

FLORIDA BAR STANDING COMMITTEE ON ADVERTISING

ADVISORY OPINION A-00-1 (Revised)

January 29, 2016

[Approved as revised by the Board of Governors on January 29, 2016.]

Advisory Advertising Opinions Are Not Binding

A lawyer may solicit prospective clients through Internet chat rooms, defined as real time communications between computer users, only if the lawyer complies with the rules on direct written communications and files any unsolicited communications with The Florida Bar for review. Lawyers may respond to specific questions posed to them in chat rooms. Lawyers should be cautious not to inadvertently form attorney-client relationships with computer users.

RPC: 4-7.18, 4-7.19

Opinions: 00-4, Illinois 96-10, Michigan RI-276, Philadelphia 98-6, Utah 97-10, Virginia A-0110, West Virginia 98-03

As use of the Internet becomes more and more a part of the practice of law, questions arise as to whether attorneys may ethically participate in chat rooms. As used in this opinion, the term "chat room" refers to a real time communication between computer users. A foremost concern in attorney participation in chat rooms is whether such activity constitutes impermissible solicitation. Rule 4-7.18(a)(1) provides:

(a) Solicitation. Except as provided in subdivision (b) of this rule, a lawyer may not:

(1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.

Several other states have considered the issue of whether attorney participation in chat rooms constitutes impermissible solicitation. For example, in Michigan Opinion RI-276, it was concluded that while e-mail communications were akin to direct mail communications:

A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such "real time" communications about the lawyer's services would be analogous to direct solicitations, outside the activity permitted by MRPC 7.3.

Similarly, the West Virginia Lawyer Disciplinary Board stated in Opinion 98-03:

The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.

The Utah State Bar's Ethics Advisory Opinion Committee has likewise concluded that an attorney's use of a chat room for advertising and solicitation are considered to be in person communications for the purposes of its Rule 7.3(a) and, thus, restricted by that rule. Utah Ethics Opinion 97-10. The Virginia State Bar Advertising Committee's Lawyer Advertising Opinion A-0110 is in accord with this reasoning.

The Philadelphia Bar Association, in Opinion 98-6, acknowledged that attorneys could not engage in any activity that would be improper solicitation. The Committee further stated, "In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such." The Illinois State Bar Association, in Ethics Opinion 96-10, has also stated:

The Committee does not believe that merely posting general comments on a bulletin board or chat room should be considered solicitation. However, if a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 4-7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.

The Board of Governors is unpersuaded by the reasoning of opinions from other states that conclude that participation in chat rooms, merely because it occurs in real time, is a form of prohibited solicitation. The underlying purpose of the prohibition against direct solicitation is the inherently coercive nature of direct conversations. The Supreme Court of the United States has upheld a ban on direct solicitation, stating "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S. Ct. 1912, 1919, 56 L. Ed. 2d 444 (1978). The Court's opinion cited the American Bar Association's argument of a compelling state interest in banning direct solicitation: "to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the

client will be clouded by his own pecuniary self-interest.” *Id.* At 461. In contrast, written communications via a chat room, albeit in real time, do not involve the same pressure or opportunity for overreaching.

The Board therefore concludes that a direct solicitation via a chat room is permissible, but only if the communication complies with all the requirements for direct written communications set forth in Rule 4-7.18(b). Requirements of Rule 4-7.18(b) include, e.g., no contact within 30 days of an accident, beginning the communication with the word “advertisement,” providing information about the lawyer’s qualifications and experience, use of the first sentence “if you have already retained a lawyer for this matter, please disregard. . . ,” and the like. The Board’s decision is limited to participation in a chat room that does not involve live face-to-face interaction, e.g., via video telephone or video teleconference (such as Skype). Live face-to-face interaction by video would implicate the possibility of undue influence and pressure that is meant to be prohibited by Rule 4-7.18(a).

Additionally, direct solicitations in chat rooms must be filed with The Florida Bar for review in compliance with Rule 4-7.19. Filing is required only when the solicitation is unsolicited by the consumer. This opinion should not be interpreted as suggesting that a lawyer must file responses to specific requests for information about the lawyer or the lawyer’s services in a chat room that were initiated by a prospective client and not at the prompting of the lawyer. A lawyer may also respond to the posting of a general question such as “Does anyone know a lawyer who handles X type of matter?” without filing the response for review by The Florida Bar. Only a lawyer’s unsolicited offers to provide legal services or information about the lawyer’s services are required to be filed for review with The Florida Bar under Rules 4-7.19 and 4-7.20. Although solicited responses need not be filed for review, they remain subject to the substantive lawyer advertising rules found in subchapter 4-7 of the Rules Regulating The Florida Bar.

The Board believes that the most likely type of question to which a lawyer will want to respond is one involving a specific legal issue, such as “I just received a speeding ticket - what should I do?” or “I have heard that I can avoid probate if I have a trust - is that true?” The Board cautions lawyers that they may inadvertently form a lawyer-client relationship with a person by responding to specific legal inquiries, which will require that a lawyer comply with all Rules of Professional Conduct, including rules regarding conflicts of interest, confidentiality, competence, diligence, and avoiding engaging in the unlicensed practice of law. See, e.g., Florida Ethics Opinion 00-4. Although interpretation of these rules is outside the scope of an advisory advertising opinion, the Board feels obligated to point out that lawyers who engage in discussions in chat rooms may have other ethical obligations, regardless of whether the lawyer’s communications are permissible under the lawyer advertising rules.

Finally, this opinion should not be construed so broadly as to require compliance with lawyer advertising rules or filing with The Florida Bar for participation by a Florida attorney in chat rooms when it is *completely unrelated to seeking professional employment*, such as when the chat concerns the attorney’s personal interests or hobbies.