembling modern day advertising, the ethical propriety of marketing legal services slowly emerged.²

The 21st Century has seen a revolution of its own as the Internet has taken the concept of movable type to an entirely new level. Proponents of the new technology believe that this millennium will be defined by the integration of the Internet into society and our global economy. With sixty-four million adults regularly using the Internet in the United States alone, there has been no other time in history when lawyers have

† Matthew T. Rollins is a graduate of the Information Technology Masters of Law at The John Marshall Law School in Chicago, Illinois. Special thanks go to Will Hornsby, staff counsel for the American Bar Association, for inspiring this paper, and David Sorkin, Associate Professor of Law at The John Marshall Law School, for the interest and patience in seeing this paper published.

1. Mary Bellis, *What You Need to Know About, Inventors with Mary Bellis* <<http://www.inventors.about.com/library/inventors/blJohannesGutenberg.htm>> (accessed Mar. 29, 2004).

2. It is important to note that even with modern advertising practices, word-of-mouth referrals remain the lawyer's best tool for client development.

had the opportunity to reach so many people with so little effort.³ The cyber-revolution has not gone unnoticed by the American Bar Association ("ABA"). In 1997, the ABA re-examined the Model Rules of Professional Conduct in an effort to provide guidance to lawyers regarding the propriety of marketing legal services in cyberspace.⁴ After five years of consideration, the revised Model Rules were published in 2003, ostensibly ushering lawyers into the information age.

This paper sets out to critically examine the changes made by the ABA to the marketing of legal services under the 2003 Model Rules. The next section provides a brief overview of the current commercial speech doctrine articulated by the United States Supreme Court. The third section describes key Internet technologies used in the online solicitation of legal services, while the fourth section examines the application of the revised Model Rules to cyberspace. The fifth section explores whether anti-spam laws apply to lawyers, the propriety of unsolicited commercial e-mail as a marketing tool for legal professionals, and proposes a revision to Rule 7.3(c). The sixth section analyzes the ban on chat room solicitations by lawyers, while the seventh section explores the classification of LISTSERVs under the Model Rules. The paper concludes with some final thoughts on the responsibility of lawyers to act ethically in conducting client development over the Internet.

II. A BRIEF OVERVIEW OF COMMERCIAL SPEECH AND ITS APPLICATION TO THE RULES GOVERNING LAWYER ADVERTISING AND SOLICITATION

A. TRADITIONAL NOTIONS OF COMMERCIAL SPEECH

In 1942, the United States Supreme Court ruled that commercial speech was constitutionally unprotected and totally outside the scope of the First Amendment. *Valentine v. Chrestensen*⁵ held that purely commercial advertising was not entitled to First Amendment protection and could therefore be regulated in the same manner as any other business activity.⁶ The Court reversed course in 1976 with *Virginia Pharmacy Board v. Virginia Consumer Council*,⁷ finding that even commercial speech is entitled to some degree of First Amendment protection.⁸

3. The Internet Economy Indicators, *Facts & Figures, Global Internet Commerce Revenue Since 1998* <<http://www.internetindicators.com/facts.html>> (accessed Mar. 29, 2004).

4. American Bar Association, *Center for Professional Responsibility, Ethics 2000 Commission* <<http://www.abanet.org/cpr/ethics2k.html>> (accessed Mar. 29, 2004).

5. 315 U.S. 52, 54 (1942).

6. *Id.* at 54.

7. 425 U.S. 748 (1976).

8. *Id.* at 761-62.

By affording limited protection to commercial speech in *Virginia Pharmacy*, the Court opened the floodgates to challenges involving the way in which lawyers acquire clients. The first of these challenges established that states may not ban all newspaper advertising of legal services. In *Bates v. State Bar of Arizona*,⁹ a divided Court upheld the right of a legal clinic to advertise "routine legal services" at "reasonable prices" in newspapers.¹⁰ The *Bates* decision determined that states had both the right and obligation to restrict lawyer advertising to the extent necessary to protect consumers.¹¹

The majority in *Bates* explicitly excluded consideration of whether lawyers could be barred from in-person solicitation of clients. However, in a pair of 1978 decisions, the Court found that certain kinds of in-person solicitation could be banned. In *Ohralik v. Ohio State Bar Association*,¹² the Court held that states may prohibit in-person solicitation for pecuniary gain, reasoning that persons in need of legal services may be emotionally vulnerable to lawyers trained in the art of persuasion.¹³ While *Ohralik* represented the most objectionable kind of solicitation (i.e., "ambulance chasing"), *In Re Primus*¹⁴ embodied the type of solicitation most worthy of protection, pro bono service. The Court held in *In Re Primus* that states could not prohibit lawyers from in-person solicitation for matters of public interest in which there was no pecuniary gain.¹⁵

B. THE CURRENT COMMERCIAL SPEECH DOCTRINE: THE *CENTRAL HUDSON GAS* TEST

On its face, *Virginia Pharmacy* appeared to hold that states could not suppress purely commercial speech as long as the speech was not false or misleading and did not propose any illegal transaction.¹⁶ However, later decisions demonstrated that *Virginia Pharmacy* could not be read this broadly. In 1980, the Supreme Court laid down a formal four-part test to determine whether a given regulation of commercial speech violates the First Amendment in the landmark case *Central Hudson Gas & Electric v. Public Service Commission of New York*.¹⁷ As a threshold matter, courts must first determine whether the commercial speech is protected at all by the First Amendment.¹⁸ All commercial speech re-

9. 433 U.S. 350 (1977).

10. *Id.* at 381.

11. *Id.* at 383-84.

12. 436 U.S. 447 (1978).

13. *Id.* at 457.

14. 436 U.S. 412 (1978).

15. *Id.* at 424-25.

16. 425 U.S. at 748.

17. 447 U.S. 557 (1980).

18. *Id.* at 566.

ceives at least partial protection except for speech that is misleading and speech that concerns unlawful activity.¹⁹ Second, the court must ask whether the governmental interest asserted in support of the regulation is "substantial."²⁰ If not, the regulation will be struck down without further inquiry. Third, the court should decide whether the regulation "directly advances" the governmental interest evaluated in part two of the test. If it does not, the regulation is struck down.²¹ The last inquiry is whether the regulation is "not more extensive than necessary to serve that interest."²²

It is within the *Central Hudson Gas* framework by which the constitutionality of restrictions placed on lawyer advertising is currently evaluated. Clearly, this test suggests that the government has significantly more power to regulate commercial speech than might be supposed from a simple reading of *Virginia Pharmacy*. While purely commercial speech is entitled to First Amendment protection, it does not receive the full range of that Amendment's protection.

