

EN GARDE!: GEOFENCING AND THE PRESSING NEED TO UPDATE  
ABA MODEL RULE 7.3

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INTRODUCTION

“Weird, this is the fourth ad I have gotten on my phone from a personal injury firm since I’ve been here. It’s like this thing can read my mind . . .,” Tanner thinks as he browses his phone while he sits in the University Hospital waiting room. He is waiting to see his elderly father, Cole, who just had a fall at the supermarket. Cole slipped in a puddle of water on the floor, and there was no warning sign. Cole will be fine, although he does have a minor concussion. While Cole might be seeing stars, Tanner sees dollar signs. Tanner knows of others who have been similarly injured in this supermarket. Tanner wants to bring a lawsuit and make an example out of it. “How convenient that all of these attorneys are showing up. Now, which one should I choose?”<sup>1</sup>

Gone are the days of attorneys advertising their legal services in Yellow Pages,<sup>2</sup> bus stop ads, and paper flyers. Gone are the days of advertisements on highway billboards<sup>3</sup> and cable TV ads. Now are the days of attorneys using social media and the Internet<sup>4</sup> to portray themselves and their firms as Davids, fighting for the little guys and seeking massive jury verdicts from the Goliaths

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<sup>1</sup> This hypothetical illustrates the ethical issues that this Note seeks to remedy.

<sup>2</sup> Matt Casey, *Some Lawyers Are Still Clinging To the Yellow Pages*, FOSTER WEB MKTG., <https://www.fosterwebmarketing.com/blog/better-way-to-advertise-law-firms-than-in-the-yellow-pages.cfm> [<https://perma.cc/EN84-2C7X>] (recommending attorneys “spend more time and money focusing on Internet marketing than on Yellow Pages”).

<sup>3</sup> *Billboards for Lawyers: Effective Advertising or Waste of Money?*, LEGAL DESIRE, <https://legaldesire.com/billboards-for-lawyers-effective-advertising-or-waste-of-money/> [<https://perma.cc/R5N2-BQBY>] (distinguishing billboards from digital marketing in that “you can’t track how many people have seen your ad and become interested in your legal services”).

<sup>4</sup> Ivan Vislavskiy, *Key Legal Marketing Statistics You Must Know in 2024*, COMRADE DIGIT. MKTG. (Nov. 9, 2023), <https://comradeweb.com/blog/key-legal-marketing-statistics/> [<https://perma.cc/VN73-9H4K>] (reporting that 96% of people seeking legal advice use a search engine, 71% of law firms use social media for marketing purposes, and 65% of law firms spend most of their marketing budget online).

out there. Approaching are the days of hyper-personalized, highly targeted, location-based solicitations, known as geofencing ad campaigns.<sup>5</sup>

Geofencing is a type of location-based marketing strategy that enables companies to advertise to potential customers within a specific geographic radius or area.<sup>6</sup> This technology uses GPS to construct a virtual boundary around a location.<sup>7</sup> This boundary tracks and relays information whenever a mobile device enters the physical area.<sup>8</sup> Once the device is detected, a targeted advertisement will appear on that device.<sup>9</sup>

This technology is already being used by retail giants such as Target.<sup>10</sup> One could easily see why geofencing would appeal to attorneys.<sup>11</sup> Geofencing allows attorneys to promote their services where they would otherwise not be seen, such as inside a hospital waiting room.<sup>12</sup> And why would they not employ such a tactic? After all, more exposure means more revenue.<sup>13</sup> An injury lawyer can focus on hospitals, a criminal lawyer can geofence local jails and police stations, a driving under the influence lawyer can target bars and pubs, and a divorce lawyer can reach therapist offices and counseling centers.<sup>14</sup> The list goes on. However, one major hurdle between client-hungry attorneys and an endless supply of potential clients is the American Bar Association's (ABA) Rule 7.3.

ABA Rule 7.3 prohibits attorneys from engaging in legal solicitation to attract clients.<sup>15</sup> Consequently, using geofencing to target people likely needing legal services with legal advertisements should be banned or regulated under ABA Rule 7.3. This form of solicitation should be regulated

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<sup>5</sup> See John F. Baker, *The Good, the Bad, and the Ugly of Geofencing*, JFB L., <https://www.johnfbakerlaw.com/the-good-the-bad-and-the-ugly-of-geofencing/> [https://perma.cc/BU2Q-RTMX].

<sup>6</sup> See Sarah Berry, *Geofencing Marketing: What is it and How Can You Get Started*, WEBFX (Apr. 12, 2023), <https://www.webfx.com/blog/marketing/geofencing-marketing/> [https://perma.cc/Q7T3-JSM6].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Elizabeth Ireland, *Target Settles DA's Consumer Protection Lawsuit Over Pricing and Advertising*, TIMES OF SAN DIEGO (Mar. 10, 2022), <https://timesofsandiego.com/crime/2022/03/10/target-settles-das-consumer-protection-lawsuit-over-pricing-and-advertising/> [https://perma.cc/JFG5-BH2M] (reporting that Target agreed to pay \$5 million in civil penalties to settle a lawsuit alleging the company misled customers regarding prices featured on its app by advertising different prices once a customer entered a Target store perimeter).

<sup>11</sup> See Christopher Seminatore, *Geofence Marketing for Law Firms*, GET GEOFENCING (Feb. 16, 2023), <https://www.getgeofencing.com/geofence-marketing-for-law-firms/> [https://perma.cc/TF46-LMUW].

<sup>12</sup> *Id.*

<sup>13</sup> Justia Team, *Marketing by the Numbers: Statistics on Legal Marketing in 2021 (And a Look at 2022)*, JUSTIA (Dec. 20, 2021), <https://onward.justia.com/marketing-by-the-numbers-statistics-on-legal-marketing-in-2021-and-a-look-at-2022/> [https://perma.cc/T4XB-S4PG].

<sup>14</sup> *Id.*

<sup>15</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 1983).

because targeted geofencing is more akin to in-person solicitation in today's digital world.<sup>16</sup> Attorney solicitation denotes a communication initiated by or on behalf of a lawyer or firm directed to a specific person the lawyer or firm knows or reasonably should know needs legal services and offers to provide or reasonably can be understood as offering to provide legal services.<sup>17</sup>

This Note examines attorney solicitations and explains how geofencing fits squarely within the ABA's definition of solicitation. It also argues that the Rule drafters would have included geofencing as prohibited attorney conduct had they been aware of this issue. Part I provides a background on the need for legal ethics (particularly Rule 7.3), explains attorney solicitations and examines the rise of geofencing. Part II distinguishes geofencing from permitted forms of advertising, analyzes what "live person-to-person" contact means, offers insight into why geofencing is distinguishable from traditional forms of advertising and solicitation, and views jurisdictional approaches to geofencing. Part III details a proposed solution, chiefly the need for the ABA to add a Comment to ABA Rule 7.3 or the issuance of an official Advisory Opinion. Part IV concludes that the use of geofencing to specifically target legal advertisements towards people known to be in likely need of legal services should be prohibited under Model Rule 7.3—which prohibits the solicitation of legal services.

## I. BACKGROUND: A BRIEF HISTORY OF PROFESSIONAL RESPONSIBILITY

This section gives an analysis of the foundational concepts needed to understand why, in most instances, geofencing is impermissible to market legal services. Section A will provide a background on legal ethics. Next, Section B will discuss attorney solicitation. Section C will then cover the Comments to ABA Rule 7.3. Then, Section D will discuss case law surrounding the issue of attorney solicitation and advertising. Finally, Section E will delve into what geofencing is.

### *A. Watergate and the Growing Need for Regulation*

The legal profession is largely self-governing.<sup>18</sup> The legal profession is unique because of the relationship between the profession, the government, and law enforcement.<sup>19</sup> This close connection stems from the fact that authority over the legal profession is vested in the courts.<sup>20</sup> "[G]overnment

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<sup>16</sup> Berry, *supra* note 6.

<sup>17</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 1983).

