MEMORANDUM

TO: **Louisiana Bar Foundation**
FROM: **Professor Diane Kemker, JD, LLM, Visiting Professor of Law (Remote), Southern University Law Center**
DATE: **August 31, 2022**
RE: **Speak Out for Justice! Focus on Civil Legal Aid [Estate Planning for Communities of Color]**

Executive Summary

Statistics suggest there is very significant unmet need for no- or low-cost estate planning services among communities of color in Louisiana. Louisiana has a large legal community on a per-capita basis, and a well-defined specialization in estate-planning and successions. However, the bar is overwhelmingly white, which may present some perceived obstacles in accessing their services. Only one of Louisiana's four law schools offers a clinic that addresses this need, and fortunately, it is located at an HBCU law school, the Southern University Law Center in Baton Rouge. But it is not nearly enough.

The first recommendation is to perform additional empirical research. It is difficult to assess precisely either the unmet need or whether there is additional capacity to meet it without more thorough quantitative data. The second recommendation is for the establishment of more law school clinics in Louisiana with this focus, particularly at one of the New Orleans law schools. A related recommendation is to develop some kind of mobile, off-site, or "pop-up" clinic that could reach parts of Louisiana outside the southeastern part of the state. Two longer-term recommendations include changing the Louisiana Rules of Professional Conduct to permit solicitation in the estate-planning context, and adding a *pro bono* requirement to the specialization requirements.

III. Recommendations: Overcoming Obstacles

A. Additional Empirical Research
B. Support the Creation and Expansion of More Clinics Throughout the State
C. Changing the Rules of Professional Conduct (ROPC) to Permit Solicitation
    1. Current Louisiana ROPC
    2. Proposed Rule Changes
D. Add *Pro Bono* to the Specialization Requirements

IV. Conclusion

Appendix A: Klein, "Knocking on Heaven's Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-to-Person Solicitation," Volume 44, *Journal of the Legal Profession*, pp. 3-35 (Fall, 2019).

I. The Need

It is difficult to assess the precise unmet need for estate planning services in communities of color in Louisiana, particularly the Black community. It is also difficult to measure the estate-planning "gap": the difference between the percentage of persons of different races who have engaged in estate planning.

However, there is good reason to believe that thousands of Black people die in Louisiana each year having not had meaningful access to estate planning services. This is being felt especially acutely because of COVID-19, which has not only resulted in significantly higher numbers of deaths from 2020 until today, but also disparately impacted communities of color. The employment and isolation dimensions of COVID-19 have also almost certainly negatively affected the likelihood of people accessing estate planning, especially making initial contact, since the pandemic began

A. Assessing the Need: General Demographics

1. Overall

The population of Louisiana in 2022 is approximately 4.68 million people.[1] The population is approximately 61% White, and a little over 32% Black, about 1.5 million.[2] Of these,

[1] https://worldpopulationreview.com/states/louisiana-population
[2] https://worldpopulationreview.com/states/louisiana-population

approximately 30% are below the poverty line.[3] (Louisiana's overall poverty rate, nearly 19%, makes it the second-poorest state in the U.S., after Mississippi.[4]

The poverty of many people of color in Louisiana should not suggest a lack of need for estate planning, although it may be a partial explanation for their under-utilization of legal services. Although the wealthier a person is, the likelier it is, statistically, that they will have engaged in estate planning, for poor people, the preservation of very limited family assets is crucially important, as is provision for persons who may be in nontraditional family arrangements.

2. Deaths

Louisiana ranks 49th in overall life expectancy in the U.S., at 73.1.[5]

As recently as 2017, fewer than 35,000 died from the top ten causes of death in Louisiana combined,[6] about 1000 more than the year before.[7]

In 2020, 56,752 people died in Louisiana,[8] and at least 55,300 died in 2021.[9]

3. Probate Statistics

Unfortunately, Louisiana is not among the forty states that participate in the Court Statistics Project, and it is difficult to determine how many probate/successions cases are filed or pending in Louisiana in any given year, or how long such matters typically take to be resolved.[10] (Alabama, similar in size and location, also does not participate.) Perhaps the most similar reported state is South Carolina, which reported 796 probate cases per 100,000 in 2019; also similar in size is Kentucky, which reported 825 per 100,000 in 2019. Each of these numbers dropped in 2020 (to 788 in South Carolina and 753 in Kentucky), but this is likely due to pandemic-related court closures, as deaths began to rise. (No statistics are yet available for 2021.)

At 800 per 100,000, there would be about 37,000 matters per year, closely tracking the annual death rate.

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[3] https://worldpopulationreview.com/states/louisiana-population
[4] https://www.fcnl.org/updates/2021-11/top-10-poorest-states-us
[5] https://www.cdc.gov/nchs/data/nvsr/nvsr71/nvsr71-02.pdf
[6] https://www.cdc.gov/nchs/pressroom/states/louisiana/louisiana.htm
[7] https://www.cdc.gov/nchs/pressroom/states/louisiana/louisiana.htm
[8] https://www.cdc.gov/nchs/fastats/state-and-territorial-data.htm
[9] https://www.nola.com/news/politics/article_c9a00050-637b-11ec-a1a3-773fc5fa7af3.html
[10] https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil

B. COVID-19 and "Excess Death"

Nationwide, the effects of COVID-19 have been devastating. Approximately 460,000 people died of COVID-19 in 2021 (based on provisional data), in addition to the 400,000 who died of COVID-19 in 2020.[11] COVID-19 resulted in thousands of tragic and untimely deaths, many of which were not planned for. The probate system nationwide began to feel the effects of this as early as December of 2020.[12]

Louisiana has been hit tragically hard by COVID-19. From the first recorded deaths from COVID-19 in March, 2020, dramatically more people died week over week in Louisiana in 2020 compared to 2019.[13] In every week of 2020 except one, more people died than in the same week in 2019, and in some of the worst weeks of 2020, nearly *twice* as many people died in 2020 as had died in the same week in 2019. For example, during the week ending April 13, 2019, 853 people died, while in the week ending April 11, 2020, 1,530 people died. In all, between 2019 and 2020, deaths increased by more than 10,000,[14] and another 7500 or more people died of COVID in 2021.[15] As of July 2022, nearly 18,000 residents of Louisiana have died from COVID-19.[16]

II. Meeting the Need: Resources and Obstacles

A. Lawyer Resources

1. Statistics

According to statistics from 2018, Louisiana had about 18,900 lawyers, ranking 11th in the U.S. in lawyers per capita.[17] By 2021, that number rose to 21,414,[18] though it dropped to 19,714 in 2022.[19]

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[11] https://www.cdc.gov/mmwr/volumes/71/wr/mm7117e1.htm
[12] https://www.courtstatistics.org/__data/assets/pdf_file/0033/57885/2020_3Q_pandemic_trends.pdf
[13] https://www.indexmundi.com/dashboards/us-deaths/louisiana
[14] https://www.kplctv.com/2022/03/24/la-death-total-jumped-more-than-10000-2019-2020/
[15] https://www.nola.com/news/politics/article_c9a00050-637b-11ec-a1a3-773fc5fa7af3.html
[16] https://covid19.healthdata.org/united-states-of-america/louisiana?view=cumulative-deaths&tab=trend
[17] https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/
[18] https://www.ilawyermarketing.com/lawyer-population-state/
[19] https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2022.pdf

Nationwide, only about 4.6% of lawyers are Black.[20] Precise demographic data about the Louisiana bar is not available. Informal interviews with Louisiana estate practitioners supported the guess that there are few, if any, Black estate-planning practitioners.

2. Estate Planning and Administration Specialization

Estate Planning and Administration is one of the nine areas of specialization recognized by the Louisiana State Bar Association (LSBA). The LSBA has promulgated rigorous standards for this specialization.[21]

There are currently about 105 certified Estate Planning and Administration Specialists in Louisiana.[22] The demographics of this group are not reported, but based on professional pictures, it appears that the leadership are all white. This of course does not mean that they would not be able or willing to serve communities of color, but there may be some perceived barriers related to the perception that this is a white area of practice for white clients. In informal interviews with successful practitioners in Louisiana, they recalled no or very few Black clients over many years of practice.

Informal interviews also suggested that successful and able estate-planning practitioners are in small firms, thinly staffed and very busy, with very little time for *pro bono* clients.

B. Law School Resources: Clinics

Another possible source of low- or no-cost legal services are law school clinics.

Louisiana has four law schools, two in New Orleans and two in Baton Rouge. All of these law schools offer several clinical experiences for their students.

Clinics provide an opportunity for students to gain real-world experience representing real clients, under the supervision of admitted lawyers. Clinics give students experience in particular subject matter areas, and also provide service to clients in the community.

By their choice of clinics, law schools also communicate to their students and the broader legal world which areas are most important and where the law school feels it can make the most valuable contribution.

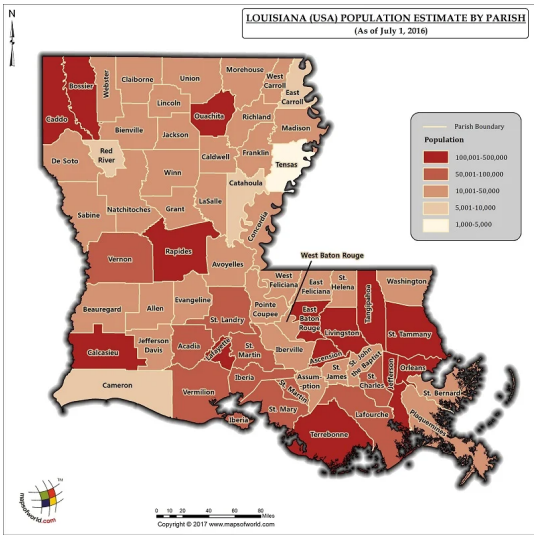
All of Louisiana's law schools have clinics. However, only one of Louisiana's four law schools offers a clinic focusing on elder law and successions, the Southern University Law Center

[20] https://www.americanbar.org/content/dam/aba/administrative/market_research/cpsaat11.pdf
[21] https://www.lsba.org/Specialization/EstatePlanning.aspx?Area=Standards
[22] https://www.lsba.org/Specialization/EstatePlanning.aspx?Area=Specialists

(SULC) in Baton Rouge. Most of the clinics offered by the law schools of Louisiana focus on criminal law, which is obviously a very important area. As of 2020, Louisiana had the highest incarceration rate of any state in the United States (at 680 per 100,000), accounting for more than 32,000 individuals.[23]

So although law school clinics are a possible source of low- or no-cost estate-planning services for those who need it, particularly persons of color, the successions and estate-planning area is badly under-served by comparison to some of the other areas of law.

