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CHANGE IS IN THE AIR: LAWYER ADVERTISING AND THE INTERNET

Louise L. Hill*

Today, virtually all the large law firms, as well as most of the small firms, have Web sites. These sites established by law firms vary considerably, with many containing a great deal of material that is informational in nature. When considering whether state ethics rules are applicable to lawyer communications on the Internet, an initial question is whether the communication is commercial speech. Regulations on advertising and solicitation that impose restrictions on commercial speech are limited to speech of that kind. This notwithstanding, states have uniformly held that these communications are subject to regulation under

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2. Most law firm Web sites contain biographical information about the lawyers along with information about the firm and its practice. See Melinda M. Hansen, Lawyers, Firms Vie for Visibility by Creative Use of Home Pages on Web, 14 Laws. Man. on Prof'l Conduct (ABA/BNA) Current Reports, at 238 (May 27, 1998). Some sites contain general information on designated legal topics and provide "hypertext" links to other material. See Internet, supra note 1. Links might be provided to files the firm maintains, such as publications by its lawyers, or sites outside the firm may be linked, such as independent research materials. See id. Some firms post recruiting information, such as starting salaries and profiles of their branches and primary practice areas. See Hansen, supra at 238; see also Beth Berselli, Firms Find Web Sites Attract Clients, Recruits, Prestige, WASH. POST, Sept. 22, 1997, at F7. However, many law firm Web sites overtly market their services and include expedited ways for visitors to contact the firm by e-mail and invite visitors to enter their names in a "guest book." See Hansen, supra, at 238.


4. See William E. Hornsby, Jr., Ethics Rules for Ads May Cover Web Sites, NAT'L L.J., Jan. 29, 1996, at C1, C9. If a law firm or lawyer Web site is not commercial speech, it should be exempt from the regulation of these state ethics rules and afforded greater First Amendment protection. See Keith Forkin, Web Pages as Lawyer Advertising (1996) (unpublished paper written for Villanova Information Law Clinic) (on file with author).
their respective rules governing lawyer advertising and solicitation, with little or no regard "for the characterization of speech as commercial or noncommercial."

Each state has its own rules that govern the lawyers in its jurisdiction. While forty-three states have adopted the Model Rules of Professional Conduct ("Model Rules"), approximately eighty percent of these states have provisions on lawyer communications that differ from the Model Rules. With few exceptions, state rules that govern lawyer advertising give little guidance on electronic communications by lawyers. Crafted within the context of print and broadcast media, jurisdictions struggle to apply these mandates to lawyers' Internet communications.

In 1997, the American Bar Association Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") was established to study and evaluate the Model Rules, which were originally promulgated in 1983. "Experience had revealed substantive shortcomings in some rules and lack of clarity in others, and the need to reconcile text and commentary in a number of cases." One of the things that influenced Ethics 2000 was "the impact of technology and globalization." Another goal of Ethics 2000 was the promotion of "national uniformity and consistency."

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7. See Vermont Adopts New Ethics Code Based Largely on ABA Model Rules, 15 LAWS. MAN. ON PROF'L CONDUCT (ABA/BNA) No. 22, at 561 (Nov. 24, 1999).
13. Love, supra note 11.
14. Id.
15. Id.
On November 27, 2000, Ethics 2000 issued a report proposing a number of significant changes to the Model Rules, along with editorial and stylistic alterations aimed at clarification. On March 27, 2001, and May 31, 2001, additional changes to the proposed November 27, 2000, revisions were circulated by Ethics 2000. To this end, changes have been recommended to more than two-thirds of the existing rules, with four new rules being suggested. Within these comprehensive proposed revisions, Ethics 2000 posited changes to the sections of the Model Rules that address lawyer communications. A number of the proposed revisions appear to be very helpful in directing lawyers in their electronic communications; however, also of interest are the areas where Ethics 2000 declined to recommend change. Generally speaking, the proposed revisions to the Model Rules leave open a number of questions regarding what constitutes a misleading communication. In addition, Ethics 2000 has declined to address whether

18. See Love, supra note 11.
19. Id.
20. See infra note 28 and accompanying text. A matter on which the various states differ is what constitutes a misleading communication. See, e.g., Capoccia v. Committee on Prof'l Standards, No. 89-CV-866, 1990 U.S. Dist. LEXIS 17310, at *18–19 (N.D.N.Y. Dec. 20, 1990) (determining that advertising that lawyer is “smart, tough lawyer” who can obtain “fast, fair cash compensation” for automobile accident victims not false and misleading in light of no-fault laws of jurisdiction); Spencer v. Honorable Justices of Pa. Sup. Ct., 579 F. Supp. 880, 887–88 (E.D. Pa. 1984) (holding it appropriate to ban use of subjective terms, such as “experienced,” “expert,” “highly qualified,” and “competent”), aff'd, 760 F.2d 261 (3d Cir. 1985); Eaton v. Supreme Ct., 607 S.W.2d 55, 59 (Ark. 1980) (holding that advertisement including “[o]ther legal problems?” and “there is no time or subject limitation” was misleading; could indicate to public that lawyer was competent to consult and advise on any legal question); In re Zang, 741 P.2d 267, 276 (Ariz. 1987) (determining that law firm’s advertisement referring to skill associated with aspects of personal-injury litigation was false and misleading when no lawyer in firm had tried personal injury case to conclusion and firm typically referred actions culminating in litigation to other lawyers); People v. Carpenter, 893 P.2d 777, 777 (Colo. 1995) (implying that a lawyer referral service supplying many lawyers in thirteen fields was misleading, when in fact there were no more than five lawyers available in four fields); Attorney Grievance Comm’n v. Ficker, 572 A.2d 501, 507 (Md. 1990) (holding that advertisement seeking clients for “palimony” cases, while crass and in bad taste, was not false and misleading despite ambiguity of words and notwithstanding fact that jurisdiction did not recognize all types of palimony claims); Attorney Grievance Comm’n v. McCloskey, 511 A.2d 56, 59 (Md. 1986) (holding that a national advertisement offering “quickie divorce” was misleading because it created unjustified expectations); In re Donnelly, 470 N.W.2d 305, 305 (Wis. 1991) (holding that, advertising for Dominican Republic divorces was misleading, absent disclaimer of their questionable validity in given state). Disparate standards implemented by the states make
lawyers may employ devices that can be used to give a law firm's Web site priority placement during an Internet search.\(^{21}\)

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Chapter 7 of the Model Rules contains directives addressing communications about the lawyer and the lawyer's services.\(^{22}\) Model Rule 7.1 governs all communications about a lawyer's services, not just those that would be characterized as advertising and solicitation.\(^{23}\) As currently adopted, Model Rule 7.1 prohibits false or misleading communications and sets forth categorical prohibitions of what would constitute a prohibited communication.\(^{24}\) The proposed revisions to Model Rule 7.1 would retain the condemnation of false or misleading communications while deleting the categorical prohibitions from the text of the rule.\(^{25}\) False it difficult, if not impossible, for lawyers to comply with the rules of multiple jurisdictions.