<sup>18</sup> MODEL RULES OF PRO. CONDUCT Preamble cmt. 10 (AM. BAR ASS'N 1983).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination . . . for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the government for the right to practice."<sup>21</sup>

Legal ethics broadly refer to the responsibilities of lawyers and the legal system, given their societal roles.<sup>22</sup> Each state's laws govern the rules of professional responsibility for lawyers.<sup>23</sup> However, all states, for the most part, follow the ABA Model Rules of Professional Conduct.<sup>24</sup>

The ABA is a private nonprofit membership organization founded in 1878.<sup>25</sup> In 1974, the ABA adopted a requirement that students take courses in professional responsibility.<sup>26</sup> The ABA made this decision in response to the Watergate scandal, in which many lawyers in the federal government, including former President Nixon, engaged in criminal conspiracy.<sup>27</sup> During the Nixon administration, members of the Committee to Re-Elect (CREEP) committed crimes to help the President be re-elected and investigated people the President viewed as enemies.<sup>28</sup> Nixon's conspiracy came to light in 1972 after it was revealed that members from CREEP broke into the Watergate complex to obtain private documents.<sup>29</sup>

Once this conspiracy was uncovered, an elaborate cover-up scheme occurred, attempting to hide Nixon's role in the plot.<sup>30</sup> A congressional investigation commenced and discovered that Nixon recorded meetings in the Oval Office.<sup>31</sup> Archibald Cox was appointed to investigate, and he subpoenaed the recording tapes.<sup>32</sup> In 1973, Nixon attempted to block the investigation by ordering U.S. Attorney General Elliot Richardson to fire Cox.<sup>33</sup> Richardson refused to do so, and he resigned.<sup>34</sup> Nixon then instructed

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<sup>21</sup> *Id.* at cmt. 11.

<sup>22</sup> *Legal Ethics*, LEGAL INFO. INST. (Mar. 2023), [https://www.law.cornell.edu/wex/legal\\_ethics](https://www.law.cornell.edu/wex/legal_ethics) [<https://perma.cc/345R-FVF2>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 44 (Rachel E. Barkow et al. eds., 6th ed. 2023).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 44–45.

<sup>28</sup> *Id.* at 45. The Committee for the Re-election of the President is often referred to using the acronym "CRP," but Lerman chooses to use the acronym CREEP, a common acronym used to mock the organization.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Carroll Kilpatrick, *President Refuses to Turn over Tapes; Ervin Committee, Cox Issue Subpoenas*, WASH. POST (July 24, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072473-1.htm#:~:text=President%20Nixon%20set%20the%20stage%20yesterday%20for%20a,who%20must%20respond%20in%20federal%20court%20by%20Thursday> [<https://perma.cc/9ZN4-EP6G>].

<sup>33</sup> LERMAN, *supra* note 25, at 45.

<sup>34</sup> *Id.*

the Deputy Attorney General, William Ruckelshaus, to fire Cox. Ruckelshaus also refused and resigned.<sup>35</sup> Finally, Robert Bork, third in line at the Justice Department, was appointed, and he fired Cox.<sup>36</sup> This series of events was named the “Saturday Night Massacre.”<sup>37</sup> Because of this impropriety, Congress appointed a new special prosecutor and initiated an impeachment inquiry.<sup>38</sup> Nixon subsequently resigned in August 1974.<sup>39</sup>

The investigation into the Watergate scandal led to the indictment of dozens of government officials, many of whom were lawyers.<sup>40</sup> Charges against these individuals included perjury, fraud, obstruction of justice, campaign law violations, and conspiracy.<sup>41</sup> Prominent lawyers convicted included Attorneys General of the United States, John Mitchell and Richard Kleindienst; White House Counsel, John Dean; Nixon’s Assistant for Domestic Affairs, John Ehrlichman; and the General Counsel for CREEP, G. Gordon Liddy.<sup>42</sup> Former President Nixon was also named as an unindicted co-conspirator.<sup>43</sup> The nation was outraged by the conviction of so many prominent lawyers; to prevent something like this from happening again, the ABA adopted a code of ethics, and law schools introduced a required course in professional responsibility to teach the Model Rules.<sup>44</sup>

### *B. The Prohibition of Attorneys Soliciting Their Legal Services*

State attempts to restrict advertising by lawyers have been one of the most frequent topics of commercial speech before the Supreme Court.<sup>45</sup> In the last 50 years, lawyers have changed how they obtain new clients.<sup>46</sup> “A shared belief persisted that any lawyer ‘worth their salt’ would not need to promote their services because their reputation for integrity and intelligence would be sufficient to gain clients.”<sup>47</sup> Until the 1970s, most lawyers did not advertise their services because it was considered inappropriate and unethical.<sup>48</sup> It is

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> LERMAN, *supra* note 25, at 45.

<sup>39</sup> *Id.*; see *Nixon Resigns*, HISTORY (Aug. 5, 2022), <https://www.history.com/this-day-in-history/nixon-resigns> [<https://perma.cc/HB9P-W5QR>] (explaining how Nixon became the first president in American history to resign).

<sup>40</sup> LERMAN, *supra* note 25, at 45.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 45–46.

<sup>44</sup> *Id.*

<sup>45</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1452 (Rachel E. Barkow et al. eds., 6<sup>th</sup> ed. 2020).

<sup>46</sup> LERMAN, *supra* note 25, at 760.

<sup>47</sup> Jonathan Bryant, *History of Lawyer Advertising and Legal Marketing*, LEGALMATCH (Dec. 1, 2023), <https://www.legalmatch.com/attorneys/resources/legal-marketing/history-of-lawyer-advertising-legal-marketing.html> [<https://perma.cc/6DGM-2TM8>].

<sup>48</sup> LERMAN, *supra* note 25, at 760.

readily apparent that the times have changed. So much so that the Supreme Court has now weighed in on permissible advertising.<sup>49</sup>

Attitudes about lawyer advertising changed after the Supreme Court decided *Bates v. State Bar of Arizona* in 1977.<sup>50</sup> Like most states at the time, Arizona's ethics code banned advertising by attorneys.<sup>51</sup> The state court determined that a lawyer shall not publicize himself, or any other lawyer affiliated with him, through newspaper, radio, or TV announcements, display advertisements in the city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf.<sup>52</sup>

A few Arizona lawyers offering low-cost legal services set up a legal clinic and advertised their low rates in a daily newspaper, violating the disciplinary rule.<sup>53</sup> The Arizona Supreme Court suspended the attorneys for violating the ethical code.<sup>54</sup> The lawyers appealed to the Supreme Court, claiming that the court's ban on advertising violated the First Amendment.<sup>55</sup>

In the *Bates* decision, Justice Blackmun spoke on behalf of the majority and supported the right of attorneys to advertise their legal services under the protection of free speech.<sup>56</sup> Throughout the decision, Blackmun addressed three alleged concerns of attorneys advertising their legal services: first, the adverse effect advertising has on professionalism; next, the inherently misleading nature of attorney advertising; and lastly, the adverse impact on the administration of justice.<sup>57</sup>

Blackmun addressed this first concern by stating the obvious: "The argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."<sup>58</sup> Furthermore, "[s]ince the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled."<sup>59</sup>

Justice Blackmun countered the second assertion by opining, "[a]lthough many services performed . . . are indeed unique, it is doubtful that any

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<sup>49</sup> See generally *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>50</sup> See generally *id.*

<sup>51</sup> *Ariz. DR 2-101(B)* (1976), quoted in *Bates*, 433 U.S. at 355.

<sup>52</sup> *Id.*

<sup>53</sup> LERMAN, *supra* note 25, at 760.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Bates*, 433 U.S. at 364 (explaining that commercial speech informs the availability, nature, and prices of products and services and thus performs an indispensable role in allocating resources in a free enterprise system).

<sup>57</sup> See *id.*

<sup>58</sup> *Id.* at 369.

