

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2004-166**

ISSUE: Does an attorney's communication with a prospective fee-paying client in a mass disaster victims Internet chat room violate California Rule of Professional Conduct 1-400?

DIGEST: While an attorney's communication with a prospective fee-paying client in the mass disaster victims Internet chat room described herein is not a prohibited "solicitation" within the meaning of subdivision (B) of rule 1-400, it violates subdivision (D)(5) of rule 1-400, which bans transmittal of communications that intrude or cause duress. Attorney's communication would also be a presumed violation of Standard (3) to rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel.

AUTHORITIES

INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

Attorney, a personal injury lawyer, searches the Internet and discovers a chat room created for victims and families of a recent mass disaster. The purpose of the chat room is prominently stated on its home web page as "the provision of emotional support to victims of the recent mass disaster and their families by similarly affected persons."^{1/} After monitoring the conversation taking place in the chat room for a while, Attorney introduces herself as a lawyer and offers to answer any questions. Attorney hopes to prompt the chat room participants to hire her to perform legal services.

DISCUSSION

I. Introduction

The central issue posed by these facts is whether participation by Attorney in the mass disaster victims chat room is subject to regulation under California laws governing attorney conduct. Specifically, we must determine whether her participation violates rule 1-400 of the California Rules of Professional Conduct.^{2/} Thus, we first address

^{1/} For purposes of this opinion, "chat room" refers to an Internet location where participants communicate with other participants electronically in real time. Unlike ordinary e-mail or electronic messages posted to a computer bulletin board or listserv, a chat room is designed to allow participants to exchange messages back and forth instantaneously. In addition, unlike "instant messaging," which typically involves real-time communication between only two people, a chat room typically allows several people or even a large group to communicate simultaneously.

^{2/} Because the chat room is a public setting, none of the chat room participants would have an expectation of privacy. (Compare Cal. State Bar Formal Opn. No. 2003-164 [No expectation of privacy when placing a call to a radio show that broadcasts the call over the airwaves].) Therefore, the Committee has not addressed whether the chat room participants may have engaged in a confidential consultation with Attorney. In addition, the Committee has considered Business and Professions Code sections 6157 et seq. covering electronic and other mass media attorney advertisements and has concluded that those provisions do not apply to the conduct of an attorney under these facts because it is not a broadcast or mass media advertisement. (Bus. & Prof. Code, § 6157, subs. (c) & (d).)

whether Attorney’s participation constitutes a “communication” within the meaning of subdivision (A) of rule 1-400.^{3/} If the participation is a “communication,” we then ask whether it is also a “solicitation” under subdivision (B). As we conclude that Attorney’s participation is not a “solicitation” under 1-400(B), we do not have to address whether Attorney’s conduct is prohibited by subdivision (C)’s restrictions on solicitation.

However, even if Attorney’s conduct is not a prohibited solicitation under subdivision (C) of the rule, see Part III, *infra*, we still must inquire whether her communications with the chat room participants violate subdivision (D)(5) of the rule, which prohibits a communication or solicitation that is “transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct,” or standard (3) to subdivision (E) of the rule, which presumes a violation for any communication “which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.”

II. “Communication”

Under rule 1-400(A), a “communication” is “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.”

Attorney’s participation in the mass disaster victims chat room is for the purpose of obtaining paying clients. By identifying herself as an attorney and answering questions, she communicates to the other participants her “availability for professional employment” within the meaning of rule 1-400(A).^{4/}

III. “Solicitation”

Given that Attorney’s participation in the chat room is a “communication,” we next consider whether her communication is also a “solicitation” as defined in rule 1-400(B). The analysis of rule 1-400(B) is important because rule 1-400(C) prohibits the solicitation of a prospective client unless there is a prior family or professional relationship, or the solicitation is protected by the United States or California Constitutions.

^{3/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{4/} Not every communication that tangentially relates to the availability for professional employment will be subject to regulation. Although the scope of rule 1-400(A) is broad, its reach is tempered by the phrase “concerning the availability for professional employment.” In a comprehensive examination of the constitutional implications of the regulation of lawyer advertising, the Los Angeles County Bar distinguished between “messages . . . concerning the availability for professional employment directed to any former, present, or prospective client” and all other messages, and concluded that only the former may be subject to regulation as commercial speech. See Los Angeles County Bar Association Formal Opn. No. 494. See also *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557 [100 S.Ct. 2343, 65 L.Ed.2d 341].

Under rule 1-400(B), “a ‘solicitation’ means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a *significant motive is pecuniary gain; and*
- (2) Which is:
 - (a) delivered *in person or by telephone, or*
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is the subject of a communication.” (Emphasis added).

Thus, to be a “solicitation” under rule 1-400(B), a lawyer’s communication must satisfy two elements. The first, found in subparagraph (B)(1), addresses the communicator’s motive; only where a “significant motive” for the communication is “pecuniary gain” will it be a “solicitation.” The facts assume that Attorney hopes to prompt participants whose questions she answers to engage her services on a fee-paying basis, so the first element is satisfied.