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21. See infra note 80 and accompanying text.
23. Id. R. 7.1 cmt. 1. Advertising is generally considered to be a group communication that informs the public that a lawyer is available to perform services. Solicitation is generally considered to be a personal appeal directed toward a prospective client. See Judith L. Maute, Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine, 13 HASTINGS CONST. L.Q. 487, 495 (1986).
24. Model Rule 7.1 provides that:
   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:
   (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
   (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
   (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.
25. The first part of paragraph (b) of Model Rule 7.1 would be deleted since it is overly broad. The second part of paragraph (b) would be moved to Proposed Model Rule 8.4(e). Id. R. 7.1 (Proposed Rules, Nov. 27, 2000) (Reporter's Explanation of Changes). Paragraph (c) of Model Rule 7.1 would be tempered and included in new comment 3 of the rule, which provides:
   (3) An advertisement that truthfully reports a lawyer's achievements 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 the 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 misleading communications would be defined in terms of that which is materially misrepresentative or misleading, with the rule providing:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.\(^2\)

The commentary to the rule sets forth the standard for determining when a lawyer's truthful statement is misleading.\(^2\) Perhaps signaling a neutral view of client endorsements, the commentary also excludes a specific reference to client testimonials when addressing the creation of "unjustified expectations."\(^2\) Ad-

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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. 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 prospective client.

\(^2\) Id. at cmt. 3.

\(^2\) Id. R. 7.1.

\(^2\) New comment 2 to Proposed Model 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 will 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.

\(^2\) Id. R. 7.1 cmt. 2.

ditionally, the comments indicate that using disclaimers may make it less likely that a statement about a lawyer or the lawyer’s services will be construed as misleading.\textsuperscript{29}

The matter of lawyer advertising is specifically addressed by Model Rule 7.2.\textsuperscript{30} A number of revisions are suggested to Rule 7.2

Where endorsements are permitted, the character of the endorsement is subject to scrutiny. Recently a committee in Connecticut determined that a client testimonial touting a lawyer as “more knowledgeable about our matters” than lawyers at other firms could not be used unless the comparison could be factually substantiated. Connecticut Bar Ass’n Comm. on Professional Ethics, Informal Op. 01-07 (May 21, 2001). However, the following quotations from satisfied clients were viewed as acceptable:

- “Appointment was helpfully scheduled at my home, since I have difficulty accessing your facility (wheelchair).”
- “Very knowledgeable, informative as well.”
- “Service was excellent.”
- “I did not feel rushed. Mr. ___ was very patient.”
- “Have used various legal firms for our special circumstances. Attorney ___ seemed more knowledgeable about our matters.”
- “We were very impressed and pleased with the commitment to service.”
- “My experience was one of courtesy and most importantly no rushing of explanations or directions, and I found myself at ease at all times.”
- “___ made me feel comfortable and like we knew one another for years.”

Id. In a recent Virginia opinion, a committee considered “statements by third parties” and determined the following:

Even statements of opinion by clients that contain comparative statements are not appropriate. This committee adopts the mixed approach, used in Pennsylvania, while prohibiting testimonials regarding results and/or comparisons, it does allow “soft endorsements.” Examples of “soft endorsements” include statements such as the lawyer always returned phone calls and the attorney always appeared concerned.


29. MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (Proposed Rules, Nov. 27, 2000).
30. Model Rule 7.2, as it is presently constituted, provides as follows:
(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.
(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
(c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and
(3) pay for a law practice in accordance with Rule 1.17.
(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.
that would have a significant impact on lawyers who market their services electronically. The suggested changes to Model Rule 7.2 begin by specifically including "electronic communication" as a permissible vehicle for advertising,\(^3^1\) while moving examples of permissible public media to the comments section.\(^3^2\) Accommodating technology such as Web sites and electronic mail,\(^3^3\) Model

\(\text{Id. R. 7.2 (1983).} \)

31. The proposed revisions to Model Rule 7.2 are as follows:

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges and otherwise participate in the programs of a legal service organization or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

\(\text{Id. R. 7.2 (Proposed Rules, Mar. 27, 2001).} \)

32. See id. at note 29. Comment 6 would be renumbered comment 5 and provide as follows:

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, televisions and radio air time, domain-name registration, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and Web site designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

\(\text{Id. R. 7.2 cmt. 5.} \) The November 27, 2000 proposed revisions called for making a law firm as an entity, not only individual lawyers within firms, responsible for the conduct of nonlawyers involved in client development activities. Id. R. 5.3. However, the endorsement of law firm discipline was criticized by the bar, primarily because of the concern that it "would deemphasize individual responsibility, which has always been the touchstone of professional discipline . . . .” Ethics 2000 Panel Gets Suggestions For Reforming Its Proposed Reforms, 17 Laws. Man. on Prof’l Conduct (ABA/BNA) No. 5, at 140 (Feb. 28, 2001). Apparently persuaded by this argument, Ethics 2000 decided to drop its recommendations that would subject law firms to discipline because “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 (2001).

Rule 7.2(a) would simply state that "[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." Proposed revisions to the commentary of Model Rule 7.2 recognize the lawful use of electronic mail as a permissible practice and acknowledge that the Internet is "an important source of information about legal services." The commentary would also reflect that nonlawyers, such as publicists and Web site designers, may be paid to engage in client development activities. Because advertising is often disseminated in areas where a lawyer does not maintain an office, communication under Model Rule 7.2 would have to include an office address for the lawyer or law firm. This is to help "provide prospective clients with important information about where the lawyer or law firm is located—an important fact in this era of multi-jurisdictional advertising."

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34. Id.
35. Id. cmt. 3. It is suggested that comment 3 of Model Rule 7.2 be amended to add the following language at its conclusion:

Similarly, 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. 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.

Id. "The reference to ‘lawful’ electronic mail was included to require lawyers to comply with any law that might prohibit 'spamming'—i.e., the mass e-mailing of commercial messages." Id. (Reporter's Explanation of Changes).

The use of electronic mail as a permissible practice had come into question early on with widespread use of the Internet. A Michigan ethics opinion found the use of electronic mail permissible, likening it to a facsimile transmission or post card. See State Bar of Mich., Op. RI-276 (1996). The Michigan Committee noted that electronic mail is "not as private as sending a sealed letter, and there is an expectation, but no guarantee, that the communication has been received by the intended recipient." Id. In contrast, an early Tennessee ethics opinion likened promotional electronic mail to a telephone call, which triggered the prohibition against telephone contact in Model Rule 7.3. See Tennessee Sup. Ct. Bd. of Prof'l Responsibility, Advisory Op. 95-A-570 (1995). The Tennessee opinion reasoned that a promotional electronic mail posting to newsgroups resembles a phone call because it imposes extra access charges on users, intrudes on their privacy, and cannot be easily ignored. Id. The majority of states followed the former approach, although it has been noted that electronic mail reaches potential clients more quickly than the post and may have a greater impact on the recipient. See Internet, supra note 1, at 81:599.