<sup>59</sup> *Id.* at 372 (describing how early lawyers in Great Britain viewed the law as a form of public service, rather than a means of earning a living).

attorney would . . . advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones.”<sup>60</sup>

Lastly, Justice Blackmun addresses the “administration of justice” concern in writing, “[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”<sup>61</sup>

The opinion precedes the ABA guidelines on attorney advertising and solicitation, which the ABA adopted in 1983.<sup>62</sup> The case went on to make clear,

[a]dvertising that is false, deceptive, or misleading of course is subject to restraint . . . [and] advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation.<sup>63</sup>

This ruling leaves attorneys with the broad ability to advertise their legal services so long as they are not false, deceptive, or misleading.<sup>64</sup> The Court refuses to allow the government to regulate attorney advertisements to, one, improve the public’s image of the bar, two, out of fear that ads will foment litigation, and three, out of unsupported fear that the public will not understand their content and will thereby be deceived.<sup>65</sup>

After *Bates*, the National Association of Law Firm Marketing Administrators met in 1985 and, in the subsequent years, began to issue newsletters and white papers and developed new chapters nationwide.<sup>66</sup> The organization changed its name in 1997 to the Legal Marketing Association (LMA), and it currently has over 4000 members, which consists of lawyers, vendors, consultants, and digital marketers in over 30 countries.<sup>67</sup> Many law firms began creating ads and increasing their marketing presence during the growth of the LMA.<sup>68</sup>

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<sup>60</sup> *Id.* (noting that “routine ones” consist of services such as uncontested divorces, simple adoptions, uncontested personal bankruptcies, and name changes).

<sup>61</sup> *Id.* at 376.

<sup>62</sup> *Bates v. State Bar of Arizona* was decided in 1977. The Model Rules of Professional Conduct were adopted in 1983. MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>63</sup> *Bates*, 433 U.S. at 383–84.

<sup>64</sup> *Id.*

<sup>65</sup> CHEMERINSKY, *supra* note 46, at 1454.

<sup>66</sup> Sam Baycer, *The Evolution of Legal Marketing*, LINKEDIN (Feb. 13, 2021), <https://www.linkedin.com/pulse/evolution-legal-marketing-sam-baycer/> [https://perma.cc/6DA4-TBEV].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Many small firms advertise on billboards, social media, and almost anywhere else they are likely to attract a large audience.<sup>69</sup> Large firms are unlikely to use these methods but engage in more sophisticated ones, such as working with public relations consultants to develop “brands” to project the firm’s identity.<sup>70</sup> In the *Bates* decision, the Supreme Court protected attorneys’ advertising but did not grant such protections to attorney solicitation.<sup>71</sup>

### C. An Analysis of the Comments

ABA Model Rule 7.3,<sup>72</sup> which regulates targeted solicitation, is more complex.<sup>73</sup> The Rule prohibits an attorney from soliciting professional employment in person to prospective clients.<sup>74</sup> In-person contact is generally prohibited.<sup>75</sup> However, there are exceptions.<sup>76</sup> ABA Model Rule 7.3 does not prohibit solicitation through “text messages or other written communications that recipients may easily disregard.”<sup>77</sup> Live in-person contact is permitted when the attorney is not significantly motivated by a monetary gain.<sup>78</sup> The Comments provide additional insight.<sup>79</sup>

Some lawyers attract clients through advertising, while others directly contact prospective clients to offer their services.<sup>80</sup> While critics might argue ABA Model Rule 7.3 violates an attorney’s constitutional right to free speech,<sup>81</sup> Comment 3 dispels this contention by stating, “[t]he potential for overreaching inherent in live person-to-person contact justifies its prohibition since lawyers have alternative means of conveying the necessary information.”<sup>82</sup>

One can find additional rationales for prohibiting attorney solicitation in other Comments under the Rule.<sup>83</sup> Comment 2 to the ABA Model Rule states that these forms of contact between a lawyer and a specifically targeted recipient are subject to the private importuning of the trained advocate in a

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<sup>69</sup> *Bates*, 433 U.S. at 383–84.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See* MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS’N 1983).

<sup>78</sup> MODEL RULES OF PRO. CONDUCT r. 7.3(b) (AM. BAR ASS’N 1983); LERMAN, *supra* note 25 at 769 (permitting lawyers to solicit pro bono work for individual clients face to face but Comment 5 does not mention solicitations of individuals for pro bono service).

<sup>79</sup> *See generally* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>80</sup> LERMAN, *supra* note 25, at 767.

<sup>81</sup> *See generally* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>82</sup> *Id.* at cmt. 3.

<sup>83</sup> *Id.*

direct interpersonal encounter.<sup>84</sup> The prospective client may find it burdensome to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence.<sup>85</sup> The situation is fraught with the possibility of undue influence, intimidation, and overreaching.<sup>86</sup>

Comment 3 of the ABA Model Rule also provides additional justification for prohibition.<sup>87</sup> The Comment posits that the potential for abuse in direct in-person, live telephone, or real-time electronic solicitation of prospective clients justifies its prohibition. Indirect legal advertising, as well as written and recorded communication permitted under the rule, offers other means of conveying necessary information to those who require legal services.<sup>88</sup>

Comment 5 of the ABA Model Rule states an attorney could solicit "public or charitable legal-service organizations" or other organizations "whose purposes include providing or recommending legal services to their members or beneficiaries."<sup>89</sup> Comment 5 outlines another exception: A lawyer may solicit a former client, a person with whom the lawyer has a close personal, family, business, or professional relationship. Solicitation is applicable if the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes.<sup>90</sup> Setting aside these minor exceptions, it is clear the ultimate goal of ABA Model Rule 7.3 is to protect potential clients from lawyer overreach.<sup>91</sup>

#### *D. A Discussion of the Caselaw*

Before ABA ethics rules curbed the practice of solicitation, lawyers sometimes contacted accident victims in person to solicit cases or hired "runners" to approach prospective clients at the scene of an accident and give out business cards of their employer.<sup>92</sup>

In 1978, the Supreme Court opined in *Ohralik v. Ohio State Bar Association* that a state could discipline a lawyer who approached accident victims, urged their services on the victim, and secretly recorded their consent.<sup>93</sup> The Court held that while a state may not prohibit truthful advertising aimed at the general public, it may ban lawyers' in-person

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<sup>84</sup> *Id.* at cmt. 2.

<sup>85</sup> *Id.*

<sup>86</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 1983).

<sup>87</sup> *Id.* at cmt. 3.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at cmt. 5.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at cmt. 2.

<sup>92</sup> LERMAN, *supra* note 25, at 767.

<sup>93</sup> *See generally* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

solicitation.<sup>94</sup> The majority opinion of the Supreme Court stated that the “potential for overreaching” was significantly greater when a lawyer, professionally trained in persuasion, personally solicits an unsophisticated, injured, or distressed layperson.<sup>95</sup> The case concludes that the regulation was appropriate to further the state’s interest in “protecting the lay public.”<sup>96</sup>

*Shapero v. Kentucky Bar Ass’n.* redefined what conduct was permissible and impermissible as the Court permitted a form of attorney solicitation that was not in-person.<sup>97</sup> In *Shapero*, a divided Supreme Court invalidated a Kentucky rule that prohibited lawyers from sending letters to people needing legal services.<sup>98</sup> The Commonwealth had contended that a targeted letter was a written version of in-person solicitation.<sup>99</sup> However, the Supreme Court disagreed.<sup>100</sup> The Court explained that writing does not necessarily involve 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” because “a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.”<sup>101</sup> While a ban on all targeted solicitation by mail was rejected, the Court did suggest that states could “require the letter to bear a label identifying it as an advertisement, or direc[t] the recipient how to report inaccurate or misleading letters.”<sup>102</sup> Critics might quickly compare geofencing to “writings” in *Shapero*.<sup>103</sup> However, this critique demonstrates a fundamental misunderstanding of geofencing. In the digital age, a geofenced solicitation can pressure the potential client for an immediate yes-or-no answer.<sup>104</sup>

Some states continue to test the boundaries of restricting attorney solicitation.<sup>105</sup> In 1989, the State Bar of Florida conducted a two-year study

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<sup>94</sup> *Id.* at 461 (“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 pecuniary self-interest.”); *Id.* at 468 (“Under our view of the State’s interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer’s in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State’s interest in protecting the lay public. We hold that the application . . . does not offend the Constitution.”).