C. POST-CENTRAL HUDSON GAS DECISIONS RELATING TO LAWYER ADVERTISING

While the Supreme Court in *Bates* gave general First Amendment protection to newspaper advertising by lawyers, it did not address whether lawyers could solicit cases against particular defendants or specific legal problems. In *Zauderer v. Office of Disciplinary Counsel*,²³ the Court held that states could not institute a blanket ban on print advertising oriented toward a particular legal problem or potential defendant.²⁴ Three years later, the Court extended *Zauderer* in *Shapero v. Kentucky Bar Association*,²⁵ holding that states may not completely ban targeted direct mail advertising of specific legal services.²⁶ However, where targeted direct mail would likely cause mental anguish to the recipient, states may be able to ban or at least delay it. In *Florida Bar v.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* A post-*Central Hudson Gas* case has watered down this "not more extensive than is necessary" test. Today, all that is required of the fit between the means and the end is that the means be "reasonably tailored" to serve a governmental objective, so that some looseness in the means-end fit will be tolerated where what is regulated is commercial speech. See *Board of Trustees of St. U. of N. Y. v. Fox*, 492 U.S. 469 (1989).

23. 471 U.S. 626 (1985).

24. *Id.* at 638.

25. 486 U.S. 466 (1988).

26. *Id.* at 477. In *Shapero*, the Court found that states could not ban lawyers writing to individuals, against whom foreclosure proceedings had been instituted, offering legal help for this specific problem.

Went For It, Inc.,²⁷ the Court upheld a thirty-day “cooling off” period before lawyers may send targeted direct mail solicitations to tort victims and their relatives following an accident or disaster.²⁸ *Went For It* acknowledged that the free speech rights of tort lawyers were being restricted but found that these rights were outweighed by two countervailing state interests. First, the Court addressed the interest of victims or their relatives in being spared a sales pitch “while wounds are still open.”²⁹ Second, the Court recognized that the public viewed direct mail solicitations sent immediately after accidents as an intrusion of privacy that reflected poorly upon the legal profession.³⁰ The Court concluded that the regulation furthered a substantial state interest, was sufficiently limited in scope and duration, and was narrowly tailored to achieve the desired objective, thereby satisfying the *Central Hudson Gas* test for commercial speech.³¹

III. THE CONSTRUCTION OF THE INTERNET: E-MAIL, CHAT ROOMS AND LISTSERVS

The Internet is a connection of global networks enabling computers of all kinds to directly and transparently communicate and share services throughout much of the world.³² The Internet constitutes a shared global resource of information, knowledge, and means of collaboration among countless diverse communities.³³ The most widely utilized method of communication over the Internet is e-mail, which consists of an electronic message transmitted from one e-mail address to another or to a group of other e-mail addresses.³⁴ Once dispatched, e-mail messages are sent instantaneously and stored electronically in the recipient’s online mailbox. The recipient can read and reply to e-mail at his or her leisure as well as delete any unwanted messages.

Chat rooms are places on the Internet where individuals or groups of people communicate simultaneously by typing messages to one another.³⁵ Unlike e-mail, chat rooms feature real-time dialogue, whereby messages appear almost immediately on a participant’s screen.³⁶ Chat rooms can focus on virtually any aspect of human interest and educe a level of emotional interaction that does not exist in other online channels

27. 515 U.S. 618 (1995).

28. *Id.* at 623.

29. *Id.* at 630.

30. *Id.* at 626.

31. *Id.* at 635.

32. *Reno v. ACLU*, 521 U.S. 845, 849 (1997).

33. *Id.* at 850.

34. *Id.* at 851.

35. *Id.*

36. *Id.*

due to the real-time communicative nature of the medium.³⁷

A LISTSERV³⁸ is a computer program that redistributes e-mail to names on a mailing list.³⁹ Users subscribe to a LISTSERV by sending an e-mail message requesting access to the mailing list.⁴⁰ Once a user is accepted, the LISTSERV automatically relays every message generated between members of a particular mailing list.⁴¹ Each LISTSERV concerns a particular topic of interest, and many professional organizations use online mailing lists to stay in contact.⁴²

IV. APPLICATION OF THE MODEL RULES TO THE SOLICITATION OF LEGAL SERVICES IN CYBERSPACE

In 1997, the "Ethics 2000" Commission ("the Commission") was formed by the ABA to review the Model Rules of Professional Conduct.⁴³ The primary reason behind the decision to revisit the Model Rules was the growing disparity in state ethics codes, which had devolved into a patchwork of regulations with no real uniformity.⁴⁴ However, there were also new questions raised by the influence that technological advancements were having on the delivery of legal services, and the Commission was forced to confront the ethical issues raised by lawyer participation on the Internet.⁴⁵ After five years of consideration, the revised Model Rules were published in 2003. Rules 7.2 and 7.3 were updated to deal with lawyer advertising and solicitation cyberspace.

37. TechTarget, Inc., *SearchWebService.com, Chat Room* (definition) <http://searchwebservicestechtarget.com/sDefinition/0,,sid26_gci541370,00.html>. For a fascinating account of the level of emotional involvement that can occur in chat room environments, see Julian Dibbell, *A Rape in Cyberspace*, Village Voice, Vol. XXXVIII, No. 51 (Dec. 21, 1993).

38. LISTSERV is a registered trademark of L-Soft, International, Inc., <<http://www.lsoft.com>> (accessed Mar. 29, 2004). However, the term has become somewhat generic in that any type of automated online mailing list is generally referred to as a LISTSERV.

39. TechTarget, Inc., *SearchWebService.com, listserv* (definition), <http://searchvb.techtarget.com/sDefinition/0,,side8_gci212488,00.html> (accessed Mar. 29, 2004).

40. *Id.*

41. *Id.*

42. The Trustees of Indiana University, *Indiana University Knowledge Base, What is a Listserv Mailing List?* <<http://kb.indiana.edu/data/afah.html>> (accessed Mar. 29, 2004).

43. American Bar Association, *supra* n. 4. The first Model Rules of Professional Conduct were promulgated in 1983.

44. Model Rules of Prof'l Conduct, Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"), Chair's Introduction, p.xv (2003).

45. *Id.*

A. MODEL RULE 7.2 – ADVERTISING

Model Rule 7.2 facilitates enforcement of the rules governing lawyer advertising. Under Rule 7.2(a), a lawyer may advertise services through written, recorded or electronic communication, including public media, subject to the requirements of Rules 7.1 and 7.3.⁴⁶ Rule 7.2(a) was revised to accommodate the emerging technologies used by law firms to market legal services.⁴⁷ Comment [3] of Rule 7.2 states that “electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.”⁴⁸ Clearly, the Commission contemplated e-mail as a viable advertising medium for lawyers and amended Rule 7.2 accordingly.