36. See supra note 32.
37. Current Model Rule 7.2(d) requires that an advertisement include the name of at least one lawyer responsible for an advertising's content. See Model R. 7.2(d), supra note 30. The proposed change would convert subsection (d) to subsection (c) and read as follows: "Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content." See supra note 30.
Model Rule 7.2 is presently constructed, only the name of a lawyer responsible for an advertisement's content must be included in the communication.\textsuperscript{39}

Model Rule 7.2 currently provides that lawyers must keep a copy or recording of any advertising for two years, along with a record of when and where it was used.\textsuperscript{40} Such an archiving requirement places an onerous burden on lawyers who update and supplement their Web sites on a routine basis.\textsuperscript{41} Furthermore, such an archiving requirement could discourage a lawyer from vigilantly revising a site with current material, working to the disadvantage of both the public and the purveyor of the information.\textsuperscript{42} Realizing that this archiving requirement "has become increasingly burdensome, and such records are seldom used for disciplinary purposes[,]\textsuperscript{43} Ethics 2000 suggests that it be deleted.\textsuperscript{44} Thus, problems that had arisen relating to what type of records must be retained, or what changes to a Web site must be documented, would be eliminated.\textsuperscript{45}

At present, Model Rule 7.2 prohibits a lawyer from giving anything of value for the recommendation of a lawyer's services, with limited exceptions.\textsuperscript{46} One of these exceptions is the payment of the usual fees of a not-for-profit lawyer referral service or legal ser-

\textsuperscript{39} Id. R. 7.2(d) (1983).
\textsuperscript{40} Id. at 7.2(b).
\textsuperscript{41} See Hill, supra note 5, at 830.
\textsuperscript{42} Id. at 829–30.
\textsuperscript{43} MODEL RULES OF PROF'L CONDUCT R. 7.2 (Proposed Rules, Mar. 27, 2001) (Reporter's Explanation of Changes).
\textsuperscript{44} This differs from the position taken in a discussion draft of proposed changes to Rule 7.2 that was circulated on February 21, 2000, calling for the two-year maintenance of an "electronic record" as an option to satisfy the archiving requirement. Id. R. 7.2(b) (Discussion Draft 2000).
\textsuperscript{45} A North Carolina committee took the position that the retention requirement of their rules "may be achieved by printing a hard copy of all screens on the Web site as launched and subsequently printing hard copies of any material changes in the format or content of the Web site." N.C. State Bar, Proposed Op. RPC 239 (1996). An Arizona Committee also determined that retention of copies of Web sites was necessary, along with copies of material changes. See State Bar of Ariz., Comm. on Rules of Prof'l Conduct, Formal Op. 97-04, at 6 (1997). Proposed Tennessee Rule 7.2 has a filing requirement for advertisements that mandates a subsequent filing for communications "changed in any material respect." Tenn. Bar Ass'n Comm. for Study of Prof'l Conduct, Final Report, Proposed Rule 7.2(a) (2000). Ethics 2000's proposal to eliminate the archiving requirement dispenses with the need to determine what constitutes a "material" change.
\textsuperscript{46} See supra note 30.
vice organization. The proposed changes to the Model Rules would broaden this rule by allowing lawyers to also pay for and participate in for-profit qualified lawyer referral services. A qualified lawyer referral service is “one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients.” Attempting to comply with appli-

47. See supra note 30.
48. See supra note 31. The recommendation to allow lawyers to participate in for-profit lawyer referral services is a recent change to Ethics 2000’s recommendations. The November 27, 2000, final report deferred consideration of whether to revise the rule to permit lawyers to pay the usual charge of for-profit lawyer referral services. MODEL RULES OF PROF’L CONDUCT R. 7.2 (Proposed Rules, Nov. 27, 2000) (Reporter’s Explanation of Changes).

The rules in Ohio expressly permit both the payment of a membership or registration fee to a lawyer referral service as well as a fee calculated on a percentage of the legal fee earned. Recently, an Ohio committee determined that a lawyer could pay a lawyer referral service a registration fee as well as a fee calculated on a percentage of the legal fee earned by the lawyer. Ohio Op. 2000-5, in 2001-8 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) at 54 (Dec. 1, 2000). The committee noted, however, that the lawyer referral service must meet certain criteria set out in the Ohio rules, and the Ohio lawyer must determine whether the referral service meets the requirements. Id. at 55. In Iowa, where such an arrangement is not permitted, an ethics committee recently determined that a law firm could not provide a link to a company that provides a lawyer referral service and be included in the company’s electronic database that is accessible by the general public. Iowa Sup. Ct. Bd. of Prof’l Ethics and Conduct, Op. 00-07 (Dec. 5, 2000), available at http://www.iowa-bar.org/ethics.nsf. The Board determined that the proposed program was a lawyer referral service that was not in compliance with Iowa’s rules. Id.

49. MODEL RULES OF PROF’L CONDUCT R. 7.2. cmt. 6 (Proposed Rules, Mar. 27, 2001). In recommending this change, Ethics 2000 attempted “to find the right balance between the need to protect the expectations of prospective clients who contact lawyer referral services and the need to allow lawyers some flexibility to pay the usual charges and otherwise participate with other mechanisms that may be developed to expand consumer access to needed legal services.” Id. (Reporter’s Explanation of Changes to the Final Draft). Proposed comment 6 to Proposed Rule 7.2 would preclude “extension of the special regulatory regime governing lawyer referral services to prepaid or group legal services plans and other similar legal service organizations.” Id. Proposed comment 6 would provide as follows:

A lawyer may pay the usual charges of a legal service organization. A legal service organization is a prepaid or group legal services plan or similar organization that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Because of the prevalent understanding among lay persons that lawyer referral services are public service organizations that afford prospective clients protections they would not have if they tried to secure counsel on their own, this Rule only permits a lawyer to pay the usual charges of, and otherwise participate in the programs of, a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See e.g. American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assur-
cable legal ethics rules, some innovative service providers have structured affiliations in the form of group advertising to make on-line information about legal services available to the public. Other service providers have structured sites where lawyers can bid on designated legal projects. The recommendation to allow

\[\text{Id.}\]

50. A number of innovative service providers have formulated mechanisms for providing information about legal services on-line. Affiliation with some of these entities thus far has been viewed as a permissible form of group advertising. In February 2001, an ethics committee of the Nassau County, New York Bar Association advised that it would be proper for a lawyer to affiliate with AmeriCounsel.com, Inc. Nassau County (N.Y.) Bar Ass’n Comm. on Profi Ethics, Op. 01-4 (Feb. 6, 2001). For-profit lawyer referral services are not permitted in New York; however, the committee viewed this affiliation as a permissible form of group advertising. Id. At the Web site of AmeriCounsel.com, a person seeking legal representation chooses among legal categories and selects from a list of lawyers that are available for hire. AmeriCounsel forwards the selected lawyer the user’s name, a brief description of the matter and a list of related parties. If the lawyer identifies no problems, such as conflicts of interest, AmeriCounsel so notifies the user. Lawyers participating in the network keep their entire legal fee and clients pay a separate fee to AmeriCounsel for its technology and administrative services. The committee determined that lawyers do not give anything of value to AmeriCounsel for participating in the attorney network. Id. at 4. The fact that lawyer participation enables AmeriCounsel to operate its business does not count as compensation. Because AmeriCounsel does not influence or control a user’s choice of counsel, the committee determined that it does not “recommend” lawyers or “obtain employment” for them. Id. According to the committee, lawyers who affiliate with AmeriCounsel do not assist nonlawyers in the unauthorized practice of law since AmeriCounsel does not hold itself out as a law firm or engage in any services nonlawyers are forbidden to perform. Id. at 7. Identified as a possible problem, however, were some statements AmeriCounsel used. Specifically, describing the attorney network as “unparalleled,” AmeriCounsel’s Legal Advisory Counsel as “prestigious,” and affiliated attorneys as “prominent,” may be considered false or misleading. Id.