In addition, because *all* of Louisiana's law schools are located in New Orleans and Baton Rouge, persons who might need estate-planning services and live far from those major cities, have even less access. Although the population map at left below (from 2016) is somewhat out of date, together with the 2020 population density map below at right, it is a good reflection of places of larger population outside of Baton Rouge and New Orleans (although the trend of population is towards the south and east).[24]



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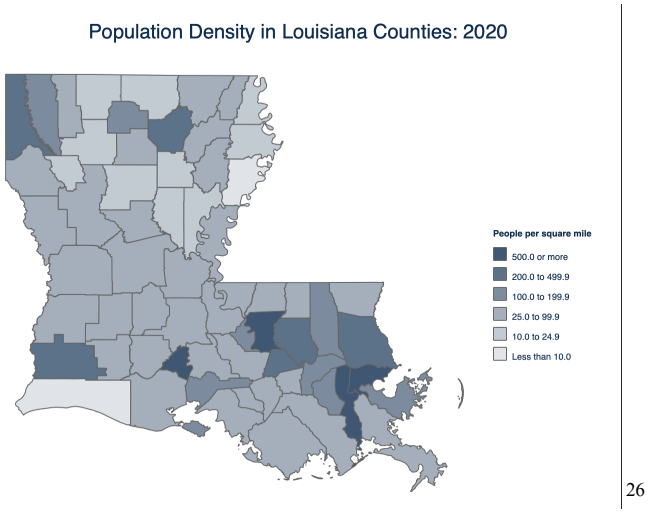

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[23] "Despite reforms, Louisiana's incarceration rate leads the nation," (October 26, 2020) https://docs.google.com/spreadsheets/d/1qq9yB0LkKccV85vqhRB3PCysV8hTwqeIj1NWExAbc64/edit?usp=sharing

[24] https://www.mapsofworld.com/answers/united-states/what-is-the-population-of-louisiana/attachment/louisiana-map-population-by-parish/

[25] https://www.mapsofworld.com/answers/united-states/what-is-the-population-of-louisiana/attachment/louisiana-map-population-by-parish/

[26] https://lailluminator.com/2021/08/23/with-census-figures-in-louisiana-turns-to-redrawing-political-maps/

1. Louisiana State University Paul M. Hebert Law Center (LSU)

LSU offers six clinics: Civil Mediation, Immigration, Juvenile Defense, Parole Assistance and Re-Entry, Prosecution, and Wrongful Conviction.

2. Loyola University New Orleans College of Law

Loyola administers its clinical program through a single clinic, the Stuart H. Smith Law Clinic and Center for Social Justice. The clinic identifies numerous "fields of practice": Children's Rights, Community Justice, Criminal Defense, Family Law, Immigration Law, Misdemeanor Clinic, Prosecution Clinic, Workplace Litigation Clinic, and Youth Justice Clinic. (There has also historically been a Litigation and Technology Clinic, not offered in 2022-2023.)

3. Southern University Law Center (SULC)

SULC offers twelve clinics: Bankruptcy, Civil & Administrative Law, Criminal, Disaster Law, Divorce & Domestic Violence, Elder & Successions Law, Juvenile Law, Low-Income Taxpayer, Mediation, Real Estate & Housing, Technology and Entrepreneurship, and Workers Compensation.

SULC is the one law school in Louisiana that offers this clinic.

4. Tulane University School of Law

Tulane offers eight clinics: Civil Rights & Federal Practice, Criminal Justice, Domestic Violence, Environmental Law Clinic, Juvenile Law, Legislative & Administrative Advocacy, Immigrant Rights Clinic, and First Amendment Clinic (free speech).

C. The SULC Elder Law/Successions Clinic

SULC's website describes the Elder Law/Successions Clinic this way:

> The purpose of the Elder Law/Successions Clinic is to allow students to gain an increased understanding of the substantive laws affecting the elderly. Students are exposed to various areas of elder law such as wills, housing, consumer fraud, as well as abuse and neglect. The cases handled by the Elder Law Clinic consist primarily of civil matters. The students represent the indigent elderly in district court and in administrative hearings. The Elder Law clinic also handles all simple successions.

The director of this clinic is Charlie Cain, Esq. Professor Cain is not a permanent full-time member of the SULC faculty. He is associated with Capital Area Legal Services Corporation, which provides services to eight Louisiana parishes, Ascension, East Baton Rouge, East Feliciana, Iberville, Lafourche, Pointe Coupee, St. John the Baptist, and Terrebonne.

The clinic does not publish data about the number of clients or matters each year, or the student enrollment. (This information has been requested but has not yet been received.)

III. Meeting the Need: Overcoming Obstacles

A. Additional Empirical Research

The first recommendation is for additional empirical research. It is difficult to assess precisely either the unmet need or whether there is additional capacity to meet it without more thorough quantitative data. Here are some of the questions that need to be answered through further research:

1. How many pending probate/successions matters are there in Louisiana currently? [How do they track the demographic makeup of Louisiana?]
2. How many Louisiana decedents die intestate or with incomplete planning documents? [With demographic data]

3. What percentage of Louisiana decedents die intestate or with incomplete planning Documents? [With demographic data]
4. What is the racial/ethnic breakdown of the Louisiana bar; practitioners in this area; and specialists?
5. How many law students have participated in the SULC clinic; how many clients have they served; how many and what percentage of these students go into estate-planning as part or all of their law practice?

There are other empirical questions that may need to be answered to assess the size (if any) of the estate-planning gap and the resources currently available for meeting unmet need. Taking account of the impact of COVID-19 on probate and succession, as well as assessing whether it has created additional interest in planning.

B. Support the Creation and Expansion of More Clinics Throughout the State

It is unknown whether the other three law schools in Louisiana would consider a successions and estate-planning clinic (or an elder law clinic including this). It is possible that with suitable outreach from LBF and members of the Louisiana Board of Legal Specialization Estate Planning and Administration Advisory Commission, one or more might be interested in developing their curriculum and clinical offerings in this way. Many of the Estate Planning and Administration specialists and Advisory Commission leaders attended other law schools in Louisiana, and might have influence as alumni, should they choose to exercise it. Joseph M. Placer, the Chair of the Advisory Commission; Leslie Halle, the Secretary,[27] and members Kevin C. Curry. T. Glynn Blazier, and Carl Servat, attended LSU.[28] Member Jimmy D. Long attended Loyola University of New Orleans.[29]

C. Changing the Rules of Professional Conduct (ROPC) to Permit Solicitation

1. Current Louisiana ROPC

Like the ABA Model Rules of Professional Conduct, the Louisiana Rules of Professional Conduct (ROPC) severely limit the ability of attorneys to do outreach to communities who do not have prior relationships with counsel.

ROPC 7.4, Information About Legal Services

> **Rule 7.4. Direct Contact with Prospective Clients (amended effective 6/22/2011)**

[27] https://www.goldweems.com/leslie-e-halle
[28] http://www.placerlawfirm.com/members.html
[29] https://www.lsmsa.edu/list-detail?pk=164134

(a) Solicitation. 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 lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer's request or on the lawyer's behalf or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this Rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase "prior lawyer-client relationship" shall not include relationships in which the client was an unnamed member of a class action.

(b) Written Communication Sent on an Unsolicited Basis.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) 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 thirty days prior to the mailing of the communication;

(B) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(C) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(D) the communication contains a false, misleading or deceptive statement or claim or is improper under subdivision (c)(1) of Rule 7.2; or

(E) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) Unsolicited written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Unsolicited written communications to a prospective client are subject to the requirements of Rule 7.2.

(B) In instances where there is no family or prior lawyer-client relationship, a lawyer shall not initiate any form of targeted solicitation, whether a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these Rules:

(i) Such communication shall state clearly the name of at least one member in good standing of the Association responsible for its content.

(ii) The top of each page of such written communication and the lower left corner of the face of the envelope in which the written communication is enclosed shall be plainly marked "ADVERTISEMENT" in print size at least as large as the largest print used in the written communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the "ADVERTISEMENT" mark shall appear above the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Written communications solicited by clients or prospective clients, or written communications sent only to other lawyers need not contain the "ADVERTISEMENT" mark.

(C) Unsolicited written communications mailed to prospective clients shall not resemble a legal pleading, notice, contract or other legal document and shall not be sent by registered mail, certified mail or other forms of restricted delivery.

(D) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any unsolicited written communication concerning a specific matter shall include a statement so advising the client.

(E) Any unsolicited written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of that person shall disclose how the lawyer obtained the information prompting the communication.

(F) An unsolicited written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

2. Proposed Rule Changes

As I argue in my article, "Knocking on Heaven's Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-to-Person Solicitation," published in Volume 44 of the *Journal of the Legal Profession* in Fall, 2019, changes in the rules governing lawyers have the potential to change this situation.

D. Add *Pro Bono* to the Specialization Requirements

The current requirements for the Estate Planning and Administration Specialization are voluminous and rigorous.[30]

CLE credit can be awarded for *pro bono*

> IV.E. Pro Bono CLE credit may be awarded for providing uncompensated pro bono legal representation related to an estate planning and administration matter, as defined in Section IC herein, to an indigent or near indigent client or clients. CLE credit shall not be granted until the representation has been assigned, completed and verified by the assigning organization as defined by and in accordance with the Supreme Court of Louisiana Rules for Continuing Legal Education.[31]

These requirements do not explicitly address any diversity-related aspects of practice, neither clients nor the bar itself. These are ongoing challenging issues, much larger than the estate-planning area of practice; but as important in that area as in any.