B. MODEL RULE 7.3 – DIRECT CONTACT WITH PROSPECTIVE CLIENTS

Lawyers utilizing e-mail for purposes of direct marketing must abide by certain ethical considerations. Under Model Rule 7.3(c), the words “Advertising Material” must appear at the beginning and ending of an e-mail solicitation to prospective clients known to need legal services unless the recipient is a lawyer, a family member or close personal friend, or has a prior professional relationship with the lawyer.⁴⁹ Moreover, any electronic communication made for purposes of advertising must include the name and office address of at least one lawyer or law firm responsible for its content.⁵⁰

The rationale behind the labeling requirement of Rule 7.3(c) corresponds with Supreme Court decisions relating to lawyer advertising. While cases such as *Bates*, *Zauderer*, *Shapero* and *Went For It* tend to permit the type of online solicitation contemplated by Rule 7.3, states may restrict certain cyber-activities of lawyers to protect prospective clients as long as those restrictions satisfy the *Central Hudson Gas* test for commercial speech. The labeling requirement of Rule 7.3(c) serves to insulate individuals known to need legal assistance from the potential apprehension that a letter from a lawyer may bring. The regulation appears to further a substantial state interest, that of protecting particularly vulnerable consumers from undue alarm. Furthermore, the provision is sufficiently limited in scope and duration, applying only to prospective clients known to be in need of legal services. Finally, the

46. Model R. of Prof. Conduct 7.2(a) (2003). Rule 7.2 harmonizes with previous Supreme Court commercial speech decisions, including *Bates*, *Zauderer* and *Shapero*.

47. American Bar Association, *supra* n. 4.

48. Model R. of Prof. Conduct 7.2 cmt. 3 (2003).

49. Model R. of Prof. Conduct 7.3(c) (2003).

50. Model R. of Prof. Conduct 7.2(c) (2003).

regulation is narrowly tailored to achieve the desired objective, thereby satisfying *Central Hudson Gas*.

Model Rule 7.3 specifically prohibits a lawyer from conducting in-person solicitations of prospective clients with whom the lawyer has no prior professional or family relationship when a significant motive is the lawyer's pecuniary gain.⁵¹ Along with in-person solicitations, Rule 7.3(a) also prohibits live telephone or real-time electronic contact with prospective clients.⁵² The issue of real-time electronic communication is a relatively novel concept, never formally addressed in previous ABA ethics regulations.⁵³ The Commission concluded that the interactivity and immediacy of response in real-time electronic messaging presents the same dangers as those of live telephone contact and should thus be prohibited under the Rule.⁵⁴ As such, a lawyer must refrain from engaging a prospective client in a chat room where the primary motivation is pecuniary gain.

The justification for the prohibition of in-person, telephone and real-time electronic solicitation of prospective clients stems from the potential abuse inherent in directly contacting vulnerable individuals known to need legal services:

These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately.⁵⁵

The touchstone of Rule 7.3 is to spare prospective clients from personal encounters, live telephone interaction or real-time electronic contact, as these situations are fraught with the possibility of "undue influence, intimidation, and over-reaching."⁵⁶ The rationale behind the Rule harmonizes with Supreme Court decisions regulating lawyer solicitation as the Court has consistently held that states may prohibit in-person solicitation for pecuniary gain.⁵⁷

51. Model R. of Prof. Conduct 7.3(a) (2003).

52. *Id.* Note that Rule 7.3 does not prohibit direct mail or prerecorded telephone contact unless the recipient has indicated that he or she does not wish to be solicited by the lawyer, or the solicitation involves coercion, duress or harassment.

53. This is not to say that the issue of real-time electronic communication has not been previously addressed by state ethics opinions or regulatory commissions.

54. American Bar Association, *supra* n. 4.

55. Model R. of Prof. Conduct 7.3 cmt. 1 (2003).

56. *Id.*

57. See *Ohralik*, 436 U.S. at 447; see also *In Re Primus*, 436 U.S. at 412.

The solicitation restrictions found in Rule 7.3 do not apply to communications between lawyers, as lawyers presumably do not need the special protection afforded by the Rule.⁵⁸ Rule 7.3(a)(1) permits direct, in-person communication with in-house council of organizations but disallows contact with non-lawyer representatives of those entities.⁵⁹ The Rule was seemingly revised in response to *Edenfield v. Fane*.⁶⁰ In *Edenfield*, the Supreme Court struck down a state ban on direct, in-person and uninvited solicitation of business owners by Certified Public Accountants.⁶¹ In reaching its decision, the Court found that some types of in-person solicitation by professionals may be allowed, and that it was the unusually vulnerable and susceptible condition of laypersons that warranted a prohibition.⁶² While the Court refused to extend its holding to lawyers, the Commission ostensibly used the rationale of *Edenfield* to justify the types of professional solicitation inherent in Rule 7.3(a)(1).⁶³

V. AN ASSESSMENT OF UNSOLICITED COMMERCIAL E-MAIL AS A MARKETING TOOL FOR LAWYERS AND PROPOSED REVISION TO MODEL RULE 7.3(C)

A. THE SPAM EPIDEMIC

Model Rules 7.2 and 7.3 clearly contemplate e-mail as a viable solicitation tool for lawyers in cyberspace. However, nowhere in the Rules is the issue of spam directly confronted. Spam, generally defined as the unsolicited transmission of commercial e-mail, represents almost half of all e-mail traffic in the United States by some estimates and is a substantial drain on Internet resources.⁶⁴ The volume of spam is anticipated to double by 2004, costing U.S. businesses more than ten billion dollars in lost productivity.⁶⁵ Additionally, spam hurts Internet service providers, which are forced to work continuously to police the practice but still lose customers because of the problem.⁶⁶ America Online, the world's largest Internet service provider, estimates that it blocks be-

58. Model R. of Prof. Conduct 7.3(a)(1) (2003).

59. American Bar Association, *supra* n. 4.

60. 507 U.S. 761 (1993).

61. *Id.* at 774.

62. *Id.*

63. Ethics 2000 – February 2002 Report, Model Rule 7.3, *Reporter's Explanation of Changes* <<http://www.abanet.org/cpr/e2k-rule73rem.html>> (accessed Mar. 29, 2004).

64. The Washington Post Company, *Washington Post.com, Spam's Cost To Business Escalates Bulk E-Mail Threatens Communication Arteries* <<http://www.washingtonpost.com/wp-dyn/articles/A17754-2003Mar12.html>> (accessed Mar. 29, 2004).

65. <http://www.governor.state.va.us/Press_Policy/Releases/2003/Apr03/0429b.htm> (accessed Mar. 29, 2004).