51. In the District of Columbia, where for-profit agencies providing advertising or referral services to lawyers are permitted, an ethics committee considered a Web site where potential clients post legal projects with an invitation for lawyers to bid on the work. D.C. Bar Legal Ethics Comm., Op. 302 (Nov. 21, 2000). After registering to participate on this site, lawyers respond to “Requests for Proposals” for legal work by filling out a summary of their bid and fee structure. The Web site sponsor charges the client a fee of two percent of the amount paid by the client to the selected law firm for the work. The committee approved lawyer participation in this type of site, noting that lawyers may pay a fee to access the site as long as they inform potential clients of this fact in their bids. Id. Additionally, lawyers must inform a potential client of any effect this payment may have on the proposed fee to be charged to the client. Id.

The Committee on Professional and Judicial Ethics of the Bar of the City of New York
lawyers to pay for and participate in for-profit lawyer referral services would facilitate on-line information about the availability of legal services that could be very useful to the public. This recommendation would enable lawyers to make use of "other mechanisms that may be developed to expand consumer access to needed legal services."52

Model Rule 7.3 addresses direct contact with prospective clients.53 In its current form, Model Rule 7.3 prohibits solicitation of

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53. Model Rule 7.3 currently provides as follows:

(a) 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's doing so is the lawyer's pecuniary gain.

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

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

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

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization approved a similar, but distinguishable, plan to the one approved by the District of Columbia Committee. In New York, where for-profit legal referral services are not permitted, the Committee found that lawyers could respond to an invitation to bid on legal projects through an Internet Web site where: (1) the client's invitation was not initiated by the lawyer; (2) only the client, and not the lawyer, was charged a fee for access to the information; (3) no legal fees were shared with the service provider; and (4) responding lawyers were not prescreened, approved, or otherwise regulated by the plan. Ass'n of the Bar of the City of New York, Comm. on Prof'l & Jud. Ethics Formal Op. 2000-1 (2000), available at http://www.abcny.org/eth2000.htm. Conversely, a Maryland committee found a proposed plan ethically flawed, where prospective clients would access a Web site to describe their cases and consent to having lawyers access this information to determine whether to take their case. Maryland State Bar Ass'n Comm. on Ethics, Op. 01-03 (May 16, 2001). The agreement between the Internet service provider and participating attorneys would require each attorney to pay the service provider a referral fee if the lawyer obtained engagement and that any engagement name both an attorney for the service provider and the participating attorney as the attorneys for the client. The engagement agreement would have the client agree to pay all fees to the attorney for the service provider and describe the division of fees between the attorneys, provide that all legal work be performed by the participating lawyer in consultation with the attorney for the service provider, and specify that any advance of expenses be the sole responsibility of the participating attorney. Id.
professional employment by telephone or in-person contact from a prospective client with whom the lawyer has no family or prior professional relationship when monetary gain is a significant motive of the lawyer. Concluding that "the interactivity and immediacy of response in real-time communication presents the same dangers as those involved in live telephone contact[,]" proposed revisions to Model Rule 7.3 would specifically prohibit lawyers from soliciting professional employment through real-time electronic contacts, such as Internet chat rooms. Suggested changes

not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. 


54. Id.
56. It is suggested that Model Rule 7.3 be amended to read as follows:

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

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) The solicitation involves coercion, duress or harassment.

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

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which used in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

would also add "lawyers" and "close personal friends" as exemptions from the prohibition against in-person solicitation. 57 Ethics 2000 reasoned that lawyers do not need the protection advanced by Model Rule 7.3, and it is "difficult to justify prohibiting a lawyer from calling a close friend and offering to represent a friend in a legal matter." 58

Model Rule 7.3 presently contains a labeling requirement for targeted solicitations, which are sent to prospective clients known to need legal services in a specific matter. 59 As the Rule currently reads, communications soliciting professional employment must be labeled "Advertising Material" on the outside envelope and at the beginning and ending of any written or recorded messages. 60 The proposed revisions to Model Rule 7.3 would require labeling with targeted "electronic" communications as well. 61 Thus "a lawyer sending e-mail to a person known to need legal services will

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 responding to unwanted solicitations." State Bar of Ariz., Comm. on Rules of Prof'l Conduct, Formal Op. 97-04 (Apr. 7, 1997), available at http://wwwazbar.org/EthicsOpinions/Data/97-04.pdf. The Arizona opinion further noted, 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 associated with targeted mailings. Id.

In a 1998 ethics opinion, the Philadelphia Bar Ethics Committee determined that lawyers generally may communicate in chat rooms with non-clients about the subject of contemplated or pending litigation. Philadelphia Bar Ethics Comm. (Mar. 1998), available at http://www.philabar.org/public/ethics. In a 2000 ethics opinion, the District of Columbia Bar Legal Ethics Committee determined that lawyers may use Internet sites as a tool to find people willing to sign up as plaintiffs for a class action lawsuit provided the lawyers disclosed their own financial interest in the case and didn't make misleading statements. D.C. Bar Legal Ethics Comm., Op. 302 (Nov. 21, 2000). Proposed revisions to the Model Rules do not specifically address whether matters relating to class actions are exempt from the proposed prohibition against real-time electronic contacts.

57. MODEL RULES OF PROF'L CONDUCT R. 7.3 (Proposed Rules, Nov. 27, 2000).
58. Id. (Reporter's Explanation of Changes).
59. See supra note 51. As originally adopted, the Model Rules prohibited targeted, direct mail solicitation. MODEL RULES OF PROF'L CONDUCT R. 7.3 (1983). However, in the case of Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), the United States Supreme Court determined that direct-mail solicitation lacked "the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'" Id. at 475 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985)). Noting that a targeted direct-mailing "poses much less risk of overreaching or undue influence" than in-person solicitation, the Court determined that less restrictive means existed for regulating its potential abuses. Id. In response to the Shapero decision, the Model Rules were amended to permit targeted mailings. See supra note 51.
61. See supra note 56.
be required to identify the e-mail as an advertisement." It is unclear whether an e-mail falling under Rule 7.3 would have to be labeled "Advertising Material" in the subject portion of the standard electronic mail format, or simply at the beginning and end of the text of the message itself.