<sup>95</sup> *Id.* at 465.

<sup>96</sup> *Id.* at 468.

<sup>97</sup> See generally *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466 (1988).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 475–76.

<sup>102</sup> *Id.* at 477.

<sup>103</sup> See *Shapero*, 486 U.S. at 477.

<sup>104</sup> See *id.* at 475–76.

<sup>105</sup> LERMAN, *supra* note 25, at 769.

to assess the impact of targeted letters that attorneys sent.<sup>106</sup> Fifty-four percent of respondents said contacting accident victims is an invasion of privacy.<sup>107</sup> Forty-five percent of those who received such letters believed that lawyers were trying to “take advantage of gullible or unstable people.”<sup>108</sup> Twenty-seven percent reported that these letters resulted in them having a “lower” regard for attorneys and the judicial process in general.<sup>109</sup>

Once Florida conducted the poll and reviewed the results, the state enacted a rule against solicitation:

A lawyer shall not send . . . a written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if . . . the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person unless the accident or disaster occurred more than 30 days before the mailing of the communication.<sup>110</sup>

This rule was challenged by G. Stewart McHenry, who owned a lawyer referral service (Went for It).<sup>111</sup> McHenry sought declarative and injunctive relief to invalidate the statute.<sup>112</sup> He pointed out that the rule disadvantaged potential plaintiffs because other professionals, such as insurance adjusters, could contact accident victims immediately after an accident occurred and obtain binding settlement agreements before the accident victim obtained counsel.<sup>113</sup>

The lawsuit, *Florida Bar v. Went for It*, was eventually appealed to the Supreme Court.<sup>114</sup> The Court, in a divided opinion, upheld the rule.<sup>115</sup> The Court determined that the rule did not violate the First Amendment because

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<sup>106</sup> *Id.*; *Fla. Bar v. Went for It*, 115 S. Ct. 2371, 2374 (1995).

<sup>107</sup> LERMAN, *supra* note 25, at 769; *Fla. Bar*, 115 S. Ct. at 2374.

<sup>108</sup> LERMAN, *supra* note 25, at 769; *Fla. Bar*, 115 S. Ct. at 2374.

<sup>109</sup> LERMAN, *supra* note 25; *Fla. Bar*, 115 S. Ct. at 2377 (looking at anecdotal evidence from the study, one gentleman was “appalled and angered” by a letter he received after he was injured, and his fiancée was killed in an auto accident. Another person found it “despicable and inexcusable” that an attorney wrote to his mother only days after his father’s funeral. Another person considered “the unsolicited contact from you after my child’s accident to be of the rankest form of ambulance chasing and in incredibly poor taste . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind”).

<sup>110</sup> R. Regulating Fla. Bar 4-7.18 (2023).

<sup>111</sup> *See generally Fla. Bar*, 115 S. Ct. at 2371.

<sup>112</sup> LERMAN, *supra* note 25, at 770.

<sup>113</sup> *Id.*

<sup>114</sup> *See generally Fla. Bar*, 115 S. Ct. at 2371.

<sup>115</sup> LERMAN, *supra* note 25, at 770.

it identified the state's interest in maintaining and improving the public image of the legal profession.<sup>116</sup> The Court frequently cited the State Bar of Florida's study.<sup>117</sup> It opined that the Florida Bar had a legitimate interest "to protect the flagging reputation of Florida lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency because it intruded upon the special vulnerability and private grief of victims or their families."<sup>118</sup>

The Court distinguished the Shapero ruling by finding that the Florida rule did not constitute an absolute ban on targeted solicitation, but only for the 30 days after an accident when victims were susceptible to nefarious tactics employed by attorneys attempting to secure a lucrative payday.<sup>119</sup> Additionally, the Florida Bar decision highlights the danger of immediate solicitation, reinforcing the need to regulate geofencing, as most targeted ads would likely reach a potential client's phone well before a 30-day wait period runs.<sup>120</sup>

Existing Supreme Court precedent came before the Internet. The advent of attorneys using the Internet to promote their legal services opens a Pandora's Box of potential ethical issues. Today, lawyers regularly advertise on web pages, provide further information to people who click the links on the web pages, and purchase geofenced pop-up ads on other third-party web pages.<sup>121</sup>

### *E. Geofencing! Prêts? Allez!*

Geofencing occurs when a mobile app or software uses GPS, radio frequencies, WiFi, or cellular data to define a virtual geographical boundary and trigger a targeted marketing action when a device enters or exits that boundary.<sup>122</sup> Geofencing is very prominent in the United States due to its

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<sup>116</sup> *Id.*

<sup>117</sup> *See generally Fla. Bar*, 115 S. Ct. at 2371.

<sup>118</sup> *Id.* at 2376.

<sup>119</sup> *See id.* at 2378.

<sup>120</sup> *See generally id.*

<sup>121</sup> LERMAN, *supra* note 25, at 771 (explaining lawyers may pay third parties a fixed amount of money for each new client attracted by the third party's website); *see generally* Laichev v. JBM, Inc., No. 1:07cv802, 2008 U.S. Dist. LEXIS 132074, at \*16 (S.D. Ohio Apr. 11, 2008) (concluding if an attorney includes information about a previous trial/judgment on their website, they are "reminded to be truthful, accurate, and balanced in all its communications to potential plaintiffs and particularly with internet materials").

<sup>122</sup> Rahul Awati, *Geofencing*, TECH TARGET <https://www.techtarget.com/whatis/definition/geofencing> [<https://perma.cc/8M9M-WHYR>].

increasingly digital society.<sup>123</sup> Since 1995, geofencing for global tracking has been cited in the United States Patent Office for patent approval over 240 times.<sup>124</sup>

The Wide Area Augmentation System (WAAS) is used by electronic devices that are equipped and used in North America.<sup>125</sup> The most common occurrence of geofencing is when mobile phones are used with positioning methods such as Assisted GPS (A-GPS).<sup>126</sup> The accuracy of this system is considered to be within three meters at least 95% of the time.<sup>127</sup> Even more concerning than the extreme accuracy of geo-locating software is that the tracking limit per application, per device, is often 100 geofences.<sup>128</sup> A mobile device user could be subject to hundreds, if not thousands, of potential geofences at any moment without their knowledge.<sup>129</sup>

Furthermore, geofencing can occur in two distinct ways: actively and passively.<sup>130</sup> Active geofencing occurs when the mobile application utilizing geofencing technology is open and in use.<sup>131</sup> This type of geofencing actively uses GPS positioning technology.<sup>132</sup> Due to tracking technology, active geofencing uses more battery power and is more prone to bugs and inaccurate techniques.<sup>133</sup> On the other hand, passive geofencing involves technology that monitors a user's real-time location.<sup>134</sup> It is always running in the background whether or not the device user knows.<sup>135</sup>

Passive geofencing is the more sinister of the pair and does not use GPS positioning in its data collection.<sup>136</sup> More likely than not, geofencing in the

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<sup>123</sup> *See id.*

<sup>124</sup> *Telephone Operable Global Tracking System for Vehicles*, GOOGLE PATENTS <https://patents.google.com/patent/US5918180A/en> [<https://perma.cc/46Z4-KAQ8>] (noting that companies such as Microsoft, IBM, and Sony have cited this technology in their patent applications).

<sup>125</sup> *Global Positioning System Wide Area Augmentation System (WAAS) Performance Standard*, FED. AVIATION ADMIN. 1 (Oct. 31, 2008), <https://www.gps.gov/technical/ps/2008-WAAS-performance-standard.pdf> [<https://perma.cc/Z5S2-DNN9>].

<sup>126</sup> *See generally* Dmitry Namiot, *GeoFence Services*, 1 *INT'L J. OF OPEN INFO. TECHS.* 30 (2013), <http://injoit.org/index.php/j1/article/view/51/48> (discussing how A-GPS uses assistance data received from the network to obtain a faster location calculated compared with GPS alone).