66. *Id.*

tween seventy and eighty percent of all incoming e-mail as spam.⁶⁷ The problem is so severe that some experts believe spam poses a threat to the continued usefulness of e-mail, the most successful tool to emerge from the information age.⁶⁸ In an attempt to combat the proliferation of spam, federal and state lawmakers are attempting to craft policy to penalize malicious spammers.⁶⁹

1. *Federal Spam Legislation*

In August 2003, nine proposed bills are before the 108th Congress addressing the issue of spam.⁷⁰ Each bill offers a different (and often disparate) approach to curb the proliferation of unsolicited commercial e-mail, demonstrating the technical and constitutional complexity surrounding the problem. Most of the proposed legislation revolves around prohibiting false routing information in e-mail headers coupled with specific labeling requirements and functional opt-out mechanisms.⁷¹ Several of the bills would create a "Do Not Spam" list, similar to the recently enacted "Do Not Call" registry maintained by the Federal Trade Commission.⁷² At the time of this writing, it is unclear whether a federal anti-spam law will pass this session of Congress.⁷³

67. CNET Networks, Inc., *ZD NET, AOL Touts Spam-fighting Prowess* <http://net-scape.com.com/2100-1105_2-998944.html?type=pt>.

68. The Washington Post Company, *supra*. n. 64.

69. Spamming itself is not illegal in the United States as it represents constitutionally protected commercial speech. The spam laws under consideration by state and federal authorities would make it illegal for spammers to surreptitiously engage in the practice by forging headers, listing false return addresses, or hacking computer systems. It is important to note that almost every Internet service provider forbids users from engaging in spamming.

70. The proposed bills before the 108th Congress include the *Anti-Spam Act of 2003* (H.R. 2515), *Ban on Deceptive Unsolicited Bulk Electronic Mail Act of 2003* (S. 1052), *CAN-SPAM Act of 2003* (S. 887), *Computer Owners' Bill of Rights* (S. 563), *Criminal Spam Act of 2003* (S. 1293), *Reduction in Distribution of Spam Act of 2003* (H.R. 2214), *REDUCE Spam Act of 2003* (H.R. 1933), *Stop Pornography and Abusive Marketing Act* (S. 1231), and the *Wireless Telephone Spam Protection Act* (H.R. 122). For more information, see <<http://www.spamlaws.com/federal/summ108.html>> (accessed Mar. 29, 2004).

71. *Id.*

72. *Id.*; see also Federal Trade Commission, *National Do Not Call Registry* <<http://www.donotcall.gov>> (accessed Mar. 29, 2004).

73. Shortly before this article went to press, Congress passed the first national anti-spam bill in form of the *CAN-SPAM Act of 2003* (S. 877). Effective January 1, 2004, the Act aims to curb the most egregious practices of spammers by targeting e-mail with falsified headers, but allows marketers to send unsolicited commercial e-mail as long as the message contains an opt-out mechanism, a functioning return e-mail address, a valid subject line indicating the e-mail is an advertisement and the legitimate physical address of the mailer. For more information and the complete text of the bill, see David E. Sorkin, *Spam Laws* <<http://www.spamlaws.com>>; select United States, select Federal Laws, select *CAN-SPAM Act of 2003* (S. 877) (accessed Mar. 29, 2004).

2. *State Spam Legislation*

Currently, thirty-five states have enacted legislation regulating spam.⁷⁴ With the exception of Virginia and Delaware, each of these laws involve civil statutes designed to empower citizens, businesses, and a few Attorneys Generals to sue malicious spammers (i.e., those not following the rules) and collect statutory and actual damages and, in some cases, civil fines. Much like that of proposed federal legislation, the majority of state spam laws typically require accurate routing information, functional opt-out systems and impose specific labeling requirements.⁷⁵ Delaware has crafted perhaps the strictest spam law of any state, making it illegal (punishable by up to a year imprisonment) to send any unsolicited commercial e-mail to its citizens.⁷⁶ In April 2003, Virginia enacted a spam law imposing felony penalties for sending unsolicited bulk e-mail to computer users through deceptive means.⁷⁷ Though well intentioned, the statutory civil approach to regulating spam has not curtailed the practice.⁷⁸

B. APPLICATION OF FEDERAL AND STATE SPAM LAWS TO LAWYERS

Nowhere do the Model Rules address the propriety of lawyers utilizing unsolicited commercial e-mail as a marketing tool. However, Rule 7.3(c) may tacitly encourage spam by only requiring the labeling of e-mail to those individuals known to need legal services; as long as a lawyer does not possess direct knowledge that a prospective client needs legal assistance, the lawyer may spam indiscriminately. Adding to the ethical quagmire, it is unclear whether state (or potentially federal)

74. For a complete listing of the states with spam laws, see David E. Sorkin, *Spam Laws* <<http://www.spamlaws.com>>; *select State Laws, select Summary of state spam laws* (accessed Dec. 4, 2003).

75. Labeling requirements in particular have given rise to challenge under the dormant commerce clause of the U.S. Constitution. See *State v. Heckel*, 143 Wash.2d 824 (2001). A 2001 Washington Supreme Court case upheld the use of labeling, finding that requiring accurate identification information in subject lines actually facilitates interstate commerce. See *id.* at 840.

76. Del. Code Tit. 11, §§ 931-39 (2004). While the constitutionality of this law is suspect, it has never been challenged in court. Additionally, the Delaware Attorney General has never prosecuted a spammer under this law.

77. Va. Code, Title 18.2, Chap. 5, Art. 7.1 § 18.2-152.3:1 (Apr. 3, 2003). It is not surprising that Virginia is taking a hard-line position against spam. Roughly half of the world's Internet traffic is routed through Virginia as America Online is located in that state.

78. To date, not one Attorneys General of states with spam laws have successfully challenged spammers in court.

spam laws even apply to lawyers. A series of cases suggest that legislation which touches upon certain aspects of the practice of law may run afoul of the rules governing a lawyer's professional conduct. If so, it is possible that state spam laws cannot ban the marketing of legal services through unsolicited commercial e-mail absent a clear intention by the legislature. Even if lawyers are specifically included in anti-spam legislation, lawmakers may encounter difficulty regulating the marketing of legal services under the separation of powers doctrine. Additionally, the federal government may be prohibited from affecting the marketing of legal services based upon Tenth Amendment state sovereignty.