Ethics 2000 also recommended a substantive change to Model Rule 7.4 which addresses certification of fields of practice and specialization. Currently, lawyers may claim certification as a specialist even though the organization that certifies the lawyer is not approved by an appropriate state authority or accredited by the ABA. In such a situation, the lawyer need only indicate the absence of such approval in the same sentence as the claim is made. Feeling this does not provide "an adequate safeguard


63. If an e-mail must be labeled "Advertising Material" in the subject portion of the standard electronic mail format, the recipient of the communication can delete the message as an unwanted advertisement without opening it. If labeling the message at the beginning and end of the text satisfies compliance with the rule, the recipient of the communication would have to open the message and begin reading to discover its character.


65. Id. Model Rule 7.4(c) provides alternative sections for jurisdictions where there is a regulatory authority granting certification of specialties and for jurisdictions which have no such procedure. For jurisdictions where there is a regulatory authority granting certification or approving organizations that grant certification, the following language is used:

[A] lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority but only if:

(1) such certification is granted by the appropriate regulatory authority or by an organization which has been approved by the appropriate regulatory authority to grant such certification; or

(2) such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from, the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertisement subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

Id. R. 7.4(c). For jurisdictions where there is no procedure either for certification of specialties or for approval of organizations granting certification, the following language is used:

[A] lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in this jurisdiction for approving certifying organizations. If, however, the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement.

Id. R. 7.4(d).

66. Id.
against potentially misleading claims of certification by an unapproved organization," the proposed rule recommends that organizations conferring certification of specialization be approved by an appropriate state authority or accredited by the ABA.\(^6\) The proposed rule also states that the name of the certifying organization must be clearly identified to enable prospective clients to make further inquiry about the certification program to which the lawyer refers.\(^6\)

Model Rule 7.5 addresses firm names and letterheads.\(^6\) Pursuant to Model Rule 7.5, lawyers are not permitted to "use a firm name, letterhead or other professional designation that violates Rule 7.1."\(^7\) Questions have arisen as to how a law firm's domain name should be characterized.\(^7\) In apparent response to this question, Ethics 2000 suggested that the commentary to Model Rule 7.5 be changed to include the following: "[a] lawyer or law firm may also be designated by a distinctive Web site address or

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67. Id. R. 7.4 (Proposed Rules, Nov. 27, 2000) (Reporter's Explanation of Changes)
Current paragraph (c) and alternative (c) would be replaced with new paragraph (d), providing as follows:

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Id. R. 7.4 (Proposed Rules, Nov. 27, 2000).

68. Id.


70. Id.

71. See infra note 82 and accompanying text. When asked whether a Web site could use a trade name as a law firm name, an Arizona committee responded negatively, since Arizona prohibits the use of trade names for law firms. State Bar of Ariz., Comm. on Rules of Prof'l Conduct, Formal Op. 97-04 (Apr. 7, 1997), available at http://www.azbar.org/EthicsOpinions/Data/97-04.pdf. The Arizona committee went on to state that "[d]omain names, however, are not firm names and thus are not subject to this limitation." Id. More recently, an Arizona opinion held that a law firm domain name does not have to be identical to the actual name of the firm, although the domain name cannot be misleading nor imply any special competence or unique affiliation unless it is factually true. State Bar of Ariz., Comm. On Rules of Prof'l Conduct, Formal Op. 2001-05 (Mar. 2001), available at http://www.azbar.org/EthicsOpinions/Data101-05.pdf. An Ohio board also determined that domain names are not subject to regulation as firm names since domain names actually represent site addresses. However, the Ohio board determined that domain names are subject to rules that prohibit false or misleading communications and that restrict specialization claims. Ohio Sup. Ct. Bd. of Comm'r's on Grievances and Discipline, Op. 99-4 in 2000-1 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) OH: Opinions, at 36 (June 4, 1999).
comparable professional designation. If a law firm’s Web site is recognized as a professional designation under Model Rule 7.5, the Web site address must comply with the requirements of Model Rule 7.1.

II

The proposed changes to Chapter 7 of the Model Rules help clarify a number of questions relating to electronic communications. For instance, “electronic communication” is specifically recognized as a permissible vehicle for advertising, as is the lawful use of electronic mail. Proposed revisions would eliminate the archiving requirement for advertising, and Web sites would be recognized as professional designations. Solicitation of professional employment by real-time electronic contacts would be prohibited, and targeted e-mails would have to be labeled as advertising. However, Ethics 2000 declined to address certain issues related to electronic communications. In particular, it is unclear whether using certain types of devices that can give a law firm Web site priority placement during a search can be classified as misleading.

On February 21, 2000, Ethics 2000 released Public Discussion Drafts with proposed revisions to some of the Model Rules, including proposed revisions to Model Rule 7.5. In the Reporter’s Explanation of Changes to the proposed Rule 7.5 revisions was 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 Web site and that there is some potential for improper use, the Commission thinks the Model Rules should not directly address such

73. Id. (Reporter’s Explanation of Changes). This notwithstanding, it seems that any communication about a lawyer or the lawyer’s services must comply with the requirements of Model Rule 7.1.
74. See supra notes 31, 34, and accompanying text.
75. See supra note 35 and accompanying text.
76. See supra notes 43, 44, and accompanying text.
77. See supra note 72 and accompanying text.
78. See supra notes 55, 56, and accompanying text.
79. See supra notes 61, 62, and accompanying text.
specific issues. If abuses arise, they can be adequately resolved by an application of the general principles in Rules 7.1 or 8.4.80

From the above noted statement, at best we can glean that while priority placement devices in and of themselves are not improper, there are circumstances where their implementation may be misleading or misrepresentative, thereby amounting to professional misconduct.

The World Wide Web links information on Internet-linked computers "by setting common information storage formats (HTML) and a common language for exchange of Web documents (HTTP)."81 A Web site can be accessed directly through its Uniform Resource Location (URL), which is a Web site address usually made up, in part, of top level and secondary level domain names.82 Another way a Web site can be accessed is through a link from any other linking site.83 A user seeking to access a site

80. MODEL RULES OF PROF'L CONDUCT R. 7.5 (Proposed Rules, Feb. 21, 2000) (Reporter's Explanation of Changes). This statement was not carried forward into the November 27, 2000, Reporter's Explanation of Changes. Id. (Proposed Rules, Nov. 27, 2000). Model Rule 8.4 addresses the matter of professional misconduct. Model Rule 8.4(c) provides that "it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Id. R. 8.4 (1983) (amended 1998).


82. Domain names contain a number of components, one of which is the generic Top-level Domain (gTLD) that applies to the type of user and appears at the right end of the domain name. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (June 10, 1998). Another component is the second level domain (SLD), that is generally selected and registered by the user and appears to the left of the gTLD. See id.

83. Links are "hidden code in a Web page that enables a user to leave that page and travel to another by simply clicking a mouse." Mark Hankins, Ambulance Chasers on the Internet: Regulation of Attorney Web Pages, 1 J. TECH. L. & POL'Y 3, 30 (1996). Although not addressed by Ethics 2000, an issue that lawyers have recently faced is whether material linked to the site of a lawyer must comply with the applicable state ethics rules. "If... lawyer[s] [are not] responsible [for material to which they link,] lawyers would be able to provide their potential clients with information, through the links, that would be impermissible for them to do directly." ABA Comm'n on Advertising, A Re-examination of the ABA MODEL RULES OF PROF'L CONDUCT Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purpose of Discussion, at http://www.abanet.org/legal services/whitepaper.html (July 1998) [hereinafter White Paper].