IV. Conclusion

[30] https://www.lsba.org/Specialization/EstatePlanning.aspx?Area=Standards
[31] https://www.lsba.org/Specialization/EstatePlanning.aspx?Area=Standards

Additional empirical research is needed to establish the precise scope of the unmet need for estate-planning services in communities of color in Louisiana, disadvantaged by poverty and historic patterns of racism and inequality. But regardless of the exact numbers, informal and anecdotal evidence makes it very likely that significant parts of the Black community in Louisiana are grievously underserved where estate planning is concerned. Although the bar consists of able practitioners of good will, additional incentives need to be created to help them do more. Similarly, Louisiana law schools have shown a commitment to clinical education of their students, but not nearly enough of them are working in this area. I am proud to serve as a visiting professor of law at Southern University Law Center, the one law school in Louisiana that has made this commitment and, not coincidentally, an HBCU. I am hopeful that with encouragement from the Louisiana Bar Foundation, the bar and legal academy will rise to meet this need.

Appendix A

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Journal of the Legal Profession
Fall, 2019
Article
Diane J. Klein[a1]

KNOCKING ON HEAVEN'S DOOR: CLOSING THE RACIAL ESTATE-PLANNING GAP BY ENDING THE BAN ON LIVE PERSON-TO-PERSON SOLICITATION

I. INTRODUCTION

More than half of all Americans die intestate,[1] and among communities of color, the percentage is even larger.[2] A 2016 Gallup poll found that while 51% of White[3] adults have wills, just 28% of nonwhite adults do.[4] Among those aged 55 and above, just over 20% of Black Americans and fewer than 20% of Hispanic Americans have either a will or a will and a funded trust, while about 60% of White Americans over 55 have these planning documents.[5] Widespread misconceptions about the cost of probate or the need ***4** for a will may be partly to blame[6] - but lack of access to affordable, culturally-competent attorneys no doubt also plays a part.[7]

The consequences of lack of planning can be devastating and heartbreaking. Consider the case of *O'Neal v. Wilkes*.[8] *O'Neal* involved a Black woman, Hattie O'Neal, born to unmarried parents in 1949.[9] Her father abandoned her and she was orphaned after her mother's death in 1957.[10] She was passed from a maternal aunt to a paternal aunt and ultimately to a couple named Cook, who took in the ten- or eleven-year-old girl and raised her to adulthood.[11] Thirty years passed, during which Mr. Cook referred to her as his daughter and her children as his grandchildren, before Mr. Cook died intestate, and O'Neal then endeavored to establish herself as his equitably adopted child - but was unsuccessful.[12] His estate ultimately passed not to the woman he'd thought of as his daughter for decades, but to other more distant relatives.[13] Informal adoptions of this kind, including by grandparents, are not uncommon in the Black community; one study contemporaneous with the *O'Neal* decision estimated that nearly 800,000 of the approximately one million Black children in the U.S. not living with a biological parent had been informally adopted in this way.[14]

More recent government data validates the prevalence and value of "kinship care," formal or informal, in many communities of color.[15] Unfortunately, the fluidity and flexibility that may make it the best approach for a ***5** child or family in difficult, possibly temporary, circumstances, when coupled with a lack of estate planning, can lead to unintended outcomes that frustrate the expectations and desires of decedents and their surviving families.

Upon learning about the disastrous consequences of failure to plan-- consequences that can fall especially hard on families where legal formalities do not necessarily reflect the emotional, psychological, and social realities-- one might reasonably wonder why motivated estate-planning lawyers don't simply go door-to-door in these underserved communities, offering their services to potential clients.

The answer might surprise you (or at least, might surprise laypeople). "Live person-to-person contact,"[16] defined in a more prolix way as "in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications," and more concisely as "a direct personal encounter,"[17] constitutes a prohibited practice called "**solicitation**." This prohibition is codified at ABA Model Rule of Professional Conduct 7.3,[18] which has been widely enacted.[19] The rules of professional responsibility in nearly every state therefore expressly forbid offering

services this way.[20] Recent amendments to the Model Rules permitting contact through electronic means that leave a verbatim record and also may be "easily disregarded"[21] (like text messages or social media posts) have increased the variety of permitted contacts, and may have made things easier and better for *lawyers* - but they still prohibit the kind of encounter that might really make a difference for many potential *clients*.[22]

***7** Even as recently amended, the current prohibition is overbroad, unnecessary, and in tension with other deep principles both of probate law and professional responsibility. There is no good reason to prohibit **solicitation** by estate-planning attorneys - but several good reasons to permit it. Limits on **solicitation** serve some worthwhile purposes, and thus should not be completely abolished.[23] But the prohibition should not apply to offers of estate-planning services made to competent prospective clients living independently, so long as informed consent, confirmed in writing, is obtained for any resulting legal services (and other applicable professional ethical rules are enforced).

As will be shown, other Model Rules and common substantive probate code provisions (including those regarding disqualified transferees and attorney-drafter-beneficiaries[24]) amply protect against the harms the anti-**solicitation** rule is supposed to prevent, to the extent they have any relevance in this setting at all. Moreover, in-person face-to-face **solicitation** itself, for planning and not adversarial purposes, is a positive *benefit* in the estate-planning context. It allows the lawyer to serve a proper role as counselor. It has the power to enable more people to die testate if they wish to, a practice favored by law and policy yet demonstrably under-utilized.[25] A narrowly-drawn exception to the anti-**solicitation** rules strikes a better balance between the risks of overreaching by will-drafting lawyers and the costs of failure to plan. These costs are disproportionately borne by members of traditionally underserved communities who have historically faced obstacles in accessing legal services. This change in the professional rules can also help close the ***8** race- and class-based estate-planning gap, and fulfill the non-discrimination principles of Model Rule 8.4(g).[26]

Part I of this article will first connect data linking the racial wealth gap (and related factors) in the United States to the estate-planning gap. Next, Part II will clarify what qualifies as a prohibited **solicitation** under the newly-amended and prior Model Rules. Part III will explore the reasons why **solicitation** is banned, and Part IV will describe how other Model Rules and statutes ameliorate these risks in the estate-planning context. Finally, Part V will set out the proposed modification of the Model Rule and describe some of the benefits of permitting estate-planning attorneys to do personal outreach to prospective clients.

II. THE WEALTH GAP AND THE ESTATE-PLANNING GAP

As noted above, White Americans over 55 are nearly three times likelier to have estate-planning documents, compared to Black and Hispanic Americans.[27] These statistics suggest, though they do not prove, that holographic will statutes, facilitating will-making without lawyers in highly populous states including California[28] and Texas,[29] do not solve the problem.[30]

How can we account for this? Unsurprisingly, a careful statistical analysis of estate planning among people over age 55 shows what most people might already have guessed: "[W]ealth is a major predictor of the usage of ***9** estate planning documents."[31] Because wealth in the United States is not evenly distributed among racial and ethnic groups,[32] this translates into substantially greater use of estate-planning documents by White older adults. As the Federal Reserve reported,

> In 2016, white families had the highest level of both median and mean family wealth: $171,000 and $933,700, respectively .... Black and Hispanic families have considerably less wealth than white families. Black families' median and mean net worth is less than 15 percent that of white families, at $17,600 and $138,200, respectively. Hispanic families' median and mean net worth was $20,700 and $191,200, respectively.[33]

As the researchers remind us, "the mean is substantially higher than the median, reflecting the concentration of wealth at the top of the wealth distribution."[34] Reflecting and amplifying this difference, 26% of White families have received an inheritance, but just 8% of Black families and 5% of Hispanic families have done so.[35] And even those families of color who do receive wealth from prior generations tend to receive much less.[36]

Familiar recommendations for closing the gap, such as education, while valuable, only go so far. Thus we find,

> Among households headed by someone with a college degree, net worth is substantially higher for white families than for the other three groups of families. The median net worth of college graduates in 2016 was $397,100 for white families, but well below $100,000 for black families and Hispanic families.[37]

Filling out more of the picture,

> ***10** Nearly one in five black households has zero or negative net worth. The share of white households without any wealth is considerably smaller, at 9 percent. Hispanic and other households fall somewhere in between white and black families on this measure.[38]

The long-term effects of structural discrimination are unmistakable and undeniable:

> [E]ven accounting for variation in *all* of the demographic factors [age, educational attainment, marital status], the gaps between families grouped by race/ethnicity remain (although they are considerably smaller). Results from regression analyses show that accounting for the demographic factors ... shrinks the gap to about one-third of the overall gap for white families and black families, and about one-fifth of the overall gap for white families and Hispanic families. Still, the adjusted gaps in net worth remain sizable.[39]

Closely related to this wealth gap is the persistent "digital divide"--sharply differentiated rates of smartphone ownership, desktop/laptop computers at home, and home broadband access, based on income[40] and also on race.[41] While policymakers are quite appropriately paying attention to the so-called "homework gap"[42]--differential access to home broadband and its effects on student achievement--the primary internet-related issue having to do with older people is fraud prevention.[43] One consequence of this discrepancy is that the recent amendments permitting lawyers to text potential clients (and use other real-time electronic communications) without transgressing the rules will not do as much to ameliorate uneven access to estate- ***11** planning services as might be hoped and, in fact, may facilitate misconduct by the unscrupulous.

In addition to the marked wealth gap and the digital divide, there are additional cultural barriers that may interfere with accessing estate-planning services. Not enough empirical research has been done about reasons for variation in utilization of estate-planning devices across races and cultures;[44] the frequent absence of race as a variable is itself revealing of the problem.[45] For members of some ethnic groups, cultural norms disfavor having the kinds of conversations that are a necessary part of estate and end-of-life planning. For example, some traditional older Chinese people, including some first-generation immigrants, are reluctant to address these issues, and out of respect for their parents, their children are equally reluctant to raise these issues with them.[46] For those with limited English, this is likely to translate into further underutilization of estate-planning services.

A small and unusual Alabama study published in 2015 surveyed about 1,000 adults, 80% of whom were Black; 71% of all respondents were between 61 and 80 years old.[47] This table of results is worth reproducing here.