1. *State Legislation Aimed at the Practice of Law*

A 1998 Illinois Supreme Court decision found that the state's consumer protection act did not apply to lawyers, holding that the proper channel of client grievance resided in the ethical rules governing a lawyer's conduct.⁷⁹ In *Cripe v. Letier*, an estate planner was accused by a client of gross over-billing in the transfer of two trust instruments.⁸⁰ The plaintiff brought suit under the *Consumer Fraud and Deceptive Business Practices Act*, alleging that the billing of clients was a business practice and not the practice of law.⁸¹ In finding for the defendant, the court concluded that the Illinois legislature did not intend for consumer protection legislation to apply to any aspect of the practice of law, including a lawyer's excessive billing practices.⁸²

Courts in several other states have addressed the applicability of consumer protection legislation to lawyers. In *Rousseau v. Eshleman*,⁸³ the Supreme Court of New Hampshire held that the practice of law was exempt from the state's consumer protection statute, finding applicable an exemption for "trade or commerce otherwise permitted under laws as administered by any regulatory board."⁸⁴ In view of the practical problems that might result, the *Rousseau* court was reluctant to interpret the statute as applying to the legal profession absent a "clearly expressed legislative intent."⁸⁵ A New Jersey appellate court also concluded that legal services were not covered by the state's consumer

79. *Cripe v. Leiter*, 703 N.E.2d 100 (Ill. 1998).

80. *Id.* at 101-102.

81. *Id.* at 101-102, 107.

82. *Id.* at 107. The court concluded that, given the already extensive regulation of the attorney-client relationship under the Model Rules, had the Illinois legislature intended the Consumer Fraud Act to apply to business aspects of the practice of law, it would have expressly stated so.

83. 519 A.2d 243 (N.H. 1986).

84. *Id.* at 245.

85. *Id.*

protection act in *Vort v. Hollander*.⁸⁶ The *Vort* court noted that the practice of law in that state is regulated, “in the first instance, if not exclusively,” by the New Jersey Supreme Court.⁸⁷ The court reasoned that, “[h]ad the Legislature intended to enter the area of attorney regulation it surely would have stated with specificity that attorneys were covered under the Consumer Fraud Act.”⁸⁸

Courts in other states have reached entirely divergent conclusions. In *Short v. Demopolis*,⁸⁹ the Washington Supreme Court held that the state’s consumer protection statute applied to “certain entrepreneurial aspects of the practice of law,” including services related to billing.⁹⁰ The court reasoned that “[t]hese business aspects of the legal profession are legitimate concerns of the public which are properly subject to [consumer protection legislation].”⁹¹ The *Short* court went on to note, however, that claims arising out of the “actual practice of law,” as opposed to the entrepreneurial aspects of the profession, were exempt from the statute.⁹² The Connecticut Supreme Court has also determined that lawyers are not entitled to blanket exemption from consumer protection legislation. In *Heslin v. Connecticut Law Clinic*,⁹³ the court held that the regulation of “trade or commerce” under the *Connecticut Unfair Trade Practice Act* did not “totally exclude all conduct of the profession of law.”⁹⁴ However, the court declined to decide in that case whether the act permitted regulation of “every aspect of the practice of law.”⁹⁵

The regulation of the practice of law through state consumer protection legislation correlates to legislative efforts aimed at curbing spam. Most state consumer fraud acts dictate acceptable advertising practices under the banners of trade and commerce.⁹⁶ However, the marketing of legal services, including advertising through unsolicited commercial e-mail, is directed by each state’s bar association or Supreme Court via the rules governing a lawyer’s professional conduct.⁹⁷ Based on the holdings

86. 607 A.2d 1339, 1342 (N.J. 1992).

87. *Id.*

88. *Id.*

89. 691 P.2d 163 (Wash. 1984).

90. *Id.* at 168.

91. *Id.*

92. *Id.*

93. 461 A.2d 938 (1983).

94. *Id.* at 943.

95. *Id.*

96. For example, under the *Illinois Consumer Fraud and Business Act*, the terms “trade” and “commerce” are defined as “the advertising, offering for sale, sale or distribution of any services and any property . . . directly or indirectly affecting the people of this State.” 815 Ill. Comp. Stat. § 505/1(f) (West 1992).

97. For the ABA regulation relating to the marketing of legal services, see Model Rules of Prof’l Conduct Rules 7.2-7.5 (2003). There are two types of bar organizations in the United States. Voluntary bar associations exist at the local, state and federal levels, and

of *Cripe*, *Rousseau*, and *Vort*, it appears that any attempt by states to legislate spam without the explicit inclusion of lawyers will fail to bring lawyers under its purview. Those states that subject lawyers to consumer protection legislation do so by distinguishing business-related activities from the practice of law. Both the *Short* and *Heslin* courts determined that a lawyer's billing practice was a business activity that could be regulated under each state's consumer protection law. As such, it is not difficult to imagine that those states would also consider lawyer advertising (including the use of unsolicited commercial e-mail) an entrepreneurial, business-related endeavor, and a legitimate concern of the public outside the practice of law. Thus, the spam laws of Washington and Connecticut likely apply to lawyers, even absent the specific inclusion of legal professionals.

An important issue that has not been raised in any of the aforementioned cases is the capability of the legislature to pass a law that interferes with the judiciary's power to regulate the practice of law. The separation of powers doctrine mandates that each branch of government contain a specific set of powers, and the powers assigned to one branch of government cannot be usurped by that of another branch.⁹⁸ The judiciary has inherent power to regulate admission to the practice of law by prescribing competency requirements,⁹⁹ setting proficiency-related standards for the continuing legal practice,¹⁰⁰ overseeing the conduct of lawyers as officers of the court,¹⁰¹ and supervising the practice of law generally.¹⁰²

Although it is the prerogative of the judiciary to regulate the practice of law, states have a substantial interest in maintaining a competent bar and assessing a lawyer's proficiency.¹⁰³ While the legislature may act to protect the public against incompetent lawyers pursuant to its police power,¹⁰⁴ it does so by aiding the judiciary and in no way detracts

membership is by choice. The practice of law in jurisdictions with voluntary state bars is regulated by the state Supreme Court. Unified (integrated) bar associations exist only at the state level and are quasi-governmental agencies usually established by rule of the state Supreme Court or (in the case of California) by the state legislature. Membership in unified bar associations is mandatory for every lawyer licensed to practice law in that state.

98. See *Barenblatt v. United States*, 360 U.S. 109 (1959) (explaining that the Constitutional Amendments I, IX, and X constitute the Separation of Powers Doctrine).

99. *Schware v. Board of Bar Exam. of N.M.*, 353 U.S. 109 (1959); *Verner v. Colorado*, 716 F.2d 1352, 1353 (10th Cir. 1983).

100. *Verner*, 716 F.2d at 1353.

101. *In re Integration of Neb. S. Bar Assn.*, 285 N.W. 265, 266-68 (Neb. 1937).