It has been suggested that with links to Web pages, Model Rule mandates should be applicable only when the linked material is under the control of the lawyer. See Internet, supra note 1, at 81:555. An alternative test for Model Rule applicability is "whether the linked material is primarily concerned with obtaining clients." Id. (citations omitted). The comments to recent Florida Rules, promulgated in December, 1999, specifically state that the rules related to computer-accessed communications do not apply simply because someone links material to a lawyer's site. FLA. RULES OF PROF. CONDUCT R. 4-7.6 cmt. (1999). The Florida rules do not address, however, whether the rules apply when it is the lawyer who links material with his or her own site. See id.
can also implement search engines. "Search engines identify sites mechanically by the words that appear in" a site's HTML language.\textsuperscript{84} Search engines identify sources that contain designated words, and matches are found.\textsuperscript{85} Generally, the more matches found in a source, the higher the rating the source will have. The higher the rating, the closer to the top of a search the source will appear.\textsuperscript{86} This situation has been likened to yellow-page advertising, where sources that appear at the top of a list are felt to have a competitive advantage.\textsuperscript{87} A user can increase the chance of a priority search placement by using word-based mechanisms such as repetitive phrases,\textsuperscript{88} meta tags\textsuperscript{89} and invisible ink.\textsuperscript{90} However, non-word based devices can also be implemented to increase the likelihood a user will arrive at a site. Software programs can be written to hit a Web site and come back repeatedly, acting as a loop. This loop generates repeated hits on a site, increasing the number of visits, which can produce a higher ranking on a Web server. Devices such as invisible links and automatic forwards may also be implemented to cause a user to arrive at a site directly. It is unclear what types of mechanisms might be classified as the "abuses" alluded to by Ethics 2000 in its February 21, 2000, draft.\textsuperscript{91}

A Nassau County, New York ethics committee has approved a cyberspace advertising plan where lawyers pay to be listed as

\begin{footnotes}
\footnote{A burden on the lawyer to monitor linked material outside his or her control would be an onerous one. Given the ease with which material can be changed, an obligation on a lawyer to check linked material for compliance could have the practical effect of eliminating the lawyer's ability to link. Arguably, this "would serve to suppress information to the consumer, rather than protecting the public from misleading practices." See Hill, supra note 5, at 842. One thing that makes linking a particularly troublesome issue is a lawyer does not necessarily know if someone has linked to his or her site. At the present time, there is no requirement that links be registered.}
\footnote{White Paper, supra note 83.}
\footnote{To find information on the hundreds of millions of Web pages that exist, a search engine employs special software robots, called spiders, to build lists of the words found on Web sites. Curt Franklin, How Internet Search Engines Work, at http://www.howstuffworks.com/search-engine1.htm (last visited Jan. 25, 2002). The process of building lists is called "Web crawling."Id.}
\footnote{Typically, a consumer conducting a search will view results on a screen that will show approximately ten matches at a time. See White Paper, supra note 83.}
\footnote{Id.}
\footnote{See infra note 97 and accompanying text.}
\footnote{See infra note 98 and accompanying text.}
\footnote{See infra note 99 and accompanying text.}
\footnote{See supra note 80 and accompanying text.}
\end{footnotes}
“sponsors” in banner advertisements on Internet sites that provide information about different areas of the law.\textsuperscript{92} However, the committee condemned as misleading a practice that would allow lawyers, for an increased fee, a priority placement at the head of an alphabetical list with a “lead counsel” identification.\textsuperscript{93} Arguably, the quarrel the Nassau County ethics committee had with the plan’s format was the designation “lead counsel,” rather than the fact that lawyers were listed out of alphabetical order.\textsuperscript{94} The committee stated that the impression could be that the noted lawyers “are exceptional compared to other attorneys and are recommended as leading counsel.”\textsuperscript{95}

Viewing priority placement as an available tool in the electronic dissemination of information, it does not appear that one should be condemned merely for implementing priority placement devices. This notwithstanding, there are certain circumstances where the use of priority placement mechanisms should be coupled with disclosures of some type.\textsuperscript{96} Word-based priority placement devices, such as repetitive phrases, meta tags, and invisible ink, have been previously considered. With repetitive phrases, words are repeatedly used on a site, causing a key-word search to rank the site more highly than if the words appeared only once or twice. Since search engines identify sites by looking for key-words in HTML language, “if a lawyer’s home page has repetitive words or phrases that correspond to those words or phrases used by the consumer to do the search, the Web site will appear at or near the top of the resulting search.”\textsuperscript{97} With repetitive phrases, the words used are apparent to the visitor, who can readily observe why the resulting search yielded the source in its ultimate place.

With meta tags and invisible ink, the language which helps trigger a search is not readily apparent to the visitor. Meta tags

\textsuperscript{92} See Nassau County (N.Y.) Bar Ass’n, Comm. on Prof’l Ethics, Op. 99-3 (1999), at http://www.nassaubar.org/ethic_opinions_details.cfm?opinionID=10. The panel stated that “[t]o avoid any ... misunderstanding ... a disclaimer [should be used indicating] that the ... service is not an attorney referral service, [that it] does not ... make recommendations of ... the use of any attorney’s services, and that the ‘Sponsor’-attorney did not prepare ... legal information being provided by the Internet service.” \textit{Id.}

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} See Hill, supra note 5, at 844.

\textsuperscript{95} See supra note 92.

\textsuperscript{96} See Hill, supra note 5, at 844.

\textsuperscript{97} White Paper, supra note 83.
are words that are embedded in HTML language, and "[invisible ink is the placement of words on a background with the same color ink as the background. . . .] The inclusion of designated language in meta tags, or the inclusion of designated language in invisible ink, can cause a site to be identified in a search, yet the viewer might see no basis for the site’s placement when the site is accessed.

When viewing these word-based priority placement devices, some have concluded that as long as the words used with these mechanisms are not misleading, they should be considered mere tools that expand the effectiveness of Internet advertising. While perhaps giving some lawyers a competitive advantage, in reality priority placement merely helps the visitor access readily apparent information that the visitor can choose to use or ignore. Some suggest, however, that when these devices are not readily apparent to the visitor, lawyers should disclose the fact that these mechanisms are being used within the context of the site itself. Such disclosure would provide the visitor with information regarding why a designated site was identified.

As technology continues to advance, more innovative measures are being developed which may increase the likelihood that a user will access a particular site. Perhaps more troubling than text-based priority placement tools such as repetitive phrases, meta tags and invisible ink are non-substantive mechanisms which increase the likelihood that a visitor will land on a particular site.

98. While not readily apparent when viewing a home page, meta tags can be seen by clicking on “view” and then clicking on “source.” Id. Meta tags can be very helpful in guiding a search engine in allocating what meaning should be given to a word with several possible meanings. See Franklin, supra note 85.