<sup>127</sup> *Global Positioning System*, *supra* note 126, at 21.

<sup>128</sup> *Create and Monitor Geofences*, DEVELOPERS (Nov. 1, 2023), <https://developer.android.com/develop/sensors-and-location/location/geofencing> [<https://perma.cc/72J5-PJFS>].

<sup>129</sup> *See id.*

<sup>130</sup> *Difference between Active Geofencing and Passive Geofencing*, RF WIRELESS WORLD (Nov. 11, 2023), <https://www.rfwireless-world.com/Terminology/Difference-between-active-geofencing-and-passive-geofencing.html> [<https://perma.cc/GY98-9RCK>].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Difference between Active and Passive Geofencing*, *supra* note 131.

<sup>136</sup> *Id.*

legal profession is used in the passive form.<sup>137</sup> This description appears on the website of a firm that offers geofencing to attorneys: “Once a person carrying a mobile device has entered the virtual perimeter of the location, we can trigger a specific programmed action, such as serving ads to that individual for up to 30 days after they leave that location.”<sup>138</sup>

Geofencing can also be analyzed through a safety lens, as it has been utilized with child location services.<sup>139</sup> In the sphere of home automation, enabling geofencing on a cellular device can allow household utilities to turn on and off automatically. Additionally, geofencing can be implemented through services that alert vehicle owners if their vehicles are stolen<sup>140</sup> and also alert cattle owners if their cows wander into a neighboring ranch or park.<sup>141</sup>

## II. ANALYSIS: THE OUTDATED ABA MODEL RULE 7.3 PROVIDES NO GUIDANCE ON HOW ATTORNEYS SHOULD PROCEED IN THE FACE OF GEOFENCING

Geofencing is similar to in-person solicitations because of the way it targets the individual.<sup>142</sup> Because of the “targeting” aspect of geofencing, the Model Rules should be expanded via a Comment or the issuance of an Advisory Opinion.

### *A. Geofencing is Distinct from Permissible Forms of Attorney Advertising*

It would be overly broad to say that in all instances, geofencing is solicitation and should be strictly prohibited. The scope is crucial in determining when the line between permissible and impermissible conduct is crossed. If the scope of the geofence is broad, for example, city-wide, that conduct would likely not be in violation. This conclusion can be reached from the ABA Model Rule 7.3 because it focuses on solicitation directed towards

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<sup>137</sup> *Geofencing for Attorneys*, ILAWYERMARKETING, <https://www.ilawyermarketing.com/geofencing-for-attorneys/> [<https://perma.cc/98RG-ELQJ>].

<sup>138</sup> *Id.*

<sup>139</sup> ANTHONY LAMARCA & EYAL DE LARA, LOCATION SYSTEMS: AN INTRODUCTION TO THE TECHNOLOGY BEHIND LOCATION AWARENESS 88 (Mahadev Satyanarayanan ed., 2008) (“Worried parents can choose from a variety of services that track the location of their child’s cell phone in real time.”).

<sup>140</sup> See *What is Geofencing for Cars and Trucks & How Does it Work?*, AUTOPI (Dec. 1, 2022), <https://www.autopi.io/blog/geofencing-explained/> [<https://perma.cc/DL92-2VXV>].

<sup>141</sup> See generally *Elephants Send Text Messages to Rangers*, SAVE THE ELEPHANTS (Oct. 12, 2008), <https://www.savetheelephants.org/news/elephants-send-text-messages-to-rangers/> [<https://perma.cc/B5A3-MBCN>].

<sup>142</sup> Sam Wixted, *How Does Geofencing Technology Work?*, WEBFX (Sept. 20, 2019), <https://www.webfx.com/blog/marketing/how-does-geofencing-technology-work/> [<https://perma.cc/D94H-PQ3E>] (“Geofencing is an extremely granular marketing strategy that allows businesses to target customers . . .”).

a specific person or group.<sup>143</sup> Impermissible conduct arises from an action directed toward a particular individual.<sup>144</sup> An attorney casting a city-wide geofence is likely permissible because it's not directed at one individual or a specific group of individuals known to need legal services. This is why attorneys are known for putting their faces on television and billboards—because there is no targeting.<sup>145</sup>

This permissive form of advertising can be distinguished from advertisements that appear strictly inside a hospital, courthouse, or jail because it is apparent the attorney is attempting to target a group of people likely to need legal services.<sup>146</sup> Several jurisdictions see this as a problem.<sup>147</sup> As of 2023, in twelve jurisdictions, attorneys must wait for a certain amount of time before trying to represent victims of events that typically spur the need for legal services.<sup>148</sup> The reality of today's digital world is that attorneys no longer chase an ambulance to the hospital in hopes of a big payday.<sup>149</sup> Attorneys are simply placing a geofence around the hospital, hoping that accident victims click their ad and retain their services.<sup>150</sup>

As the Supreme Court determined in the Florida Bar decision, attorneys using direct mailing to contact accident victims is impermissible conduct.<sup>151</sup> Although the subject matter of Florida Bar may seem dated, its rationale remains relevant. In the modern era, mailed letters are more akin to digital advertisements.<sup>152</sup> This is true, considering that in 2021, just under a third of Americans had written a personal letter within the past 12 months.<sup>153</sup> Thirty-seven percent of Americans say it has been over five years since they've written and sent one.<sup>154</sup> Another 15% say they have never written and sent one.<sup>155</sup> If “mailed letters” were replaced with “geofenced ads,” Florida Bar

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<sup>143</sup> See MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 1983).

<sup>144</sup> See *id.*

<sup>145</sup> See *Fla. Bar*, 115 S. Ct. at 2380.

<sup>146</sup> See Lucian T. Pera, *Ethics: Avoiding Prohibited Lawyer Solicitation*, AMERICAN BAR ASSOCIATION (Jan. 1, 2023), [https://www.americanbar.org/groups/law\\_practice/resources/law-practice-magazine/2023-january-february/ethics-avoiding-prohibited-lawyer-solicitation/](https://www.americanbar.org/groups/law_practice/resources/law-practice-magazine/2023-january-february/ethics-avoiding-prohibited-lawyer-solicitation/).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (“All jurisdictions would also likely believe it to be misconduct if a lawyer approached a potential client at an accident scene or in a hospital or emergency room, if the client alleged that the circumstances were at all coercive.”).

<sup>149</sup> William Vogeler, Esq., *Can Injury Lawyers Target Hospitals With Geofencing*, FINDLAW (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/technologist/can-injury-lawyers-target-hospitals-with-geofencing/> [https://perma.cc/DW5K-ACTC].

<sup>150</sup> *Id.*

<sup>151</sup> See generally *Fla. Bar*, 115 S. Ct. at 2371.

<sup>152</sup> Fred Backus, *Most Americans Haven't Written a Personal Letter on Paper in Over Five Years*, CBS NEWS (Oct. 11, 2021), <https://www.cbsnews.com/news/most-americans-havent-written-a-personal-letter-on-paper-in-over-five-years/> [https://perma.cc/CD4A-4BKG].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

would be read as distinguishing legitimate marketing directed towards the entire population from solicitation targeted at a specific group of people.<sup>156</sup>

*B. Geofenced Materials Fall Under “Live Person-to-Person”  
Communications*

Currently, solicitation is prohibited if it is “live person-to-person” contact.<sup>157</sup> In determining what is meant by “live person-to-person contact,” one must look to the comments—specifically, Comment 2 of ABA Model Rule 7.3, which states, “‘Live person-to-person contact’ means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection.”<sup>158</sup>

While it is apparent that geofencing does not fall under in-person or live telephone contact, the statute is silent as to what “real-time” means.<sup>159</sup> One proposed definition for “real-time” is “the electronic process of transactional data instantaneously upon data entry or receipt of a command.”<sup>160</sup> Geofencing falls under this definition because geofenced ads are delivered in “real-time,” instantly, to specific mobile devices within a geographical area.<sup>161</sup> Data is transferred in real time because once the electronic device enters a geofenced perimeter, the “command” is sent, triggering the appearance of a geofenced solicitation.<sup>162</sup>

Comment 2 of the ABA Model Rule distinguishes chat rooms, text messages, or other written communications that the recipients may easily disregard from prohibited contact.<sup>163</sup> However, geofencing is inherently different than these modes; it is more akin to real-time communication because they are not easily ignored.<sup>164</sup> Using the language of the Comment, geofenced advertising subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter.<sup>165</sup> An emotionally distraught person may find it difficult to fully evaluate all available alternatives with reasoned judgment in the face of the lawyer’s presence and

<sup>156</sup> *Fla. Bar*, 115 S. Ct. at 2379.