102. 7 Am. Jur. 2d *ATTORNEYS AT LAW* § 2 (West 2003); *Bassi v. Langloss*, 174 N.E.2d 682, 684 (Ill. 1961).

103. *Scinto v. Stamm*, 620 A.2d 99 (Conn. 1993).

104. *Id.*

from the power of the courts.¹⁰⁵ Any spam law that specifically includes lawyers must be crafted in such a way to ensure the competency of the legal profession and not unnecessarily intrude upon the judiciary's power to regulate the marketing aspects of legal practice. Thus, spam legislation which brings lawyers under its purview must act only to aid the judiciary in insulating the public against unscrupulous legal marketing practices if it is to survive constitutional scrutiny vis-à-vis the separation of powers doctrine.

2. *Federal Legislation Aimed at the Practice of Law*

Essential to the understanding of the constitutional underpinnings of power in this country is the concept of federal and state sovereignty. The basis of our federalist system is one of dual sovereignty, whereby enumerated powers are delegated to the federal government, and those not specified in the Constitution are reserved for the states.¹⁰⁶ In the most recent Supreme Court case addressing the issue, the Court held that the Tenth Amendment limits Congress' power to commandeer the legislative processes of the states:

If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.¹⁰⁷

It is well established that the responsibility of regulating the practice of law is an important governmental function that has historically been reserved to the sovereign states.¹⁰⁸ Thus, a state's authority regarding a lawyer's license to practice law within its borders is not preempted by federal law.¹⁰⁹ As such, federal spam legislation may not directly affect lawyers, as the marketing of legal services is directly tied to the practice of law regulated by the states. Moreover, even a federal spam law that explicitly includes lawyers may be insufficient to defeat the protection afforded the states under the Tenth Amendment.¹¹⁰

Unquestionably, controversy surrounds the notion that lawyers are immune from legislation touching upon the practice of law. In his dis-

105. *McKenzie v. Burris*, 500 S.W.2d 357 (Ark. 1973); *Mrotek v. Nair*, 231 A.2d 95 (Conn. 1967); *Wallace v. Wallace*, 166 S.E.2d 718, 721 (Ga. 1969).

106. See U.S. Const. amend. X; Alexander Hamilton, *The Federalist Papers* No. 32.

107. *New York v. United States*, 505 U.S. 144, 156 (1992).

108. *Wallace*, 166 S.E.2d at 723.

109. See *Mississippi S. Bar v. Nixon*, 494 So. 2d 1388 (Miss. 1986).

110. It is important to note that Congress, by careful use of its enumerated powers (including the spending and commerce powers) can achieve practically any regulatory end it wants without running afoul of the Tenth Amendment. Thus, a sufficiently crafted federal law could prohibit lawyers from engaging in marketing practices sounding in unsolicited commercial e-mail.

sent in *Cripe*, Justice Harrison writes, "Holding attorneys to the same standards of honesty and fair dealing that apply to other business people will inevitably affect the practice of law. In my view, the results can only be positive."¹¹¹ Other lawyers and policymakers have expressed a similar view.¹¹² While it remains unclear if state or federal legislation arising under civil statutes apply, lawyers certainly must comply with laws that make spam a criminal offense.¹¹³ Whether the rules governing professional conduct insulate lawyers from certain state and federal laws, the current commercial speech doctrine articulated by the Supreme Court and encapsulated in Rule 7.3 is broader than most state laws regulating spam.

C. THE MODEL RULES' CURRENT APPROACH TO SPAM

While the Model Rules contains no provision directly dealing with spam, the practice may run afoul of Rule 7.3(b)(2), which prohibits solicitation involving coercion, duress or harassment.¹¹⁴ This provision could reasonably be interpreted as prohibiting lawyers from engaging in the continuous spamming of prospective clients.¹¹⁵ The notion that spamming may already constitute an ethical violation is supported by *In Re Canter*.¹¹⁶ There, the Tennessee Supreme Court temporarily suspended the license of a lawyer who spammed e-mail LISTSERVs and Usenet newsgroups (Internet discussion fora) with a promotion for his immigration practice.¹¹⁷ The court held that the lawyer's failure to label his e-mail as advertising was an impermissible violation of the Model Rules.¹¹⁸

It is unclear whether Rule 7.3(b)(2) in its present incarnation acts as a prophylactic against the unsolicited transmission of commercial e-mail as there are no cases or ethics opinions directly on point. However, in light of Rule 7.2's adoption of electronic communication as a viable advertising medium, it is reasonable to assume that the Model Rules would tolerate the practice as long as the messages did not involve coercion,

111. *Cripe*, 703 N.E.2d at 108.

112. For example, in a recent spam seminar held at The John Marshall Law School in Chicago, Illinois, Matthew Prince, President and CEO of Unspam.com, stated that he would "resign from the bar" if state and federal anti-spam laws did not apply to lawyers.

113. Unlike civil laws that may be preempted by the Model Rules and other ethical regulations, lawyers enjoy no special immunity from criminal prosecution.

114. See Model R. of Prof. Conduct 7.3(b)(2) (2003).

115. The continuous spamming of individuals would likely be interpreted as harassment under Rule 7.3(b)(2).

116. *In Re Canter*, 95-831-O-H, Judgment of the Hearing Committee (1997).

117. *Id.* *Canter* is widely believed to be the first case of spamming to ever appear on the Internet. See *Spamming Lawyer Disbarred*, (July 10, 1997) <<http://www.wired.com/news/news/politics/story/5060.html>> (accessed Mar. 29, 2004).

118. *Id.*

duress or harassment. This probably means that lawyers are prohibited from sending a continuous stream of unsolicited commercial e-mail to the same prospective clients. Moreover, lawyers must allow individuals to opt-out of receiving further spam pursuant to Rule 7.3(b)(1), which requires the break-off of communication with those individuals who have made clear a desire not to be solicited by the lawyer.¹¹⁹ Additionally, a lawyer may be prohibited from sending unsolicited commercial e-mail to tort victims and their relatives for thirty days following an accident or disaster.¹²⁰

D. THE PROPOSED AMENDMENT TO MODEL RULE 7.3(C)

While the marketing of legal services through unsolicited commercial e-mail is not as prevalent as other commercial ventures, the unrealized potential of spamming by lawyers remains high. As more law firms take to cyberspace in an effort to reach greater numbers of clients, incidence of spam will undoubtedly rise and contribute to the ever-increasing socio-economic problems associated with the practice. The Model Rules relating to lawyer advertising and solicitation only add to the problem by essentially granting lawyers the right to spam individuals indiscriminately with very little in the way of restrictions.¹²¹ Although lawyers clearly have a constitutional right to engage in advertising as an expression of commercial speech, the Model Rules should be revised to temper that right for the benefit of the online community.