***12 Table 2. Listing of Barriers by Percentage and Race**[48]

AFRICAN AMERICANS WITHOUT DOCUMENTS (N=645)		CAUCASIAN AMERICANS WITHOUT DOCUMENTS (N=115)	
Barriers	**% of Respondents**	**Barriers**	**% of Respondents**
a) Family members will make the correct decisions about my property & other things after my death and when I can't make them for myself	59.8	a) Do not have good understand of the documents	53.9
b) Do not have good understanding of the documents	37.5	b) Family members will make the correct decisions about my property & other things after my death and when I can't make them for myself	52.6
c) Do not want to choose between family members	31.3	c) Too expensive to get a person to help with developing such documents	40.9
d) Do not have enough assets	31.1	d) Do not know who to trust	35.5
e) Too expensive to get a person to help with developing such documents	30.3	e) Do not have enough assets	31.9
f) Do not know who to trust	22.4	f) Do not want to choose between family members	28.4
g) Death & Property are my business & should not be discussed with others	20.5	g) Death & Property are my business & should not be discussed with others	27.9

h) Not at the age to start considering such documents	16.2	h) Not at the age to start considering such documents	15.2
i) Cannot discuss health issues or decisions due to religious beliefs	8.1	i) Cannot discuss issues such as death & property due to religious beliefs	7.5
j) Cannot discuss issues such as death & property due to religious beliefs	7.6	j) Cannot discuss health issues or decisions due to religious beliefs	6.6

While self-reported barriers should perhaps not be taken entirely at face value--people may fail to plan for reasons they themselves don't understand well--lack of understanding of planning documents, not knowing who to go to, concerns about cost, and cultural/religious beliefs clearly play a role.[49] All of these issues can be directly addressed by a competent estate planner. The Alabama researchers also concluded as follows:

> A significant difference was found between Caucasian Americans and African Americans. African American older adults were significantly less likely to have a will, power of attorney, and a health care proxy than their Caucasian American counterpart[s]. Likewise, African Americans were significantly less likely to have had exposure to information pertaining to a power of attorney and a health care ***13** proxy. Estate planning directed at all older adults, but especially African Americans, could improve the number of Alabamians with estate plans in place while also helping family and community members avoid many legal and family battles. Also, the differences in estate planning by ethnicity denote the need for further research and education in areas of Alabama that have high concentrations of African Americans, such as the Black Belt area.[50]

The well-documented and persistent wealth gap, together with the other barriers only briefly sketched here, have translated into a predictably racialized estate-planning gap. Anglo-American law contains a strong and oft-expressed preference for testacy,[51] a formal legal commitment to enabling those competent persons who wish to control the devolution of their property upon death to do so, and a rule of professional responsibility banning conduct with a discriminatory impact.[52] Yet the profession continues to burden itself with a rule that virtually ensures that (especially poor) people of color do not benefit from estate-planning as much as they might.[53]

III. WHAT IS A PROHIBITED SOLICITATION?

Although an estate-planning attorney knocking on doors and offering his or her services might meaningfully increase the number of planned estates--a desirable goal--the attorney's conduct would squarely violate Model Rule of Professional Conduct (MR) 7.3, subsections (a) and (b), which read as follows:

> ***14** (a) "**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.
>
> (b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain ...[54]

Solicitation as currently defined thus has seven elements:

(1) it is a “communication”;

(2) “directed to a specific person”;

(3) who the lawyer knows or should know “needs legal services in a particular matter”;

(4) “initiated by or on behalf of a lawyer”;

(5) made “by live person-to-person contact”;

(6) offering to provide legal services; and

(7) motivated by “the lawyer’s ... pecuniary gain.”

Elements (2), (3), and (5) most clearly distinguish prohibited **solicitation** from permitted advertising, which is also a communication (1), initiated by a lawyer (4), including an offer to provide legal services (6) for a fee (7) -but to the general public, and not live and in person.[55]

No less an authority than the U.S. Supreme Court has held that anti-**solicitation** rules are constitutionally permissible as a form of State regulation of the legal profession not inconsistent with the First Amendment. In *Ohralik v. Ohio State Bar Association*, the Court upheld the suspension of an attorney disciplined for soliciting an accident victim, under a predecessor form of the rule.[56] A year before, in *Bates v. State Bar of Arizona*,[57] the Supreme Court had struck down a ban on truthful advertising (on First ***15** Amendment grounds) but reserved the question of “in-person **solicitation**.”[58] In *Ohralik*, the Court reached that question, and sharply distinguished **solicitation** from advertising.[59]

Advertising, because it is broadcast to the public, is not “targeted” or “directed to a specific person.” This relational aspect is critical. The ban contained in MR 7.3(b) in fact has a few exceptions not quoted above. Certain people are permitted targets of what would otherwise be forbidden **solicitation**: lawyers, persons with whom the lawyer or firm “has a family, close personal, or prior business or professional relationship”; and “person[s] who routinely use [] for business purposes the type of legal services offered by the lawyer.”[60] Thus, under current rules, lawyers can solicit other members of the profession and can solicit family, friends, former clients, and regular users of legal services of the relevant kind. But if the lawyer would be introducing him- or herself to a prospective client for the first time, the communication is probably a prohibited **solicitation** and would form the basis for professional discipline of the lawyer.[61]

IV. WHY IS SOLICITATION BANNED?

Why do the rules prohibit this conduct? In upholding the ban on **solicitation**, the Supreme Court in *Ohralik* made the very strong claim that “the potential for overreaching ... is *inherent* in a lawyer’s in-person **solicitation** of professional employment.”[62] The Supreme Court also referred reflexively to “[t]he substantive evils of **solicitation** ... [as being] stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, un-derrepresentation, and misrepresentation.”[63]

***16** Similarly, the ABA defended its original anti-**solicitation** rules “on three broad grounds: ... reduc[ing] the likelihood of overreaching and the exertion of undue influence on lay persons, ... protect[ing] the privacy of

individuals, and ... avoid[ing] situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest."[64]

Although the Model Rule itself does not separately explain what is wrong with **solicitation** or why it is or should be banned, the Comments (which "explain [] and illustrate[] the meaning and purpose of the Rule" and "are intended as guides to interpretation"[65]) do address justifications for Model Rule 7.3 in language that draws heavily from *Ohralik*.

A. Overreaching Lawyers, Overwhelmed Clients

The central concern with **solicitation** arises from the relative positions of attorney and prospective client. Comment [2] to Model Rule 7.3 describes it this way:

> This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.[66]

This Comment evokes an image of the parent of an injured child, or a traumatized person in the aftermath of an accident, being harassed by the stereotypical "ambulance chaser." Indeed, those were the facts of *Ohralik*, and Comment [2] draws heavily from the case language and reasoning there. The *Ohralik* Court emphasizes the vulnerability of the solicited client in rather purple (or at least lavender) prose:

> [T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an *unsophisticated, injured, or distressed* lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to ***17** *uninformed* acquiescence. Although it is argued that personal **solicitation** is valuable because it may apprise a *victim of misfortune* of his legal rights, the very *plight* of that person not only makes him more *vulnerable* to influence but also may make advice all the more *intrusive*. Thus, under these adverse conditions the overtures of an uninvited lawyer may *distress* the solicited individual simply because of their *obtrusiveness* and the *invasion* of the individual's privacy, even when no other harm materializes.[67]

Both the Comment and *Ohralik* note how the immediacy of the face-to-face interaction heightens the challenge to the client's decision-making. The Court notes, "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person **solicitation** may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[68]

B. Conflicts of Interest

The Court also identifies a concern about conflicts of interest between the attorney and his or her own client. The Court explains it this way:

> A lawyer who engages in personal **solicitation** of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.[69]

The thought is that, ordinarily, interactions between lawyer and prospective client are initiated *by* that prospective client. Although some of the same temptations might afflict the unscrupulous lawyer even in that situation, here the concern is that the lawyer has pursued the vulnerable client for the lawyer's financial gain and that this will place undue pressure on the client and distort other decisions in the representation.

18** ***C. No Particularized Showing Needed

So persuaded is the Court of the "inherent" risks of **solicitation** that no particularized showing of injury is needed. "Under such circumstances, it is not unreasonable for the State to presume that in-person **solicitation** by lawyers more often than not will be injurious to the person solicited."[70] The Court continues,

> The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a **solicitation** ... the State were required in addition to prove actual injury .... [I]n-person **solicitation** is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the **solicitation** that he could not recall specific details at a later date .... It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.[71]

The Court in *Ohralik* is clear that a lawyer may not defend him- or herself from discipline for engaging in a prohibited **solicitation** by showing that the communication in question was not, in fact, harmful.

V. QUESTIONING ASSUMPTIONS AND AMELIORATING RISKS

A. Inapt Assumptions Underlying the Solicitation Ban

Whatever their accuracy in general, it can be shown that many of the assumptions that underlie the **solicitation** ban simply do not apply to most estate-planning situations. Let us look at several of these assumptions in turn.

1. The Client is a Helpless Victim

The first, most obvious premise for the ban on **solicitation** is that the attorney solicits the client in the immediate aftermath of an injury, when the client, a "victim of misfortune,"[72] is in a distressed, vulnerable condition, ***19** "overwhelmed by the circumstances."[73] But most prospective estate-planning clients are not like tort or crime victims. Creating or updating an estate plan is appropriate after a *positive* life event: marriage, retirement, the birth of a child or a youngest child's graduation, the sale of a business, even winning the lottery. Estate planning may also be appropriate after a negative event, of course, like a death, divorce, or a serious medical diagnosis or "scare"--but in that case, the benefits of planning may outweigh some of the concerns about immediacy impairing client judgment. When the alternative is no plan at all, clients (and their intended beneficiaries) are arguably better served by planning in the context of an attorney-client relationship, with the protections of malpractice liability and other rules of professional discipline, than no planning at all.

2. All Legal Representation is in Adversarial Matters (a.k.a. There Is No Such Thing as a Planning Lawyer)

The second implicit assumption is either that all attorneys engage in **solicitation** related to disputed, adversarial litigation matters or that such matters are sufficiently typical or paradigmatic that other situations can be ignored in rulemaking. Though this is never made quite explicit in *Ohralik*, the ABA's justification for the predecessor rule, or Comment [2] to Model Rule 7.3, the first two concerns about **solicitation** identified by the ABA are "stirring up litigation" and "assertion of fraudulent claims"[74] (what might have been called "champerty" and "barratry"[75] in common law parlance). In *Ohralik*, the Court refers to the lawyer improperly assessing the "legal merit" of the claim and possible untimely settlement of the claim. But estate-planning is not a lawsuit; it is not adversarial. It is

transactional, and there is only one "side"--the client's side. There is no "claim" whose "merit" must be assessed nor any dispute that might be settled too soon or pursued for too long, simply to benefit the lawyer.