<sup>157</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>158</sup> *See id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Real-time*, LAW INSIDER, <https://www.lawinsider.com/dictionary/real-time> [<https://perma.cc/E7GW-H8T6>].

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See* MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS’N 1983).

<sup>164</sup> *See* Jacob Baadsgaard, *Pop-Up Ads: Why Everyone Hates Them and Why They’ll Never Die*, MARTECH (Dec. 30, 2019), <https://martech.org/pop-up-ads-why-everyone-hates-them-and-why-theyll-never-die/> [<https://perma.cc/JVC4-U9D4>] (Explaining pop-up ads are hard to ignore because they interrupt the user experience).

<sup>165</sup> *See* MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS’N 1983).

insistence upon a response.<sup>166</sup> Because geofenced ads can be personal and targeted to facilities containing people needing legal services,<sup>167</sup> the ABA should update Comment 2 to include geofencing or issue an ethics opinion like several states have done.

### C. Why Geofencing is Unique

Legal literature and case law are scant concerning how geofencing should be classified. While parallels can be drawn between directed letters<sup>168</sup> and microtargeted advertisements, some scholars state, “The use of microtargeted online ads falls somewhere between in-person solicitation and billboard or television advertising.”<sup>169</sup> The distinction is made that traditional advertisements are “static” and aimed at a “general audience,” while geofencing is targeted to “particular emotional, financial, or ideological vulnerabilities.”<sup>170</sup>

In *Pilliod v. Vionsanto Co.*, a California case, the plaintiff asserted that Monsanto was using geofencing to target advertisements about the safety of Roundup (a weedkiller) to cellphones and other mobile electronic devices around the courthouse.<sup>171</sup> However, the court was not persuaded that alleged geomarketing is materially different from carrying signs or placards outside a courthouse or wearing buttons inside the courthouse or that geofencing requires a different judicial response.<sup>172</sup> In ruling that there is no material difference between “buttons inside a courtroom” and high-tech targeted messages, the court demonstrated that it did not fully understand geofencing or its potential dangers.<sup>173</sup>

The court hesitated to entirely prohibit geofencing because it believed the jurors might be exposed to such marketing at their homes and on their commutes to and from the courthouse.<sup>174</sup> The court reasoned that even if the parties were ordered to stop placing geofences, the court could not stop

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<sup>166</sup> *Id.*

<sup>167</sup> *Geofencing for Lawyers—Get in Front of Your Ideal Clients*, SMBTEAM <https://smbteam.com/geofencing-for-lawyers/> [<https://perma.cc/QB4V-FXYW>] (“Defense attorneys can find clients by placing a geofencing ‘net’ around correctional facilities and courthouses. Geofencing allows you to have a virtual presence in all the locations where your potential clients are likely to spend time.”).

<sup>168</sup> *See Fla. Bar*, 115 S. Ct. at 2371.

<sup>169</sup> Eric T. Kasper & Troy A. Kozma, *Did Five Supreme Court Justices Go “Completely Bonkers?”: Saul Goodman, Legal Advertising, and the First Amendment Since Bates v. State Bar of Arizona*, 37 *CARDOZA ARTS & ENT L.J.* 337, 367 (2019).

<sup>170</sup> *Id.*

<sup>171</sup> *Pilliod v. Vionsanto Co.*, No. RG17862702, 2019 Cal. Super. LEXIS 23599, at \*7 (Alameda Cty. Super. Ct. Apr. 4, 2019).

<sup>172</sup> *Id.* at \*7.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

general marketing in Alameda County and the Bay Area.<sup>175</sup> While the jurors might be exposed to material on their commutes, they will see the advertised material if they access their electronic devices inside the bounds of the geofence.<sup>176</sup>

Interestingly, the court makes a point to observe that jurors, or anyone, could be exposed to advertising on their commutes.<sup>177</sup> A billboard directed toward the general public is an acceptable form of advertising.<sup>178</sup> The distinction between permissible and impermissible geofencing is found in examining the intent of the geofence.<sup>179</sup> An entire city with a geofence around it, in which every device inside the perimeter receives the advertisement, is similar to a mass marketing campaign in which every resident receives the same mailed letter. The latter is permissible conduct because there is no direct targeting.<sup>180</sup> However, a geofence around a nursing home known for malpractice cases is similar to an attorney mailing targeted letters to residents. The latter is impermissible conduct because of the targeted and predatory nature of the letters.<sup>181</sup>

#### *D. Jurisdictional Approaches to Geofencing*

With the realization of a growing need for regulation of attorneys using geofencing to solicit their legal services, and in light of a silent ABA, some states have issued their own advisory opinions.<sup>182</sup> New Jersey, for example, ruled that geofencing is not flatly prohibited.<sup>183</sup> Still, the advertisements may not appear as a pop-up:

In certain geographical areas or target victims of a mass-disaster event, the lawyer's advertisement must appear adjacent to the content of the website the internet user is

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Pilliod*, 2019 Cal. Super. LEXIS 23599, at \*7.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Alan C. Horowitz, *Predatory Legal Advertising: How Nursing Homes Can Respond*, IADVANCE SENIOR CARE, (Feb. 17, 2016), <https://www.iadvanceseniorcare.com/predatory-legal-advertising-how-nursing-homes-can-respond/> [<https://perma.cc/M78G-ZY6Y>] (listing several examples of predatory advertisements. "State bar associations and state supreme courts promulgate rules regarding attorney advertising. For example, according to the New York Lawyer's Code of Professional Responsibility, 'A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that contains statements or claims that are false, deceptive or misleading.' Thus, where there is a false, misleading, or deceptive advertisement, the applicable state bar association might become involved").

<sup>182</sup> *Id.*

<sup>183</sup> N.J. Supp. Ct. Advisory Comm. On Geo-Fencing, Geo-Targeting and Similar Elec. Advert. Techs., Op. 46 (2020).

visiting and may not “pop up” or be presented in a way that the user must watch it for a designated period before allowing the user to reach the chosen website.<sup>184</sup>

The opinion clarifies that presenting attorney advertisements to people in emergency rooms, hospitals, urgent care centers, funeral homes, police stations, courthouses, and accident sites, for instance, violates Rule 7.3.<sup>185</sup>

Arguably, the most consequential determination from the opinion is that if an attorney uses a directed digital advertisement, it must appear adjacent to the content on the webpage and not intertwined with the online material.<sup>186</sup>

The opinion rations that when an attorney places an advertisement adjacent to the online material, they are not engaged in “unsolicited direct contact.”<sup>187</sup> Therefore, an ad that does not appear adjacent to the online material, like an Instagram or Facebook ad, is unsolicited direct contact and is prohibited.<sup>188</sup>

Additionally, some “pop-up” ads interfere with the ability to visit a webpage.<sup>189</sup> Users must view an ad video before accessing the website.<sup>190</sup> The New Jersey Committee on Attorney Advertising finds these types of advertisements to be “substantially equivalent” to other forms of “direct contact” with the user, and they are prohibited by the New Jersey Rule of Professional Conduct 7.3(b)(5).<sup>191</sup>

Massachusetts follows a rule similar to the ABA and does not account for geofencing.<sup>192</sup> According to the Massachusetts Rules of Professional Conduct Comment 2 of Rule 7.3:

[L]ive person-to-person contact means in-person, face-to-face, live telephone, and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include text messages or other written communications that recipients may easily disregard.<sup>193</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> N.J. Supp. Ct. Advisory Comm. On Geo-Fencing, Geo-Targeting and Similar Elec. Advert. Techs., Op. 46 (2020).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See generally MASS. RULES PRO. CONDUCT (2002).