Presumably, the labeling requirement of Rule 7.3(c) is not universally imposed on e-mail solicitations for two reasons. First, it is generally difficult for recipients of e-mail to know who sent a message, as tracking e-mail to its source can be a tedious process. Second, there is a common presumption that messages sent by e-mail are not as important as those sent through traditional postal channels. As such, Rule 7.3(c) was ostensibly drafted with a view that there exists little tendency for consumers to be alarmed by e-mail solicitations, and that labeling is only necessary to protect those individuals known to need legal assistance. However, the rationale behind the Rule's labeling requirement does not address the systemic proliferation of spam, and a balance must be struck between a lawyer's right to online advertisement and the public's right to reject unwanted e-mail. While lawyers have a constitutionally protected

119. See Model R. of Prof. Conduct 7.3(b)(1) (2003).

120. See *Went For It*, 515 U.S. at 623.

121. As previously discussed, lawyers are prohibited from engaging in solicitation resulting in coercion, duress or harassment, and spam meeting these criteria will result in an ethical violation. Furthermore, a lawyer must obey an individual's desire not to be solicited in the future and must include the words "Advertising Material" in e-mail sent to prospective clients known to be in need of legal services. Other than these restrictions, lawyers are free to use spam as a marketing tool.

right to advertise, e-mail recipients have an equally compelling right to be left alone. Furthermore, Internet service providers have the right to protect their considerable investment by blocking unsolicited e-mail.¹²²

A technical remedy may be able to satisfy the interests of all parties. In an effort to stave off the proliferation of unwanted spam, many large Internet service providers have set up internal mechanisms to filter such message from reaching their subscribers.¹²³ Additionally, Microsoft and Apple have included spam filtering technology in their most recent e-mail software to meet the needs of customers.¹²⁴ Based on the spam filtering technologies currently in place, Rule 7.3(c) should be amended to read: "Further, all non-real-time electronic communications must include the phrase 'ADV:' as the first four characters in the subject line of the message, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2)." The labeling revisions to the Rule would allow individuals and Internet service providers to filter out unwanted e-mail solicitations. Moreover, revised Rule 7.3(c) would require lawyers that solicit business on Usenet newsgroups and LISTSERVs to include the phrase "ADV:" in the subject line of messages where pecuniary gain is the impetus for posting.

The amendment to Rule 7.3(c) would effectively balance the rights of both lawyers and the general public. Under the proposed revision, Internet service providers and individuals have the right to opt-out of receiving spam from lawyers, while lawyers retain the right to utilize unsolicited commercial e-mail as a marketing tool. Although some may argue that the proposed revision tends to favor the public, a great many users do not filter spam from their e-mail. The proposed labeling constraint is tantamount to Rule 7.3(c)'s requirement that written solicitations include the words "Advertising Material" on the outside envelope.¹²⁵ Furthermore, filtering spam from e-mail is analogous to individuals hanging up on pre-recorded telephone solicitations or throwing away direct mail advertisements, both viewed as acceptable options for consumers. The amendment would allow lawyers to continue reaching

122. In *CompuServe Inc. v. Cyber Promotions Inc.*, the United States District Court for the Southern District of Ohio held that CompuServe, as an Internet provider, was entitled to a preliminary injunction enjoining Cyber Promotions from sending unsolicited advertisements to any e-mail address maintained by CompuServe. 962 F. Supp. 1015, 1028 (S.D. Ohio 1997). The court additionally held that Cyber Promotions' intentional use of CompuServe's computer equipment was an actionable trespass to chattels for which the First Amendment provided no defense. *Id.* at 1015.

123. TRUSTe, *Consumer Education, Playing it Safe on the Web: Consumer Dos and Don'ts* <http://www.truste.org/partners/users_primer.html> (accessed Mar. 29, 2004).

124. Both Microsoft Outlook and Outlook Express include a spam filtering option. Apple's latest e-mail application, Mail.app, also includes spam filtering.

125. As e-mail contains no physical envelope, the subject line acts as a virtual envelope, putting the recipient on notice that a solicitation is to follow.

prospective clients through the use of unsolicited commercial e-mail, while individuals wishing to avoid those solicitations may do so. The result should satisfy all parties involved while helping to alleviate the current spam epidemic.

VI. EXAMINATION OF THE PROHIBITION OF LAWYER SOLICITATION IN CHAT ROOMS

The participation of lawyers in chat rooms provides a different dynamic than that of e-mail due to the contemporaneous nature of the communication and absence of readily available methods to record the transaction. Chat rooms are treated as direct, in-person solicitations under the Model Rules, as a lawyer's level of persuasion is presumably greater with real-time communication.¹²⁶ As a result, lawyers are prohibited under Rule 7.3(a) from engaging prospective clients in chat rooms for pecuniary gain.¹²⁷ However, should Rule 7.3 include a ban on solicitations in chat rooms, and is there an actual distinction between real-time and other forms of electronic communications?

A. REAL-TIME VS. TIME-SHIFTED COMMUNICATIONS

In order to understand Rule 7.3(a)'s ban on chat room solicitations, an examination of the differences between real-time and time-shifted communications is necessary. Chat rooms represent real-time, online communication, communiqués that occur almost instantly between two or more individuals.¹²⁸ Time-shifted communications, such as e-mail and Usenet newsgroups, do not occur instantaneously, but feature a period of time (however slight) that elapses between transactions.¹²⁹ Real-time communications are usually less structured than time-shifted transactions, resembling telephone or in-person conversations.¹³⁰ As such, real-time communications tend to contain elements of emotion and spontaneity, while time-shifted transactions are more calculated, manifesting less feeling and impulsiveness.

126. Model R. of Prof. Conduct 7.3(a) (2003). See also American Bar Association, Center for Professional Responsibility, *Ethics 2000 Commission*, <<http://www.abanet.org/cpr/ethics2k.html>>.

127. Model R. of Prof. Conduct 7.3(a) (2003). A lawyer may engage in chat room solicitation with a fellow lawyer, family member, close personal friend, or a prior client under Rule 7.3(a)(1) and (a)(2).

128. See *Reno*, 521 U.S. at 851 (1997).

129. *Id.*

130. American Bar Association, *supra* n. 126.

B. THE PROPRIETY OF CHAT ROOM SOLICITATIONS¹³¹

The justification for the ban on chat room solicitations is to spare prospective clients the possibility of “undue influence, intimidation, and over-reaching,” as real-time, online communications purportedly hold more sway over individuals than time-shifted varieties.¹³² However, to fully understand the rationale behind the prohibition of chat room solicitations, it is helpful to weigh the potential benefits against the possible harms that could result from the real-time, online contact with prospective clients.