The Court in *Ohralik* and the Comment also describe the attorney as "[a] trained advocate," and "a professional trained in the art of persuasion."[76] And while that might be technically correct, an estate-planning lawyer is also a trained *counselor*, more than she is an advocate.[77] Moreover, as one critic of the current rules noted,

> ***20** [T]he **solicitation** rule reflects the arrogant and inaccurate assumption that lawyers possess superior powers of persuasion that can easily overpower the naive and unsuspecting citizen who has not had legal training. In today's world, consumers are sophisticated, they are educated, they are bombarded with offerings of goods and services both online and otherwise.[78]

Rather than seeing estate-planning attorneys as predators, the rules should treat them as professionals trained, among other things, to draft documents that effectuate the testamentary wishes of their clients.

3. Representation Decisions are Made in Haste

Comment [2] further assumes that the soliciting lawyer seeks to be "retained immediately," before the prospective client can evaluate their choices and make a considered decision whether to hire this lawyer or any counsel at all.[79] But this is not how will-drafting and estate-planning lawyers do business.[80] Ordinarily, at least one and frequently several preliminary meetings should take place long before any formal will-execution ceremony occurs, giving the client ample time to change his or her mind, change counsel, or abandon the project (as frequently occurs). In addition, the Comment drafters do not seem to acknowledge that the estate-planning attorney is offering a *service* (albeit, for a fee) that the prospective client may want or need. The attorney is not simply trying to "sell" the client his or her services; those services are actually valuable in ways some of which may not be known to the client in advance. Not everyone who needs an estate plan may know that they do--and by the time they figure it out, it may be too late.

4. Other Means of Communication are As Effective As Face-to-Face Contact

Old Comment [2], also seemingly drawn from *Ohralik*, brings these tropes together, alleging that although "[the] potential for abuse [is] inherent ***21** in direct in-person, live telephone or real-time electronic **solicitation**,"[81] lawyers have "alternative means," specifically, mail and email, that are impliedly asserted to be just as effective at allowing "a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment."[82]

New Comment [3] expresses the same view, updating only the range of permissible media to include more modern modes (like texting and social media posts):

> The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.[83]

Additional outdated and dubious assumptions underlie this analysis. A recent study suggests that in-person requests are up to *34 times* more successful than email.[84] Mail and email are not necessarily as effective, affordable, or available as face-to-face contact (or a text message or phone call), and it is both disingenuous and economically insensitive to suggest that they are. Direct mail is neither efficient nor inexpensive (nor environmentally desirable)

and may be burdensome for a solo practitioner.[85] The assumption that everyone will receive paper mail of this type favorably (rather than, for example, discarding it or being frightened by receiving a letter from a lawyer) or has reliable access to email[86] is belied by the facts. Although clear ***22** majorities of non-White groups have some form of Internet access (smartphones are more common than home broadband[87]), access still lags. Similarly, while greater majorities of older Americans than ever before use the Internet, usage is correlated with income and education but inversely with age.[88] Taken together, the blithe confidence expressed by the Comment drafters that electronic or paper communication is a good substitute for face-to-face contact, especially for older persons of color of modest means--those most in need of estate-planning services they may not be receiving--seems clearly unwarranted. Moreover, just as we permit attorneys to make their own business decisions about whether to produce a television commercial, buy space on a bus bench, or advertise in a high-end magazine, the decision whether to send direct mail or email, to make "cold calls" or to knock on doors, should be within the sound discretion of licensed practitioners themselves.

5. All Attorneys are Sharks

Even beyond what is identified above, Comment [3] further insults both attorneys and prospective clients. The Comment seems to "forget" that the relationship between attorney and client is a fiduciary one, and that even prospective clients are protected by this to some degree.[89] The current balance struck by MR 7.3 and Comment [3] elevates the legitimate concern that clients not be abused by those with a fiduciary duty to them, over the right not only of ethical attorneys to ply their trade as they see fit, especially in underserved communities, but also over the right of prospective clients to learn about access to estate-planning services in an appropriate and impactful way that respects their agency. It overstates the predatory conduct of attorneys and treats their prospective clients, competent adults who may be under-informed about estate-planning, as weak-minded victims, while micromanaging how a professional runs their business. By preventing attorneys from initiating relationships with prospective clients who might not seek them out, it not only assumes that the "default" behavior of attorneys is unethical, it ignores the social cost of unmet legal needs, especially in communities of color.

23** ***6. Live Person-to-Person Contact Has No Benefits

The Rules and Comments are so fixated on the risks allegedly "inherent" in allowing attorneys actually to speak directly to prospective clients about their services that they overlook what business and psychology experts regard as a well-established fact: that face-to-face, in-person communication has tremendous *benefits* that other forms of communication lack.[90] The attorney-client relationship is, among other things, a *relationship* between human beings. Few estate-planning attorneys would dare to suggest that they could competently plan for a client without meeting them in person.[91] In our digital age, scholars have begun reminding us that the "personal encounter" so feared by the Model Rules is what we need *more*, not *less*, of, in our lives, including our business and professional lives.[92] Like all lawyers who work with individuals, most estate-planning lawyers care about the people they serve: their clients, and those their clients wish to benefit through their plans. They come to know their clients well, sometimes better than their own families do.[93] To artificially erect a barrier at the inception of that relationship by requiring that live contact must be initiated by clients and not lawyers is as outdated as believing that men should ask women on dates and never the reverse. It is not justified by the realities of this area of practice.

24** ***B. Other Rules Offer Sufficient Protection Against Misconduct

To the extent that we share these concerns about protecting prospective clients from abusive and overreaching attorneys, notwithstanding the distinguishing features of the estate-planning situation, I would argue that other rules of professional responsibility significantly ameliorate those risks. The "web" of such rules will ensnare the unscrupulous lawyer and protect the unwary client, while presenting no obstacles to the ethical practitioner.

The first two and most obvious concerns we might have with estate-planning lawyers soliciting potential clients are gifts to themselves and excessive/improper fees. As described below, other Model Rules and probate code sections explicitly address both of these issues. Moreover, any attorney who would be deterred by the anti-**solicitation** rules

would, *a fortiori*, presumably also care enough about his or her reputation and license not to transgress the substantive prohibitions of the disciplinary rules in their state. For those for whom that is *not* sufficient, it is hard to imagine that a specific anti-**solicitation** rule is any more effective

1. Attorney-Drafter-Beneficiaries Are Prohibited (MR 1.8(c))

The concern about unethical attorneys writing themselves into the wills of their clients is a real one--so real it prompted the California Legislature in 1993 to change the State's probate code in the aftermath of the "Leisure World" scandal.[94] The Model Rules contain the same prohibition, so such a gift is not only invalid, but will expose a lawyer to discipline.

Model Rule 1.8(c) prohibits lawyers from soliciting gifts from clients,[95] and specifically prohibits a lawyer from "prepar[ing] on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client."[96] This means that even if an estate-planning lawyer were to solicit a client and draft a will for that person, the attorney would not be able to receive anything in that will.

***25** Substantive provisions of state probate codes also can and do prohibit attorney-drafters from receiving any gift in a will.[97] For example, California Probate Code Section 21380, "Presumption of Fraud or Undue Influence," raises an irrebuttable presumption of undue influence as to any gift to any person "who drafted the instrument ... or to a person who is related to, or associated with, the drafter ...."[98] Section 21380(c) goes on to state, "the presumption created by this section is conclusive."[99] Rhode Island law is similar.[100] It is not difficult, as an evidentiary matter, to determine whether an unrelated attorney (or person connected to an attorney) who receives a gift in a will is also the drafter, and statutes like this should be sufficient to deter most such egregious conduct.

2. Unreasonable Fees Are Prohibited and Unenforceable (MR 1.5)

Recall that one element of a prohibited **solicitation** is that "a significant motive" for the communication "is the lawyer's or law firm's pecuniary gain."[101] Because, in the estate-planning context, that "gain" cannot come in the form of a testamentary gift,[102] presumably what is meant (as in most other contexts) is the fee. But if the concern is that the attorney will charge an exploitative fee--in other words, take advantage of the estate-planning client in the fee arrangements--this is squarely addressed by the rules related to fees, especially Model Rule 1.5. MR 1.5 prohibits unreasonable fees, and the multi-factor test used to evaluate the reasonableness of fees makes clear that simple estate planning for a small estate should not result in an excessive fee. This rule provides that

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> ***26** (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.[103]

Thus, in thinking about estate-planning in less affluent communities--planning for what most probate codes refer to as "small estates" (although in some cases homeownership may take an estate out of this category), the time, labor, and skill will not be especially great. "The fees customarily charged in the locality" for planning an estate of that size and complexity will also limit the fee the lawyer will be able to lawfully charge and enforce against the solicited client.[104] Model Rule 1.5(b) further requires that "the basis or rate of the fees and expenses for which the client will be responsible" be communicated to the client, "preferably in writing."[105] Finally, for estate-planning services rendered close to the client's death, the client's legatees or intended beneficiaries will have good reason to evaluate and challenge the reasonableness of any legal fee, because it reduces the estate.[106] There is therefore no special reason to be concerned about unreasonable fees in matters of this type.

3. Coercion, Duress, and Harassment Are Prohibited (MR 7.3(c)(2))

Model Rule 7.3(c)(2) states that even a permitted **solicitation** (for example, to a friend or another lawyer), may not involve "coercion, duress or harassment."[107] Nor may a lawyer persist in soliciting someone who "has made ***27** known to the lawyer a desire not to be solicited."[108] A simple "not interested" would be sufficient to terminate the **solicitation**, and if the lawyer persists, bar discipline would be appropriate The familiar "No Solicitors" sign many people place on or near their front door would trigger this provision, and keep unwanted lawyers away (probably more effectively than it does with Girl Scouts or Jehovah's Witnesses, neither of whom have codes of professional responsibility and disciplinary bodies like the bar).