<sup>193</sup> MASS. RULES PRO. CONDUCT r. 7.3 cmt. 2 (2002).

The Massachusetts Rule differentiates from the ABA in that chat rooms are not a form of permissible communication.<sup>194</sup>

The New York Rules of Professional Conduct make clear that in-person solicitation has been historically disfavored by the bar because of the dangers it poses to potential clients.<sup>195</sup> The same risks posed by in-person solicitation are also posed through real-time or interactive computer-accessed communications.<sup>196</sup> Computer-accessed communication is defined by Rule 1.0(c) as “any communication made by or on behalf of a lawyer or a law firm that is disseminated through the use of a computer or related electronic device . . . including banner advertisements, pop-up and pop-up advertisements . . .”<sup>197</sup> The comment states, “Ordinarily, email communications and websites are not considered to be real-time or interactive communication.”<sup>198</sup> This exception presumably draws from the ABA Model Rules in that these forms of communication can be easily disregarded.<sup>199</sup>

However, “instant messaging, chat rooms, and other similar types of conversational computer-accessed communications—whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device and whether sent directly or via social media—are considered to be real-time or interactive communication.”<sup>200</sup>

Geofencing is more akin to instant messaging than email and would be prohibited under the New York rule.<sup>201</sup> This is because of the instantaneous interrupting nature of a geofenced solicitation.<sup>202</sup> It is similar to instant messaging because some forms of digital advertising allow a real-time conversation with a chatbot.<sup>203</sup> An email usually lacks this instantaneous back-and-forth nature that is present with a chatbot.<sup>204</sup>

The comments under Virginia’s rule against solicitation are far less detailed than New York’s.<sup>205</sup> The Comment states:

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<sup>194</sup> *Id.*

<sup>195</sup> N.Y. RULES PRO. CONDUCT r. 7.3 cmt. 9 (2022).

<sup>196</sup> *Id.*

<sup>197</sup> N.Y. RULES PRO. CONDUCT r. 1.0(c) (2022).

<sup>198</sup> N.Y. RULES PRO. CONDUCT r. 7.3 cmt. 9 (2022).

<sup>199</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS’N 1983).

<sup>200</sup> *Id.*

<sup>201</sup> N.Y. RULES PRO. CONDUCT r. 7.3 cmt. 9 (2022).

<sup>202</sup> See *Baadsgaard*, *supra* note 166.

<sup>203</sup> *What is Chatbot Marketing?*, IBM, <https://www.ibm.com/topics/chatbot-marketing> [<https://perma.cc/NUP8-AWJ8>] (“Chatbot marketing is a digital marketing strategy that involves using chatbots, which are automated computer programs designed to engage in conversations with users, to promote products, services or brands. These chatbots can be integrated into various messaging platforms, websites, or mobile apps to interact with customers and prospects in real-time.”).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.<sup>206</sup>

Therefore, unrestricted geofenced advertisements would be prohibited under the Virginia rule because they are directed toward an individual and not the general public.<sup>207</sup>

Proponents of geofenced ads would argue geofencing is permitted under the State and ABA rules because a geofence is essentially an Internet banner. However, this contention misses the general purpose of the Rule: allowing forms of solicitation directed to the "general public."<sup>208</sup> A geofenced solicitation is not directed toward the general public but "to a specific person known to be in need of legal services . . .," which is prohibited under the Virginia Rule.<sup>209</sup>

Lastly, looking at Indiana's Rules of Professional Conduct, Comment 2 of Rule 7.3 states that:

This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offers alternative means of conveying necessary information to those who may require legal services.<sup>210</sup>

Rule 7.2 states:

The term 'advertise' as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.<sup>211</sup>

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<sup>206</sup> VA. RULES PRO. CONDUCT r. 7.3 cmt. 1 (2024).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> VA. RULES PRO. CONDUCT r. 7.3(a) (2024).

<sup>210</sup> *See* IND. RULES PRO. CONDUCT r. 7.3 cmt. 2 (2024).

<sup>211</sup> *Id.* at r. 7.2(a).

Geofencing does not fit into Indiana's permitted forms of advertising because inherent to a geofence is the fact that it is targeted to a specific group of individuals.<sup>212</sup> This state survey shows no unanimity on how to classify geofencing.<sup>213</sup>

It is readily apparent from the sampled jurisdictions that there is no clear path forward in the face of geofencing. Additionally, the identified misunderstandings of courts create the need for the ABA to speak out on the issue.

### III. RESOLUTION: PROPOSED MODIFICATION TO ABA MODEL RULE 7.3

ABA Model Rule 7.3 should be reexamined amid the growing use of geofencing. This can be done through the addition of a Comment or the issuance of an Official Advisory Opinion. The Comment or Opinion would not place a flat ban on geofenced advertising but instead on time, manner, and place restrictions. Rewriting ABA Model Rule 7.3 would clear up a lot of confusion.

The ABA lags behind New Jersey's State Bar Association and the Supreme Court, which has prudently issued an advisory opinion on this issue.<sup>214</sup> The 2020 opinion does not flatly prohibit attorneys from engaging in geofencing; however, it does prohibit them from appearing in areas where targets are "likely to be in a compromised physical, emotional, or mental state."<sup>215</sup> The ABA must, therefore, issue a similar opinion to prevent lawyers from taking advantage of emotionally compromised individuals. A new definition of solicitation need not be formulated to encompass geofencing. Instead, including geofencing as prohibited conduct under ABA Model Rule 7.3 would suffice.

#### *A. Addition of a New Comment*

A proposed comment to the rule should state:

Any use of digital location marketing or geofencing to encompass an area frequented by those known to need or

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<sup>212</sup> See MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 1983) (explaining that "solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter).

<sup>213</sup> See *supra* Section II.D.

<sup>214</sup> See generally N.J. Supp. Ct. Advisory Comm. On Geo-Fencing, Geo-Targeting and Similar Elec. Advert. Techs., Op. 46 (2020).

<sup>215</sup> See *id.* (noting areas such as emergency rooms, hospitals, urgent care facilities, funeral homes, and police stations).

likely need legal services and offers to provide, or reasonably can be understood as offering to provide legal services, shall not be permitted.

This proposed definition is appropriate because it updates the antiquated ABA rule to the developments of the modern world.<sup>216</sup>

Exceptions to ABA Model Rule 7.3 would still apply to this proposed Comment.<sup>217</sup> Comment 5 states that there is far less overreaching when the solicitation is targeted at a person with whom the lawyer had a close relationship (business, family, or personal) or when the lawyer is not motivated by a monetary interest.<sup>218</sup> This exception allows an attorney to place a geofence around an area frequented by indigents if the attorney seeks to help this group of people, as long as their doing so is not motivated by a monetary gain.<sup>219</sup>

Additionally, there is no need to craft new punishments for attorneys who are found to have violated the provision. Since the 1930s, punishment for soliciting business from potential clients has included censorship, suspension, and disbarment.<sup>220</sup> In the New York case *In re Kreizvogel*, an attorney was reprimanded for soliciting an automobile accident victim in her home.<sup>221</sup> Additionally, in *In re Marino*, the court suspended an attorney for a prima facie pattern of systematic solicitation of automobile negligence business by utilizing their relationship with people as a cover for directing legal business to them.<sup>222</sup> A final example comes from *In re Horwitz*, an attorney who accepted retainers from two “runners” who he knew engaged in soliciting negligence cases warranted his disbarment.<sup>223</sup> The level of punishment to be levied against an attorney deemed to have violated the revised ABA Model Rule 7.3 should vary based on how egregious the violation was.

A first-time offender or single instance of solicitation should face a fine and censorship. This punishment is appropriate if the solicitation is not extensive.<sup>224</sup> A repeat offender or instances of multiple solicitations should

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<sup>216</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

<sup>217</sup> MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 5 (AM. BAR ASS’N 1983).