The second element, found in subparagraph (B)(2), is satisfied if either of two tests is met: (1) a particular mode of communication, i.e., “in person or by telephone,” is used, subparagraph (B)(2)(a); *or* (2) the recipient of the communication is known to be represented by counsel, subparagraph (B)(2)(b). As to the latter, the facts do not state that any of the other participants are represented by counsel. As a result, Attorney’s communications in the chat room can be a “solicitation” within the meaning of rule 1-400(B)(2)(a) only if the communications are delivered “in person or by telephone.”

Since chat room communications occur via a computer, they are not “in person.” However, because Internet communications may be transmitted over telephone lines, it is arguable that chat room communications are “delivered by telephone.” The problem with that argument is that rule 1-400(B) expressly refers to communications “delivered by telephone,” not to communications “delivered over telephone lines.” E-mail messages may also be delivered by telephone lines, but it cannot reasonably be asserted that an e-mail message to a prospective client is a prohibited solicitation under 1-400(B). As we discussed in California State Bar Formal Opn. No. 2001-155:

Although e-mail communication as part of web site technology permits faster responses and more interaction than is possible with other forms of written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client’s thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.

Even acknowledging that chat room discussions take place in real time (after all, people in chat rooms carry on conversations – albeit by typing rather than having sound waves transmitted and converted into voices) and that the opportunity to “reflect, re-read, and analyze” is not as apparent as it is in e-mail situations, these factors do not overcome the express requirement in rule 1-400(A) that the communication be “delivered by telephone.”

We note that ethics committees in other states, including Florida, Michigan, Oregon, Utah, Virginia, and West Virginia, have concluded that messages delivered via real time Internet communication channels are prohibited solicitations. Some of these states, for example, Florida, have a rule more broadly-worded than rule 1-400, which more readily permits its application to chat room situations.^{5/} However, other states, including Utah and Michigan,

^{5/} Florida Rule of Professional Conduct 4-7.4(a) provides in part that:

have interpreted their rules regulating in person and telephonic communications to encompass “real time” chat room conversations.^{6/}

Chat rooms may be subject to abuse since they do not necessarily afford the same opportunity to “reflect, re-read, and analyze,” as does simple e-mail.^{7/} That might be a reason to amend the rule to include a chat room communication as a “solicitation.” However, the committee declines to interpret rule 1-400(B) beyond its express language. Our role is limited to interpreting the rule as currently written. Thus, we conclude that the “by telephone” language in rule 1-400(B)(2)(a) does not apply to chat room communications because that would contradict the rule’s plain language and undermine fair notice of prohibited conduct.

We have previously emphasized that rule 1-400(B)(2)(a)’s requirement that the communication be “in person or by telephone” is a “bright-line” test which lawyers and disciplinary authorities should be able to understand and apply easily. In California State Bar Formal Opn. No. 2001-155, we concluded that a lawyer’s web site does not constitute a prohibited solicitation. True, Attorney here goes a step further, i.e., by communicating *in real time* with *particular* prospective clients, as opposed to the static communication to no one in particular in the case of a web site. Nevertheless, the committee is unwilling to conclude that conduct is disciplinable where it does not fit within the specific language our Supreme Court has adopted as a bright-line standard to enable members to predict with reasonable certainty the kinds of conduct in which they may engage.^{8/}

“(a) Except as provided in subdivision (b) of this rule, a lawyer shall not solicit 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.” (Emphasis added.)

See also Florida Bar Ethics Opn. A-00-1 (08/15/2000).

^{6/} Utah has determined that chat rooms are the equivalent of “in person” communications. Utah Ethics Advisory Opinion 97-10. See also, Michigan Bar Ethics Opn. RI-276 (07/11/1996); Illinois Bar Ethics Opn. 96-10 (05/16/1997); Virginia Bar Lawyer Advertising Opn. A-0110 (04/14/1998); West Virginia Bar Ethics Opn. 98-03(10/16/1998), which generally have held that lawyers participating in chat rooms implicate their states’ rule barring solicitation (usually some variation of Model Rule 7.3(a)). But cf. Arizona State Bar Association Ethics Opn. 97-04 (4/7/1997) (communications in chat rooms not the same as prohibited in-person and telephonic contacts “because there is not the same element of confrontation/immediacy as with the prohibited mediums”).

The District of Columbia has taken a slightly different approach from these states. Although it has not expressly analogized chat room communication to in-person or telephonic communication, its ethics committee has nevertheless cautioned lawyers that they must be careful that their conduct in a chat room does not violate the proscriptions of D.C. Rule of Professional Conduct 7.1(b). In D.C. Ethics Opn. 316 (2002), after first observing that unlike other states, the D.C. rule does not draw a distinction between in-person and written communications, the committee opined that:

“Lawyers communicating about their services in chat rooms therefore must take care not to run afoul of D.C. Rule 7.1(b) (2), which prohibits solicitations that involve the ‘use of undue influence,’ and D.C. Rule 7.1(b) (3), which prohibits lawyers from seeking employment by a potential client whose ‘physical or mental condition’ makes rational judgment ‘about the selection of an attorney unlikely.’”