4. Anti-Fraud and Anti-Misrepresentation Rules Also Apply (MR 7.1)

The Model Rules already require attorneys to be truthful about their own qualifications, the law, and any representations about legal outcomes.[109] Model Rule 7.1 states that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[110] Comment [1] to Model Rule 7.1 makes clear that "Whatever means are used to make known a lawyer's services, statements about them must be truthful."[111] Further Comments to Model Rule 7.1 explain that even a truthful statement can be misleading if taken out of context, and provides specific examples.[112]

But this is apparently not enough to satisfy the anti-**solicitation** forces. Old Comment [3] to MR 7.3 doubted the efficacy of MR 7.1, and did so in a way that is shockingly cynical about the conduct of lawyers.[113] It suggested that traditional advertising is superior to **solicitation** because it is the only way to keep attorneys from lying, not just *to* their prospective clients, but also later, about what they have said to them![114]

> The contents of advertisements and communications permitted under Rule 7.2 [advertising] can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and ***28** misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.[115]

New Comment [4] is an improvement, insofar as it does not take direct aim at MR 7.1. It retains only the last two sentences, updated with the new more permissive restriction:

> The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.[116]

It is hard to account for this particular antipathy and suspicion about human beings speaking directly to one another. Even as the Model Rules seem to suggest that (given the chance) lawyers will solicit prospective clients by lying to them, those same Model Rules do not require that all fee agreements be in writing; or that all attorney-client communications be in writing - although there, too, the opportunity to lie and mislead one's actual clients (not just potential clients) certainly also exists.[117] The Old Comment itself acknowledged that Model Rule 7.1 already prohibits false and misleading communications; but if Model Rule 7.1 is somehow not enough to prevent some attorneys from lying to prospective clients while soliciting them, this risk must be weighed against the potential benefits of **solicitation** by honest and ethical attorneys.

5. The Carpetbagging Objection

One additional concern should be addressed. Might a relaxation of the **solicitation** ban tempt unscrupulous lawyers (or even non-lawyers) to take ***29** advantage of vulnerable individuals in need of estate-planning services?[118] We might refer to this, with some historical inexactness, as the "carpetbagging" objection: the fear that opportunistic bad actors will be drawn into this area of practice by this change of the rules.[119]

The first thing to keep in mind is that with respect to nonlawyers, nothing is stopping them from engaging in this conduct right now. The rules of professional responsibility cannot directly affect their behavior. Nonlawyers cannot be disbarred or sanctioned by the bar; they are not members of the profession. Instead, states criminalize and otherwise punish the unauthorized practice of law;[120] how effective those deterrent practices are, is of course debatable,[121] but what are, from the outside at least, relatively minor changes of the rules of professional responsibility, seem unlikely to impact that significantly one way or another.

With respect to lawyers, the permission to engage in face-to-face communication with prospective clients--to "knock on doors," literally or metaphorically-- does not seem obviously *likelier* to attract bad actors than the recently-enacted permission to send texts or other real-time electronic communications. Direct **solicitation** may be much more effective than these other modes,[122] but it is also time-consuming and labor intensive, and the fee that can ultimately be collected will be governed by MR 1.5 just the same (together with other applicable rules discussed above)

C. The Proposed Rule

As noted above, existing Rule 7.3 permits attorneys to solicit certain categories of prospective clients, but does not distinguish based on the nature of the legal services.[123] Lawyers may solicit other lawyers and the attorney's own family members, as well as former clients.[124] What is recommended here is a different approach, an exception based on the nature of the services to be provided, with additional safeguards to insure the solicited prospective client is protected. Estate-planning **solicitation** would not be allowed in ***30** nursing homes and other facilities whose residents might be deemed vulnerable to the "undue influence, intimidation, and overreaching"[125] as the Comment drafters fear. Model Rule 1.5(b) already requires that "the basis or rate of the fees and expenses for which the client will be responsible" be communicated to the client, "preferably in writing."[126] My proposed broader exception to the anti-**solicitation** rule strengthens this by requiring informed consent, confirmed in writing, a standard used elsewhere in the Model Rules for transactions between attorney and client that are permissible but have certain recognized ethical risks particularly related to conflicts of interest. These aspects of the proposed rule minimize the risks, while insuring the benefits of permitted **solicitation**. Of course, all the other applicable Model Rules and substantive probate laws in effect in the jurisdiction would also apply.

Model Rule 7.3(b) should be amended to add this new subsection:

> (b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a: ...
>
> (4) competent, non-dependent adult to whom non-litigation estate-planning services are offered, and from whom informed consent, confirmed in writing, is obtained for any resulting legal services.

This proposed rule strikes a better balance than the current one, between the protection of vulnerable potential clients and their needs for access to estate-planning services.

1. Competence/capacity

Strictly, the requirement of capacity or competence is pleonastic: *no* testamentary instruments executed by a person not competent to do so would be valid, regardless of whether they derived from **solicitation**, nor would any fee agreement entered into by a person lacking contract capacity be enforceable by its own terms.[127] However, there may be a value in explicitly limiting estate-planning **solicitation** to prospective clients who are demonstrably ***31** competent at all relevant times: the time of **solicitation**, the time any retention agreement is executed, and the time of execution of any testamentary or other planning documents.

As a general matter, it is not malpractice or a violation of professional rules to prepare documents for a person about whom the lawyer is uncertain of capacity,[128] and this proposal does not change that. Such a rule would overdeter representation of clients of marginal capacity, and run the risk of depriving a competent person who wishes to die testate from having the opportunity to do so. It is not for the attorney to make this finding on pain of malpractice or professional discipline if he turns out to be wrong.[129] Nevertheless, it seems prudent to permit **solicitation** only of prospective clients who clearly possess both testamentary and contract capacity, the former for the estate-planning documents themselves, and the latter for the fee agreement.

2. Non-dependent

Current probate codes already show special solicitude for dependent adults.[130] Due to legitimate concerns with avoiding exploitation of the vulnerable, the proposed rule is intended to prohibit estate-planning **solicitation** of conservatees, persons under guardianship, persons in a nursing home, and others of similar status. Although some persons in this status may have testamentary capacity, the risks associated with direct **solicitation** of these populations may not be outweighed by the benefits. Note that this is a *stronger* anti-**solicitation** provision than currently exists under Model Rule 7.3, which permits **solicitation** of a lawyer, family member, or former client, even in a dependent status, for any type of legal representation.

3. Non-Litigation Estate-Planning Services

The rule change recommended here focuses exclusively on estate-planning services, as distinct from probate litigation Unlike estate-planning, which involves counseling a client in a non-adversarial setting, probate litigation has much readily raised the specter of "ambulance-chasing" and the "evils of **solicitation** ...: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the ***32** form of overreaching, overcharging, underrepresentation, and misrepresentation."[131] Direct outreach to those who might be in need of estate-planning services is to be sharply distinguished from "hearse-chasing," in which an attorney, for her own gain, encourages an unsuspecting and bereaved prospective client to challenge a will on a dubious basis, with all the expense, delay, and family discord almost certain to result. While appropriate **solicitation** furthers large-scale goals of the probate system, like the preference for testacy and the orderly post-mortem transmission of property, **solicitation** by a probate litigator may tend to frustrate those goals, and remains properly banned.

4. Informed Consent Confirmed in Writing

Under the Model Rules, a number of transactions between attorney and client are subject to the requirement of informed consent, confirmed in writing.[132] These are often transactions with a higher-than-usual risk of conflict of interest, or where the law confers additional protection on vulnerable clients, such as contingency fee agreements or business transactions between lawyer and client other than the representation itself. The requirement of informed consent, confirmed in writing, authorizes these transactions, while protecting the client and creating a written record of the interaction. The concerns expressed by the Supreme Court in *Ohralik*, and codified in the Model Rules, align **solicitation** with these riskier, but permissible, interactions, making this familiar requirement appropriate in this setting.

VI. OTHER BENEFITS OF "LIVE PERSON-TO-PERSON CONTACT"

A. Solicitation by Estate Planners Provides Many of the Same Benefits as Attorney Advertising

As we have seen, the existing rules that forbid **solicitation** permit attorney advertising, subject to certain guidelines. The recognized benefits of attorney advertising, however, also apply to attorney **solicitation** in the estate-planning ***33** g context once the risks of **solicitation** have been ameliorated. Appropriate advertising has an obvious commercial benefit to attorneys, a free speech dimension, and an educational function. It informs the public about the legal services that are available, enables potential clients to contact attorneys willing to provide those services, and creates broader knowledge about the events that create legal rights, remedies, and planning opportunities.[133] While nothing currently prohibits an estate-planning lawyer from advertising his or her services, what **solicitation** adds is the opportunity for the personal touch, and the exercise of cultural competency to reach the client individually.

B. The Preference for Testacy Outweighs the Risk of Frivolous Litigation

Some people regard anti-**solicitation** rules as a deterrent to frivolous litigation, a preventative for attorneys, motivated solely by their own gain, to "stir up" litigation between and among persons who otherwise would not use the justice system to work out their differences.[134] This is one of the "evils" the ABA identified in defending the predecessor anti-**solicitation** rule.

But whether this is generally true or not, it does not apply in the estate-planning context. While the law might be neutral about whether people resolve their differences by filing lawsuits, or even disfavor that outcome, the law is *not* neutral about whether persons who wish to die testate should be enabled to do so.[135] The preference for testacy has justified, among other things, the admission of holographic wills,[136] the relaxation of formalities requirements and the "harmless error" rule,[137] and the procedures for proving up lost wills.[138] But it seems safe to say that many of those who die intestate never made a will at all, but might have, had they only known how and why. Reducing the frequency of this undesired intestacy is a legitimate policy goal worth pursuing for all the same reasons.