100. It seems that it might be easier for a site to obtain a higher ranking using invisible ink, given the ease with which multiple repetitions could be included on a home page.

101. See cases cited in supra note 20. Given the multi-jurisdictional nature of the Internet, information is made available to anyone, anywhere, who has the necessary access and equipment. This raises a question for lawyers as to which jurisdiction’s rules are applicable. It is easy to say a communication cannot be misleading, but hard to delineate what is misleading given jurisdictional differences. Id. Prohibiting advertising that is false or misleading is a permissible regulation of commercial speech. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

102. See White Paper, supra note 83; Hill, supra note 5, at 844-45.

103. See White Paper, supra note 83.

104. See Hill, supra note 5, at 845. If multiple meta tags, or repetitious terms in invisible ink are used, these facts should be incorporated into the disclosure. Such information might further help to explain why a particular site is given a specific designation.
With text-based priority placement tools, jurisdictions may mandate compliance with professional standards on misleading communications with respect to the text itself. Admittedly, this is not an ideal control since what constitutes a misleading communication is often unclear and varies considerably from jurisdiction to jurisdiction. Additionally, this leads to questions concerning which jurisdiction’s rules should apply and which jurisdiction’s rules define permissible conduct for the lawyer.

105. While jurisdictions have disparate rules relating to advertising and solicitation, every jurisdiction prohibits lawyers from making communications that are false or misleading. See Hill, supra note 6, at 91–93; Krakaur, supra note 10, at 2. This is not as straightforward as it sounds, however, because jurisdictions differ on what constitutes a false or misleading communication. See supra note 20; infra note 106.

106. See supra note 20. When inquiring into whether a particular assertion by a lawyer is misleading, state ethics committees, either in a binding or an advisory fashion, have condemned certain practices. See, e.g., Conn. Informal, Op. 88-3, Unsolicited Mailed Advertising [1998 Transfer Vol.] Nat’l Rep. Legal Ethics (Univ. Pub. Am.) CT: opinions:26 (1988) (determining that advertisement employing fabricated newspaper article with headline “Biker Awarded $250,000 for Accident” was misleading because the article was not written by independent source but created for advertising purposes); D.C. Op. 235, Registered Limited Liability Partnership/Limited Liability Company, [1993 Transfer Binder] Nat’l Rep. Legal Ethics (Univ. Pub. Am.) DC: opinions:ll (1993), available at http://www.dcbar.org/attorney-resources/opinions/opin235.pdf (noting that a law firm registered in another state as “limited liability partnership” or “limited liability company” using phrase “L.L.P.” or “L.L.C.” in advertising may be misleading because citizens may be unfamiliar with those terms); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 539 (1982) (stating that lawyer’s description of selected past cases with recovery amounts in advertisement was misleading because it was difficult to verify and the advertisement suggested that lawyers can achieve similar results in other cases); Penn. Bar Ass’n, Comm. on Legal Ethics and Prof’l Resp., Op. 85-170, [1986 Transfer Vol.] Nat’l Rep. Legal Ethics (Univ. Pub. Am.) PA: opinion: 8 (1985) (noting that the use of subjective terms such as “expert” or “competent” are impermissible because such terms are inherently misleading); Phila. Bar Ass’n Comm. on Prof’l Guidance, Op. 95-12 (1995), available at http://www.philabar.org/public_ethics/displayethics.asp?id (advertising “25 Years of Legal Representation” and “30 Years Legal Representation” was contradictory and misleading because advertisement failed to explain to whom experience belonged and in what field experience was gained).

107. Recognizing that a lawyer may be subject to more than one set of rules that impose different obligations, Ethics 2000 has proposed revisions to Model Rule 8.5 that attempt to help resolve the issue. After suggesting in subsection (a) that the rule be modified to expand disciplinary enforcement jurisdiction over lawyers not admitted in a jurisdiction, proposed Rule 8.5(b) would provide as follows:

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to
Scrutinizing the actual words used in a text-based priority placement mechanism can serve as a means to help protect the public from misrepresentation, while at the same time making useful information available to consumers. In addition to applying professional standards to text-based communications, these standards should be applicable where the user is able to manipulate the search engine to correlate meta tags with page content and reject meta tags that do not match the words on the page. When non-text based mechanisms are implemented, a comparable element of substantive control, tied into a particular site, is not present. Rather, with non-text based mechanisms, it is the mechanism itself, as a specific implementation of the mechanism, which should be subject to scrutiny.

Software programs can be written to repeatedly hit a Web site and come back in a loop-type fashion. This generates many hits on a Web site, which might push the site's ranking higher on a Web server that considers the number of visits to a site in its ranking criteria. Implementing this type of software generates "visits" to the site which are phantom in nature. Is this a deceptive practice since there is no substantive basis for the site's resulting inflated position if the number of visits is a ranking criteria? Or is one who uses this type of software simply taking the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Model Rules of Prof'l Conduct Proposed R. 8.5 (Proposed Rules, Nov. 27, 2000). With communications on the Internet, it is difficult to determine where conduct has its predominant effect. The proposed safe harbor provisions of the rule protect the lawyer who makes a reasonable (if incorrect) determination about which jurisdiction's rules apply. Id.

108. Proposed revisions to Model Rule 5.5, addressing Unauthorized Practice of Law, would require lawyers admitted in an adopting jurisdiction to comply with rules in other jurisdictions where they practice. Suggested changes to Model Rule 5.5 would provide four safe harbors for lawyers engaging in multijurisdictional practice. The safe harbor provision that sweeps the broadest is Proposed Rule 5.5(b)(2)(ii), which provides as follows:

[a] lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when the lawyer acts with respect to a particular matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice.

Id. R. 5.5(b)(2)(ii).

109. See Franklin, supra note 85, at *3. "[A] careless or unscrupulous page owner might add meta tags that fit very popular topics, but have nothing to do with the actual contents of the page. To protect against this, spiders will correlate meta tags with page content, rejecting the meta-tags that don't match the words on the page." Id.
advantage of available technology, hopefully capturing the audience that is being targeted by the lawyer?

Invisible links (not to be confused with invisible ink) are another mechanism that can be used to increase the likelihood that a viewer will arrive at a particular Web site.110 Invisible links to a site can be embedded in other sites, which will cause a viewer to be linked to a designated site by the click of a mouse.111 In essence, when a cursor happens to land on an invisible link, the viewer cannot see any textual evidence of what the linked material is, yet a “hand” appears that can be activated with a “click.” Presumably, viewers “clicking” on this unidentified “hand” could be linked with a lawyer’s Web site, and these visitors may often be surprised at the content of the site to which they are transferred. Is this a deceptive practice because visitors may find themselves at a lawyer’s page without intending to access information of this type when the mouse is “clicked”? Or is the implementation of invisible links simply taking advantage of available technology in an efficient way?