Our approach is similar to that of the District of Columbia in focusing on the circumstances surrounding the communication rather than on its specific mode. See Part IV, *below*.

^{7/} See California State Bar Formal Opn. No. 2001-155 at page 2.

^{8/} If rule 1-400 is to prohibit a lawyer from engaging in chat room conversations where a significant motive is pecuniary gain and still retain its capacity to provide lawyers with guidance on how to conform their conduct, then the rule itself should be amended to expressly prohibit such conduct. We note that recently the American Bar

IV. Other Bases for Regulating Communications: Rule 1-400(D)(1)-(4), (D)(5) & Standard (3)

While not a prohibited solicitation under subdivision (C), Attorney's participation in the mass disaster victims chat room may be regulated under other provisions of rule 1-400. As we noted in California State Bar Formal Opn. No. 2001-155, at page 2, communications that have been found to be "inherently capable of abuse" may be prohibited consistent with the First Amendment.^{9/} In reaching our conclusion, we relied on the State Bar Request That the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation (1987), at p. 18, which in turn cited to *Ohralik v. Ohio State Bar Association* (1977) 436 U.S. 447 [98 S.Ct. 1912, 56 L.Ed.2d 444]. *Ohralik* addressed the danger that a lawyer may coerce or otherwise take advantage of a vulnerable person during an in-person solicitation. *Ohralik* concluded that when there is potential for overreaching by a lawyer seeking legal employment, whether by a "solicitation" or a "communication," it may be banned.

In the latter regard, rule 1-400(D)(5) provides that a communication or solicitation shall not "[b]e transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." Thus, attorneys must always be concerned with the context in which they seek to communicate their availability for a legal engagement. Under our facts, Attorney's conduct is intrusive. Victims and family members who visit the chat room are there to seek emotional support, and do not expect to encounter a lawyer hoping to be retained.^{10/} Attorney's participation in this particular chat room is therefore a violation of subdivision (D)(5) of the rule.^{11/}

In addition to the actual provisions of the rule itself, the Board of Governors of the State Bar has adopted 16 standards governing "communications" that are presumed violations of the rule. Standard (3) applies to communications "delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel." Thus, if Attorney under our facts "knows or should reasonably know" that visitors to the mass disaster victims chat room are inhibited from making a reasonable judgment about retaining Attorney because of their "physical, emotional, or mental state," any "communication" Attorney makes about her availability for employment is a presumed violation of rule 1-400.

The lawyer in *Ohralik, supra*, 436 U.S. 447, personally visited an accident victim lying in traction in a hospital, and another victim from the same accident shortly after she had been discharged from the hospital. The Court reasoned

Association amended its Model Rule 7.3(a), relating to "Direct Contact With Prospective Clients" to include a prohibition on "real-time electronic" contact, as well as "in-person" and "live telephone" contact. Although "real-time electronic" contact is somewhat broad, it has an advantage in that it is not tied to a specific electronic technology, and gives sufficient notice to lawyers about what kind of conduct will not be tolerated.

^{9/} The specific context of our statement in California State Bar Formal Opn. No. 2001-155 was resolving whether a web site is a "solicitation" under rule 1-400.

^{10/} The prohibition under federal law on making *any kind of* unsolicited communication--*even letters that do not involve the danger of overreaching as does the situation here*--to victims of aircraft accidents for 45 days following the accident supports the Committee's conclusion that the conduct described here is intrusive. (E.g., 49 U.S.C. § 1136.)

^{11/} By this, we do not mean to suggest that all visits to all chat rooms by attorneys motivated to generate legal business are improper. We recognize the importance of providing truthful, accurate information about the availability of qualified lawyers to the public. Thus, in other contexts (for example, a chat room dedicated to the "legal rights and remedies of mass disaster victims"), the same conduct exhibited by Attorney here would not involve intrusion. Still, any communication the lawyer makes must comport with the requirements of subparagraphs (1), (2), (3), and (4) of subdivision (D) of the rule that communications not be false, misleading, or deceptive.

that, under the circumstances, the accident victims “were especially incapable of making informed judgments or of assessing and protecting their own interests.” *Id.*, at p. 467. In reaching its decision, the Court was influenced by the common knowledge that persons who have recently suffered a debilitating injury are often in a weakened physical or emotional state, and thus are particularly susceptible to overreaching. Standard (3) incorporates that concept.

Any victim or family member who visits this chat room will likely be doing so for emotional support, which reasonably implies that their emotional state may render them incapable of making a reasonable judgment about retaining Attorney. Attorney should thus be aware that, given that the chat room’s prominently displayed purpose, her communication in the chat room will be a presumed violation of rule 1-400 under standard (3).

CONCLUSION

Rule 1-400 regulates communications, including those made through the Internet and chat rooms. Attorney’s communications in a chat room for the mass disaster victims described in this opinion are prohibited under subdivision (D)(5) of rule 1-400, and would trigger the presumption under Standard (3).

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities or any member of the State Bar.