****34 C. Proposed Model Rule 7.3(b)(4) Furthers the Anti-Discrimination Goal of Model Rule 8.4(g)***

Despite the inclusion in the Model Rules of a requirement of nondiscrimination in the practice of law,[139] the profession is not doing all it can to address or ameliorate the racial estate-planning gap. Recent modifications of the **solicitation** rules that make life easier for *lawyers*, but not necessarily better for *clients*, do not address this. Failure to reexamine a rule when there is reason to believe it has a demonstrably disparate impact on already under-served communities runs afoul of the spirit of the new rule. Concededly, MR 8.4(g) is a *non*-discrimination rule, not an *anti*-discrimination rule. But continued adherence to the anti-**solicitation** rule becomes more problematic once we see its connection to the racial estate-planning gap. A change in the rule might affect that, and whether it does so, will be measurable. If the risks are minimal, and the benefit is meaningful in equalizing access, failing to enact the change amounts to complicity in the planning gap, and is fairly characterized as "conduct that the lawyer knows or reasonably should know is ... discrimination on the basis of race ... or socioeconomic status in conduct related to the practice of law."[140]

VII. CONCLUSION

Let me end where I started: in Houston, Texas, where I first began teaching law in 2000, at the Thurgood Marshall School of Law, where the question that prompted this paper was first posed to me in 2018. Today, the city contains about 2.1 million people, of whom about 600,000 are Black,[141] and at least 925,000 (44%) are Hispanic/Latinx.[142] Yet just 2.75% of law firm partners and 5% of associates are Black, while fewer than 5% of partners and 8% of associates are Hispanic/Latinx.[143]

Houston is not alone. Underrepresentation within the bar continues to bedevil the profession nationally; although the U.S. population is over 13% Black, the percentage of Black attorneys has remained flat at 5% nationally ***35** for more than 10 years.[144] In Detroit, Michigan, a city that is over 80% Black, with a Black population of about 715,000, Black attorneys are just 3% of law firm partners and just 7.5% of associates.[145] Statistically, un-derrepresentation is worse for Latinx communities; the population is at 18% and rising,[146] while the percentage of attorneys also hovers around 5%.[147] Los Angeles County (where I live now) is home to over 10 million people,[148] including 4.9 million Hispanics, nearly 9% of the entire U.S. Hispanic population,[149] but just over 4% of law firm partners, and about 6.5% of law firm associates, are Hispanic.[150] Asians, who constitute just under 6% of the U.S. population,[151] are no more than 3% of the legal profession.[152] Although "race-matching" is not the only, or necessarily the most important, dimension of cultural competence in law practice,[153] these statistics contribute to an accurate impression of the legal profession as predominantly White.

In light of these dispiriting statistics, it is clear that a relaxation of the anti-**solicitation** ban for estate-planning will hardly cure all that ails us. On the other hand, it is a concrete step that can facilitate access to valuable estate- and end-of-life planning documents for members of communities facing major challenges of access to legal services, as well as wealth-preservation and transmission. As Rabbi Tarfon famously said in Pirkei Avot 2:16, "It is not your responsibility to finish the work, [of perfecting the world], but you are not free to desist from it either."[154]

Footnotes

[a1] Professor of Law, University of La Verne College of Law, Ontario, California. This Article is dedicated to the faculty and student body of Thurgood Marshall School of Law, Texas Southern University, who first taught me that wills and trusts - like every subject in the American law school curriculum - is a civil rights course. I would especially like to thank Prof. Fernando Colon-Navarro whose question during a talk I gave at TSU on January 29, 2018 inspired this Article. Thanks also to Prof. Bridget Crawford for organizing the Trusts and Estates Collaborative Research Network at the 2019 Law and Society Association meeting and creating the panel entitled "Access to Justice: Estate Planning for the Not-so-Rich (and Other People Like You and Me)," where this paper was presented on June 1, 2019. Many helpful comments were made by my co-panelists there, Prof. Alex Boni-Saenz, Prof. Carla Spivack, Prof. Crawford, and Aurora Grutman, and by participants including Prof. Victoria Haneman and Prof. Thomas Mitchell. Any errors are, of course, my own.

[1] Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2016), http://news.gal-lup.com/poll/191651/majority-not.aspx (finding that just 44% of Americans had a will); *see also* Tim Hewson, *Are there even fewer Americans without Wills?*, U.S. LEGAL WILLS: THE U.S. LEGAL WILLS BLOG (June 16, 2016), https://www.uslegalwills.com/blog/americans-without-wills/ (based on a 2016 Google poll that divides respondents by age and other features).

[2] One source reports that nearly 70% of Black Americans do not have a will, and nearly 75% of Hispanic Americans do not have a will. *A shocking statistical look at estate planning [infographic]*, THE VIRTUAL ATTORNEY, (last visited Sept. 17, 2019), https://web.ar-chive.org/web/20160731041535/thevirtualattorney.com/blog/shocking-statistical-look-estate-planning-infographie; *2019 Survey Finds That Most People Believe Having a Will Is Important, but Less Than Half Have One*, CARING.COM (last visited Sept. 15, 2019), https://www.caring.com/caregivers/estate-planning/2019-wills-survey/.

[3] A note about capitalization conventions: In this Article, I have capitalized both White and Black when referring to racial groups. Many sources do not and original capitalization conventions are retained.

[4] Jones, *supra* note 1.

[5] Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 1, 18 (2015).

[6] *See, e.g.*, THE VIRTUAL ATTORNEY, *supra* note 2, at 1.

[7] *See generally* Dorothy P. Brandon & Kevin Crenshaw, *An Assessment of the Estate Planning Among Older Adults in Alabama*, 53 J. OF EXTENSION 2 (Feb. 2015), https://www.joe.org/joe/2015february/pdf/JOE_v53_1rb7.pdf; Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. OF L. AND SOC. CHANGE 367, 367-406 (2017). As does underrepresentation in related professions, like Certified Financial Planners, just 3.5% of whom (out of 80,000) are Black or Latinx, according to a 2018 survey. Richard Eisenberg, *Why Minority Financial Planners Are Nearly Nonexistent -And How to Fix It*, FORBES (June 12, 2018), https://www.forbes.com/sites/nextavenue/2018/06/12/minority-financial-planners-nearly-nonexistent/#3fe3f367d9cb. This issue has been studied in the context of psychotherapy, where cultural incompetence is strongly correlated with negative outcomes. *See, e.g.*, Lo and Fung, *Culturally Competent Psychotherapy*, 48 CAN. J. PSYCHIATRY 161, 161-70 (2003); Monnica Williams, *Culturally Incompetent Therapy: When Therapists Do Harm*, PSYCHOLOGY TODAY (Feb. 2, 2014), https://www.psychologytoday.com/us/blog/culturally-speaking/201402/culturally-incompetent-therapy-when-therapists-do-harm.

[8] *See generally* O'Neal v. Wilkes, 263 Ga. 850 (1994).

[9] *O'Neal*, 263 Ga. at 851.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *See Id*. at 853.

[14] Lynda Richardson, *Adoptions That Lack Papers, Not Purpose*, N.Y. TIMES (Nov. 25, 1993), https://www.nytimes.com/1993/11/25/garden/adoptions-that-lack-papers-not-purpose.html (citing JESSE DUKEMINIER & ROBERT H. SETOFF, WILLS, TRUSTS, AND ESTATES 105, fn. 64 (10th ed. 2017)).

[15] CHILD WELFARE INFORMATION GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 12 (2016) https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf ("kinship care is an oft-used practice amongst families of color").

[16] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. (AM. BAR ASS'N 2019).

[17] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2019).

[18] MODEL RULES OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N 2019).

[19] *Variations of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, (Aug. 20, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_3.pdf.

[20] *See* AM. BAR ASS'N, *supra* note 19, at 4 (MR 7.3 has been adopted in some form by nearly all jurisdictions); e.g., 7.03 Prohibited **Solicitations** & Payments, TEX. CTR. FOR LEGAL ETHICS, https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/VII-INFORMATION-ABOUT-LEGAL-SERVICES/7-03-Prohibited-**Solicitations**-Payments (last visited Sept. 17, 2019) (Texas has modified MR 7.3, as follows: "A lawyer shall not by in-person contact, or by regulated telephone or other electronic contract ... seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment ... when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.").

[21] AM. BAR ASS'N, *supra* note 17, at 4.

[22] In 2015, primarily in response to changing communication technologies available for lawyer advertising, the Association of Professional Responsibility Lawyers ("APRL") issued a Report recommending a significant overhaul of the advertising rules, expressly reserving **solicitation**. ASS'N OF PROF'L RESPONSIBILITY LAWYERS, REGULATION OF LAWYER ADVERTISING COMMITTEE SUPPLEMENT REPORT (2016) [hereinafter SUPPLEMENTAL REPORT], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf

(One year after the Association of Professional Responsibility Lawyers ("APRL") issued a report recommending a significant overhaul of advertising rules that expressly reserved **solicitation** in 2015, they issued this report on **solicitation** along with paid referrals.

As APRL sees the matter,

the ABA historically expressed concern about in-person **solicitation** assuming a lawyer may overwhelm a potential client and that, given the verbal nature of the exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. However, that rationale does not apply to electronic communications, such as text messaging and posting on social media and in chat rooms, where there are verbatim logs or records of the communications that preserve the lawyer-prospective client exchange, and where the consumer can simply delete/ignore the exchange. (SUPPLEMENTAL REPORT, *supra* note 22, at 2.)

Because people can "block, delete, or not answer" electronic **solicitations** today,

the risk of duress, coercion, over-persuasion or undue influence is far less with many forms of electronic communications than with live (face-to-face) communications and therefore the case for restricting **solicitation** by electronic communication is much weaker. (SUPPLEMENTAL REPORT, *supra* note 22, at 2.)

See MODEL RULES OF PROFESSIONAL CONDUCT 7.1, 7.2., 7.3, 7.4 7.5, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/eth-icsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/ (follow "Working Draft of the proposed amendments" hyperlink) (the Comments in effect in 2016 referred to "real-time electronic contact").

APRL successfully argued that this is an artificial category; and that the risks of real-time *face-to-face* contact do not apply to electronic communications (notwithstanding their "real-time" nature), which are more properly analogized to (permitted) direct mail. SUPPLEMENTAL REPORT, *supra* note 22, at 2.

As a result, the 2018 version of MR 7.3 now refers to "live person-to-person contact" and the 2019 version of the Comments [1]-[4] to MR 7.3 have been significantly revised. They now read in pertinent part as follows, with important changes *italicized:*

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by *live person-to-person contact* when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain .....

[2] *"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. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard .....*

[3] The potential for *overreaching inherent in live person-to-person contact* justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to *live person-to-person* persuasion that may overwhelm a person's judgment.

[4] The contents of *live person-to-person contact* can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. (AM. BAR ASS'N 2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/comment_on_rule_7_3/.

APRL's successful reform efforts were directed mostly at permitting what we might regard as intrusive but not coercive electronic communications - communications that, despite their real-time nature, can still be "easily disregard[ed]." These changes are clearly good for lawyers who wish to take advantage of less-costly,

more precisely targeted ways of finding clients than billboards and glossy direct mail).