<sup>218</sup> *See id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See In re Kreizvogel*, 240 N.Y.S. 314, 315 (App. Div. 1930); *see In re Marino*, 20 N.Y.2d 176, 177 (1967); *see In re Horwitz*, 9 N.Y.S.2d 56, 56 (App. Div. 1939) (exemplifying an attorney who accepts retainers from two “runners” who he knew engaged in the business of soliciting negligence cases warrants disbarment).

<sup>221</sup> *See generally Kreizvogel*, 240 N.Y.S. at 314.

<sup>222</sup> *See generally Marino*, 20 N.Y.2d at 176.

<sup>223</sup> *See generally Horwitz*, 9 N.Y.S.2d at 56.

<sup>224</sup> *See Kreizvogel*, 240 N.Y.S. at 14 (“The record in this case does not indicate extensive indulgence in solicitation.”).

warrant a fine and suspension.<sup>225</sup> Finally, a previously reprimanded attorney who continues to solicit or engage in a particularly egregious example of solicitation should face disbarment.<sup>226</sup>

### *B. The Issuance of a Formal Advisory Opinion*

Another viable option is for the ABA Ethics Committee to release an advisory opinion similar to New Jersey's.<sup>227</sup> Advisory opinions released from the ABA assist attorneys in making sense of vague rules or statutes.<sup>228</sup> As recently as April 2022, the ABA's Standing Committee on Ethics and Professional Responsibility released an opinion seeking to clarify ABA Rule 7.3.<sup>229</sup>

Formal Opinion 501, as the advisory opinion is referred, considers solicitation in the presence of ABA Model Rule 8.4(a) and Rule 5.3, which extend a lawyer's responsibility or solicitation to those the lawyer employs, not just themselves.<sup>230</sup> This recent Opinion proves that questions of permissible solicitations are still prevalent but leaves many of these questions unanswered.<sup>231</sup>

This clarifying Opinion is a step in the right direction. However, the legal community needs not a step but a stride. This Opinion still leaves several questions:<sup>232</sup> Has the definition of "live, person-to-person" changed in the digital age? What is real-time? How does solicitation prohibition apply to geofencing? Opinion 501 rounds out by positing several ABA Model Rule 7.3 hypotheticals and then gives suggested approaches to the issues.<sup>233</sup>

<sup>225</sup> See *In re Marino*, 20 N.Y.2d at 176 (concluding that suspending the respondents was appropriate because they engaged in 881 instances of solicitation).

<sup>226</sup> See generally *In re Horwitz* 9 N.Y.S.2d 56; see *In re Nadelweiss*, 20 N.Y.S.2d 773, 774 (App. Div. 1940) ("The respondent, an attorney at law, is disbarred, where it appears that in three instances he has been guilty of unprofessional conduct in aiding and abetting in the solicitation . . .").

<sup>227</sup> See N.J. Supp. Ct. Advisory Comm. On Geo-Fencing, Geo-Targeting and Similar Elec. Advert. Techs., Op. 46 (2020).

<sup>228</sup> *Advisory Opinion, LEGAL INFORMATION INSTITUTE*, [https://www.law.cornell.edu/wex/advisory\\_opinion](https://www.law.cornell.edu/wex/advisory_opinion) [<https://perma.cc/KCU6-XV2Z>].

<sup>229</sup> *ABA Issues Guidance on 'Live Person' Lawyer Solicitation to Clarify Existing Model Rules*, ABA, <https://www.americanbar.org/news/abanews/aba-news-archives/2022/04/aba-issues-guidance-on-live-person-lawyer-solicitation/> [<https://perma.cc/3CKW-UPUR>] (defining Rule 7.3 as it pertains to third-party advertising on behalf of an attorney).

<sup>230</sup> *Id.*

<sup>231</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 501 (2022) ("Despite the 2018 clarifications, ambiguity remains concerning a lawyer's ethical responsibility for the lawyer's actions and for the actions of others who engage in live, person-to-person solicitation with specific individuals.").

<sup>232</sup> See *id.*

<sup>233</sup> *Id.* (Explaining that the first hypothetical gives a situation where the lawyer obtains a list of people who have been arrested and calls them to offer legal services. The ethics committee concluded this is a prima facie case of an ABA Rule 7.3 violation. The second deals with a lawyer who hires a lead generator who lurks in online chat rooms to identify injury victims. The lead generator calls the victims. The attorney

Unfortunately, none of the hypotheticals addressed geofencing or location-based targeting.<sup>234</sup> Regarding guidance, the Opinion is not substantial and mainly serves to remind attorneys that they are responsible for the conduct of those they employ.<sup>235</sup>

#### IV. CONCLUSION

To attract new clients, the increasingly digital world has made “carrying signs” and “wearing buttons in a courtroom” a thing of the past.<sup>236</sup> As younger lawyers begin their practice, geofencing will be the norm unless addressed and curtailed. Crucial to maintaining integrity in the legal profession, the ABA must amend Model Rule 7.3 to account for geofencing.<sup>237</sup> Not only would an amendment protect the legal profession, but it would also protect the people that the lawyers seek to serve.

This Note addresses the shortcomings of the ABA Model Rules and highlights why targeted geofencing is a form of attorney solicitation that should be barred. If the ABA does not act now, untold damage could occur to plaintiffs and defendants as they are manipulated by over-intrusive attorneys looking for their next big paycheck. Several states have slightly different rules on attorney solicitations. These differences make it hard to determine where geofencing fits into the solicitation determination. Regarding the dangers of geofencing, New Jersey is the most progressive state in addressing the issue by releasing Opinion 46.<sup>238</sup> The ABA must issue a similar opinion to clarify its position to prevent lawyers from taking advantage of emotionally compromised individuals.

This Note suggests several ways the ABA could clarify how attorneys can continue to exercise their First Amendment rights while abiding by the ethical rules. Additionally, this Note shows how geofencing is employed in everyday life and analyzes several jurisdictional approaches to geofencing. A lasting impact would be for the ABA to amend Model Rule 7.3 and add a Comment to the rule to account for geofencing. As demonstrated, targeted

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did not know of this practice but accepted the referrals, violating Rule 7.3. The third involves a paralegal who works part-time as a paramedic and hands out business cards of the law firm to accident victims. This was determined to be a Rule 7.3 violation. Finally, in the last hypothetical, a lawyer asks his banker friend to provide the lawyer’s contact information to the bank’s clients who might need a lawyer. The committee found this scenario similar to a “word of mouth” referral and not a violation of the rules).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Pilliod*, 2019 Cal. Super. LEXIS 23599, at \*7.

<sup>237</sup> *Ambach v. Norwick*, 99 S. Ct. 1589, 1593 (1979) (“[Attorneys are] responsible for strict adherence to the announced and implied standards of professional conduct and to the requirements of evolving ethical codes, and for honesty and integrity in his professional and personal life.”).

<sup>238</sup> N.J. Supp. Ct. Advisory Comm. On Geo-Fencing, Geo-Targeting and Similar Elec. Advert. Techs., Op. 46 (2020).

geofencing is a form of solicitation, as defined under ABA Model Rule 7.3. The Rule drafters would have included geofencing as prohibited attorney conduct had they been aware of this developing issue.

If amending ABA Model Rule 7.3 to include a Comment is not feasible, the ABA should issue an Official Advisory Opinion informing attorneys how to proceed in the face of geofencing. While not binding, Advisory Opinions advise states on how to craft their rules. As technology continues to advance, the issue of targeted solicitations is bound to get worse before it gets better. Now is the time for the ABA to act and halt this unfair practice before it becomes too late.

With the clarification of ABA Model Rule 7.3 in the presence of geofencing, Tanner can rest easy knowing that a money-hungry attorney is not looking to make a quick buck off of Cole's misfortune. Furthermore, Cole and others in his position can rest easy knowing that attorneys are not acting predatorily regarding the misfortunes of others. Finally, Americans can rest easy knowing their digital privacy is protected in this ever-increasingly digital world.