Another way viewers can arrive at the site of a lawyer is through an automatic forwarding mechanism. Sites can be created or programmed so that when they are accessed, visitors are automatically forwarded to the site of the lawyer. Visitors may be attracted to a particular site with a popular topic, but when accessing that site instead find themselves at the site of the lawyer, with no idea of what precipitated their arrival. Does this constitute a deceptive practice, or is one merely making use of available tools?

At first blush, the use of loop software, invisible links, and automatic forwards is troubling. These practices serve to increase the likelihood that a visitor will arrive at a site with no intention to do so. Regarding loop software, if a server uses the number of visits to a site as a criteria for ranking within the context of a search, a lawyer who uses this type of program might gain a competitive advantage. In essence, the software is creating phantom visits that result in the server being tricked. Upon further reflection, however, one might ask whether using loop software to inflate one’s position is substantially different from using invisible

110. For a general discussion of “links,” see Hankins, supra note 83.
111. Id.
ink with multiple repetitions to inflate one's position by increasing the number of key-word matches?

With invisible ink, the use of repetitious words can result in the server being effectively "tricked," to the extent that the number of key-word matches it finds will be elevated. When considering invisible ink, the previously held position was that as long as the words used were not misleading, the implementation of invisible ink should be permissible.112 When resolving whether this position should be altered, it is necessary to consider whether the implementation of invisible ink significantly differs from the implementation of loop software. Due to its hidden nature, perhaps the better standard would be that lawyers ought to disclose the fact that invisible ink is being employed to provide the visitor with information to help the visitor understand why a designated site was identified.113

When one steps back to contemplate the use of repetitious language in invisible ink, as well as its use in sites employing multiple meta tags or repetitious phrases that are fully visible on a site, one must recognize that with all these devices, page owners are trying to have their site identified and to elevate their position in a search. While the repetitious use of words may be somewhat deceptive in that it may increase the number of key-word matches, there is some control deployed since the words used must not be misleading and the use of the mechanism ought to be disclosed. Also, even if the implementation of these mechanisms causes a site to be identified and listed at the top of a search, the visitor must still choose to access a site from those that have been identified.

Implementing means to elevate the position of a site can be compared to a law firm that employs a trade name114 beginning with the letter "A," and, as a result, it appears at the top of an alphabetical list. While perhaps giving the law firm an advantage115 because of where it falls in alphabetical order, the trade name

112. See supra note 101, 102, and accompanying text.
113. See supra note 104 and accompanying text.
114. Model Rule 7.5(a) permits a lawyer to use a trade name in private practice "if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1." MODEL RULES OF PROF'L CONDUCT R. 7.5 (1983).
115. See supra notes 86–87 and accompanying text.
should be permissible if it complies with the mandates of Model Rule 7.5. Consumers accessing a list of law firms still must ultimately decide whether to choose a firm from a list of available lawyers or to direct their attention elsewhere.

Unlike text-based mechanisms used to give a site priority placement during a search, loop software can arguably be viewed as deceptive. Even though the use of loop software may merely serve to elevate a site in a search, the mechanical act of repeatedly hitting a site results in the impression that the site has been visited more often than it actually has. In essence, loop software causes inaccurate information to be considered by the server. Servers, which consider the number of visits when ranking a site, are dealing with information that is fundamentally incorrect. When repetitive language is considered in text-based mechanisms during key-word searches, the language itself must not be deceptive and the mechanism's use ought to be disclosed. In contrast, controls relating to misrepresentative "speech" are not present in loop software since it is a non-text-based mechanism. Although lawyers want to make information about their legal services available to the public, it must be done in a way that is not misrepresentative or misleading.117

Even more troubling than the use of loop software is the use of invisible links and automatic forwards to direct a visitor to a lawyer's site. Loop software may help elevate a site during a search, but invisible links and automatic forwards can transfer a visitor directly to a lawyer's site.118 With respect to the latter, visitors can be lured to a site with a popular topic, only to find themselves transferred to a lawyer's page via an automatic forward. With the implementation of an automatic forward, the visitor does not choose to access the site of a lawyer from a list of potential choices.

Also missing with invisible links is the act of knowingly accessing the site of the lawyer. Granted, with invisible linking the visitor initiates the contact that causes the link to be activated; however, the viewer activates the link without the intent to access the site of the lawyer since there is no discernable textual reference

116. See supra note 114.
117. See supra note 105.
118. See supra notes 110–14 and accompanying text.
tied to the link. One solution might involve making the doctrine of *caveat emptor* applicable to the practice of linking. However, it seems the better approach would be to preclude lawyers from initiating invisible links or automatic forwarding mechanisms, or otherwise being their known recipient.

III

As changes to the Model Rules proposed by Ethics 2000 are considered by the ABA and reviewed by state and local bar associations, it is clear that some revisions to the rules in Chapter 7 will be forthcoming. Recognizing electronic communications as a permissible form of lawyer advertising and the Internet as an important source of information about available legal services, the changes suggested to the rules governing lawyer advertising and solicitation will significantly impact lawyer communications on the Internet.

The proposed changes to the Model Rules are helpful in giving lawyers direction on some matters relating to electronic communications. The use of electronic mail is specifically addressed, as are real-time electronic contacts. It is suggested that the archiving requirements associated with lawyer advertising be eliminated, but that labeling requirements be retained. A matter that Ethics 2000 declined to address, however, is to what extent lawyers may use devices designed to increase the likelihood that their Web sites will be accessed by the public.

Viewing priority placement as an available tool in the electronic dissemination of information, it does not appear that one should be condemned merely for implementing priority placement devices. As long as the words used in text-based priority placement mechanisms are not misleading or misrepresentative, these devices should be permissible when accompanied by disclosures that alert the viewer as to why a site might have achieved a par-

119. *See supra* Part I.
120. *See supra* note 31 and accompanying text.
121. *See supra* note 35 and accompanying text.
122. *See supra* note 35 and accompanying text.
123. *See supra* note 56 and accompanying text.
124. *See supra* note 44 and accompanying text.
125. *See supra* notes 61, 62, and accompanying text.
ticular position. Loop software, which is not text based, also merely functions to elevate the placement of a site by a server in situations where the number of visits to a site is a ranking criteria. Even though the individual initiating the search is free to choose whether to access the site from a resulting search, its use is troubling because it creates archival information for the server that is not accurate. Because loop software generates hits on a site which are acknowledged but do not represent actual visits by the public, this component is misrepresentative. Lawyers should be prohibited from implementing loop software since its sole purpose is to generate hits on a site.

Even more troubling than priority placement devices are mechanisms that result in a visitor's arrival at the Web site of a lawyer, where the visitor has engaged in no initiative that would cause the resulting access. Automatic forwarding is a mechanism that accomplishes this end, as are invisible links. Mechanisms that result in direct access to a lawyer's page without the visitor knowingly accessing the site should be a prohibited practice. While technological advances continue to present individuals with innovative measures that can increase the likelihood a visitor will arrive at one's site, lawyers must be mindful that the implementation of these tools must be in concert with applicable legal ethics rules. Ultimately, it is in the best interest of lawyers and the public that information about available legal services be available and accessible. However, it should not be forgotten that this information must be disseminated and made available in a way that is not misrepresentative or misleading.