There are several potential benefits in allowing lawyers to engage prospective clients through real-time, online solicitation. First, individuals may benefit from the expertise of lawyers whereupon the discussion of legal issues arises during a chat room session.¹³³ Second, as chat rooms tend to be organized by topic,¹³⁴ lawyers with experience in a particular area of law could be easily matched with prospective clients in need of specific legal services. For example, a person in need of trademark advice could network with competent lawyers in a “Trademark Help” chat room. Allowing lawyers to use chat rooms for direct marketing would also lessen the cost of client development, as participating in chat rooms is usually free for both the lawyer and the prospective client.

Clearly, there are many potential benefits in allowing lawyers to solicit individuals in chat rooms. However, there are also numerous problems connected with the practice that may outweigh the advantages. The most severe problem associated with real-time, online communication is the undue influence lawyers may exert over prospective clients. Lawyers spend considerable time in law school and everyday practice honing the art of persuasion, and the types of interpersonal exchanges that occur in chat rooms could subject a layperson to the importuning of a trained advocate.¹³⁵ The risk lies with the prospective client who, already feeling overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of a lawyer’s presence and insistence upon being retained immedi-

131. For purposes of this discussion, chat rooms also include Instant Messaging services such as AIM, MSN and Yahoo! Chat.

132. Model R. of Prof. Conduct 7.3 cmt. 1 (2003).

133. Lawyers are free to offer legal information (as opposed to legal advice) in chat rooms as long as the reason for doing so is not a solicitation for pecuniary gain. See American Bar Association, Law Practice Management Section, *elawyering, Best Practice Guidelines for Legal Information Web Site Providers* <<http://www.elawyering.org/tools/practices.shtml>> (accessed Mar. 29, 2004).

134. *Supra* n. 37.

135. Model R. of Prof. Conduct 7.3 cmt. 1 (2003).

ately.¹³⁶ There are also several practical drawbacks to using chat rooms as a solicitation mechanism for lawyers. First and foremost, chat rooms are generally public fora, and maintaining lawyer-client confidentiality may be problematic.¹³⁷ Equally important, chat rooms leave out vital information that a client would otherwise use to determine whether or not to retain a lawyer. For instance, while an individual may be able to discern that a lawyer is technically proficient in a certain area of law, that person has no way of knowing the lawyer's temperament. Chat rooms mask body language and other non-verbal cues that a prospective client would normally use in selecting a lawyer.

Based on a balancing of the potential benefits with the possible harms, it appears that the Model Rules are justified in prohibiting lawyers to engage in the solicitation of chat rooms for pecuniary gain.¹³⁸ The risk of undue influence and intimidation on the part of lawyers in chat rooms is too high to ignore, and the damage that could result to the integrity of the profession is substantial. Unlike e-mail, a labeling requirement is not sufficient to address the potential drawbacks associated with chat room solicitations, as the underlying problem of over-reaching still exists.¹³⁹ Thus, the Model Rules appear correct in apportioning chat rooms a higher degree of regulation than other modes of online communication, such as e-mail.

VII. THE CLASSIFICATION OF LISTSERVS UNDER THE MODEL RULES

LISTSERVs occupy a unique position in cyberspace, sharing aspects of both e-mail and chat rooms. While not formally satisfying the criteria for real-time, online communication, LISTSERV messages can transpire with very little time elapsing between them. On the other hand, extremely long periods may occur between messages on inactive LISTSERVs. Sharing the technical qualities of both, the question becomes whether LISTSERVs should be treated as real-time or time-shifted communication. The issue of how a LISTSERV fits into the Model Rules is important, as the characterization determines the type of solicitation that is ethically permitted.¹⁴⁰

LISTSERVs tend to play a major role in keeping professional organizations in contact. For example, many lawyers utilize LISTSERVs to

136. *Id.*

137. While it is true that a lawyer may initiate a private chat session with a prospective client, it is uncertain who (other than the lawyer and client) is privy to that communication. This is especially true in public chat rooms.

138. See Model R. of Prof. Conduct 7.3(a) (2003).

139. Requiring every chat room communication to begin with "ADV:" would be particularly burdensome on lawyers and not very practical.

140. See Model R. of Prof. Conduct 7.3(a) (2003).

discuss issues involving a particular area of practice. The rationale behind protecting individuals from the undue influence of lawyers would not apply in this situation, as reflected in Rule 7.3(a)(1).¹⁴¹ The problem emerges in LISTSERVs that are open to the general public, where lawyers and prospective clients could intermingle. There, the prospect of intimidation and over-reaching by lawyers may exist, and the question becomes whether a ban on solicitation is necessary to protect individuals.

LISTSERVs should be treated as time-shifted communication under the Model Rules, and a bar on lawyers utilizing this technology for purposes of client development is unnecessary. First, while it is technically feasible for messages to transpire instantaneously, LISTSERVs are not designed to facilitate real-time communication between individuals. In fact, the overwhelming majority of LISTSERV postings occur with time elapsing between messages, more closely resembling e-mail than chat rooms. Consequently, the justification banning in-person solicitations found in Rule 7.3(a) is not applicable, as lawyers are farther removed from prospective clients on LISTSERVs and less likely to unduly influence them. Second, unlike chat rooms, LISTSERV communications are always public, with each message broadcast to every subscriber on the mailing list. As such, individuals are likely to receive multiple opinions and viewpoints and not be influenced by just one. Based on these reasons, it seems evident that LISTSERVs should be classified as time-shifted communications under the Model Rules, and a ban on lawyer solicitation is not necessary to protect prospective clients.¹⁴²

VIII. CONCLUSION

Clearly, the Internet holds great promise in the area of client development for lawyers in the 21st Century. With people flocking to cyberspace in droves, the marketing of legal services on the Internet virtually guarantees a lawyer exposure to a broader base of potential clients. However, utilizing the Internet for purposes of solicitation is not a privilege to be taken lightly. As part of a greater online community, lawyers share the burden of ensuring that cyberspace remains a useful tool for society and not an advertising wasteland.

The legal profession already has a strike against it when it comes to abusing online advertising, as the first known case of spamming originated from an immigration lawyer.¹⁴³ While lawyers have a constitutional and ethical right to engage in a variety of online marketing techniques, practitioners should seriously contemplate the types of

141. See also *Edenfield*, 507 U.S. at 774.

142. As time-shifted communications, LISTSERVs must still follow the rules that regulate e-mail.

143. *Supra* n. 117.

solicitation that are considered acceptable before foraging into cyberspace. If the legal profession is to command a modicum of respect on the Internet, lawyers must conscientiously strive to engage in solicitation practices that do not offend the greater online community.