[23] By amendments that took effect July 1, 2013, Virginia very nearly abolished its anti-**solicitation** rule. Virginia Rule 7.3, Comment [1], defines **solicitation** exactly as in Model Rule 7.3, Comment [1], VA. RULES OF PROF'L CONDUCT r. 7.3 cmt. 1 (2019), but prohibits it *only* if "the potential client has made known to the lawyer a desire not to be solicited by the lawyer," VA. RULES OF PROF'L CONDUCT r. 7.3(b)(1) (2019), or "the **solicitation** involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits," VA. RULES OF PROF'L CONDUCT r. 7.3(b)(2) (2019). Virginia Rule 7.1(a), the prohibition on "false or misleading" communications, tracks Model Rule 7.1 verbatim, and so also serves as a limit on what attorneys can say to prospective clients.
Virginia is the U.S. state with the 10th-largest percentage of Black residents (nearly 20%) and is home to about 4% of the nation's Black population, nearly 2 million people. *10 States with the Largest African-American Populations*, WORLDATLAS.ORG, https://www.worldatlas.com/articles/us-states-with-the-largest-relative-african-american-populations.html (last visited Sept. 15, 2019). It is unknown whether Virginia's estate-planning attorneys have taken advantage of the abolition of anti-**solicitation** rules to commit themselves to providing greater access to estate-planning for the state's large Black population. But if they haven't, they should.

[24] MODEL RULES OF PROF'L CONDUCT r. 1.8(c) (AM. BAR ASS'N 2019).

[25] *See, e.g., Preference for Testacy*, 64 CAL JUR. 3D *Wills* § 4.

[26] Model Rule 8.4(g), added in August 2016, reads, "It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2019).

[27] James, *supra* note 5; *see also* Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, TEX. A&M U. SCH. OF L. LEGAL STUD. RES. NO. 19-27 (June 12, 2019).

[28] CAL. PROB. CODE § 6111 (West 2019).

[29] TEX. EST. CODE ANN. § 251.052 (West 2019).

[30] Prof. Victoria Haneman has suggested that statutes permitting a notarial procedure might usefully strengthen holograph statutes, by adding a level of formality supportive of the use of holographs. This is an especially promising approach for holograph states with large numbers of immigrants and others in ethnic communities associated with countries, like Mexico, where a notarial approach to will-making is familiar. Victoria J. Haneman, *Everybody Dies. Or, A Consideration of Simultaneous Death Statutes and the Struggles of the Self-Represented*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 221, 244 (2018); *see* ALFREDO SANCHEZ TORRDO & CHEVEZ RUIZ ZAMARRIPA, *Private Client Law in Mexico: Overview*, PRACTICAL LAW COUNTRY Q&A 1-523-2179, Westlaw, https://1.next.westlaw.com/Document/I0206275b1cb611e38578f7ccc38dcbee/View/FullText.html?con-textData=(sc.Default)&transitionType=Default&isplcus=true&firstPage=true&bhcp=1 (last visited Sept. 16, 2019) ("Mexican and foreign residents can make wills in Mexico. Although there are several types of wills, the most common one is the 'public open will', which is executed before a Mexican notary public with the presence of a witness and is formalised in a public deed.").

[31] James, *supra* note 5, at 19.

[32] *See generally* Trymaine Lee, *How America's Fast Racial Wealth Gap Grew: By Plunder*, N.Y. TIMES, Aug. 14, 2019, at MM82, https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html.

[33] Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RES. (Sept. 27, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm; *see also* Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 468-69 (2010).

[34] Dettling et al., *supra* note 33.

[35] Strand, *supra* note 33, at 466-69.

[36] The relationship between racial inequality and the statutes governing intestate succession has also been explored by scholars. *See, e.g.*, Strand, *supra* note 33. (Note, however, that this article does not address intestate succession as distinct from testate planning.)

[37] Dettling et al., *supra* note 33.

[38] *Id*.

[39] *Id*. (emphasis added); *see also* Strand, *supra* note 33.

[40] Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, PEW RESEARCH CENTER (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

[41] Andrew Perrin & Erica Turner, *Smartphones help blacks, Hispanics bridge some - but not all -digital gaps with whites*, PEW RESEARCH CENTER (Aug. 31, 2017), https://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/.

[42] Emily Tate, *Digital Equity Act Would Provide $250M Annually to Address Digital Divide*, EDSURGE (Apr. 12, 2019), https://www.edsurge.com/news/2019-04-12-digital-equity-act-would-pro-vide-250m-annually-to-address-digital-divide.

[43] *See, e.g., Fraud Against Seniors*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors; *Top 10 Financial Scams Targeting Seniors*, NAT'L COUNCIL ON AGING, https://www.ncoa.org/economic-security/money-management/scams-security/top-10-scams-targeting-seniors/#intraPageNav5 (sixth on a list of top ten scams); Trevor Hughes, *More Fraudsters are Scamming Senior Citizens Through Technology - and it's Costing Them Millions*, USA TODAY (Mar. 17, 2018), https://www.usatoday.com/story/money/personalfmance/2018/03/17/more-fraudsters-scamming-senior-citizens-through-technology-and-its-costing-them-millions/428406002/.

[44] *See* Mitchell, *supra* note 27.

[45] Cheryl Tilse et al., *Making and Changing Wills: Prevalence, Predictors, and Triggers*, SAGE OPEN 1-11 (Jan.-Mar. 2016), https://journals.sagepub.com/doi/pdf/10.1177/2158244016631021 (Australian study, not addressing race although stating, "[I]t is important to better understand the attitudinal, *cultural*, informational, and systemic reasons why people do or do not make a will and use of alternatives to a legally drafted will ..." (emphasis added)).

[46] Robert Weisman, *Breaking taboo, Chinese elders learn to express end-of-life wishes*, BOS. GLOBE (July 22, 2018), https://www.bostonglobe.com/metro/2018/07/22/breaking-taboo-chinese-elders-learn-express-end-life-wishes/MJkrcRX1QGkMrOOYIjtypJ/story.html?event=eventl2.

[47] Dorothy P. Brandon & Kevin Crenshaw, *An Assessment of the Estate Planning Among Older Adults in Alabama*, 53 J. OF EXTENSION 2 (Feb. 2015), https://www.joe.org/joe/2015febru-ary/pdf/JOE_v53_1rb7.pdf.

[48] Brandon & Crenshaw, *supra* note 47, at 6-7.

[49] Other barriers may intersect with race and culture in ways that have not yet been studied explicitly. *See*, e.g., Emily Beach, *Nudging Testators Toward Holistic Estate Planning: Overcoming Social Squeamishness on the Subjects of Money and Mortality*, 26 OHIO ST. J. ON DISP. RESOL. 701 (2011).

[50] Brandon & Crenshaw, *supra* note 47, at 8.

[51] *See, e.g., Preference for Testacy*, 64 CAL JUR. 3D *Wills* § 4 (2018) and cases collected therein; In re Janes' Estate, 116 P.2d 438, 441 (Cal. 1941) (referring to "the policy of the law favoring testacy rather than intestacy"); In re Spitzer's Estate, 237 P. 739, 741 (Cal. 1925) ("the law favors testacy rather than intestacy"); Dantzic v. Dantzic, No. 06-C-144, 2007 WL 7711642 (W. Va. Cir. Ct. Feb. 7, 2007) (referring to "the law's preference for testacy"), rev'd in part on other grounds, 228 W. Va. 535 (2008); Anderson v. Griggs, 402 So. 2d 904, 909 (Ala. 1981) (expressing "this Court's preference for testacy over intestacy if at all possible"); In re Ulkrison's Estate, 290 N.W.2d 757, 759 (Minn. 1980) ("the law prefers testacy over intestacy"); Wehrheim v. Golden Pond Assisted Living Facility, 905 So. 2d 1002, 1007, fn. 6 and cases cited therein (Fl. Dist. Ct. App. 2005) ("testacy is preferred by the courts over intestacy");

[52] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR. ASS'N 2019); *see also* Kristine Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, 20 UNDER CONSTRUCTION (Mar. 8, 2019), https://www.amen-canbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4/.

[53] For a nuanced discussion of the data related to the estate-planning gap and theories about its causes, *see* Mitchell, *supra* note 27.

[54] The Rule builds in exceptions for "contact ... with a: (1) lawyer; (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or (3) person who routinely uses for business purposes the type of legal services offered by the lawyer." MODEL RULES OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N 2019).

[55] MODEL RULES OF PROF'L CONDUCT r. 7.2 (AM. BAR ASS'N 2019).

[56] https://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000780&cite=436US447&originatingDoc=I4c0ae2d5590d11eaadfea82903531a62&refType=RP&fi=co_pp_sp_780_449&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_449*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

[57] *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

[58] *Bates*, 433 U.S. at 366 ("[W]e also need not resolve the problems associated with in-person **solicitation** of clients at the hospital room or the accident site, or in any other situation that breeds undue influence by attorneys or their agents or 'runners.' Activity of that kind might well pose dangers of overreaching ... not encountered in newspaper announcement advertising. Hence, this issue also is not before us."); https://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000780&cite=436US449&originatingDoc=I4c0ae2d5590d11eaadfea82903531a62&refType=RP&fi=co_pp_sp_780_449&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_449*Ohralik*, 436 U.S. at 449.

[59] *Ohralik*, 436 U.S. at 455-59.

[60] MODEL RULES OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N 2019).

[61] *See, e.g.*, Office of Gen. Counsel, *Ethics Opinion RO-2006-01 Direct **Solicitation** of Former and Present Clients*, ALA. STATE BAR (June 21, 2006), https://www.alabar.org/office-of-general-counsel/formal-opinions/2006-01/; Legal Ethics Comm., *Ethics Opinion 1992-3*, SAN DIEGO CITY. BAR ASS'N (1992), https://www.sdcba.org/index.cfm?Pg=ethicsopinion92-3; Gary Blankenship, *Unlawful **solicitation** is taken very seriously*, FLA. BAR NEWS (May 1, 2016), https://www.floridabar.org/the-florida-bar-news/unlawful-**solicitation**-is-taken-very-seriously/; *but see*

Steven Gursten, *Exposé: Illegal attorney **solicitation** runs wild in Detroit*, MICH. AUTO L. BLOG (Mar. 9, 2017), https://www.michiganau-tolaw.com/blog/2017/05/09/illegal-attorney-**solicitation**-detroit/.

[62] *Ohralik*, 436 U.S. at 468 (emphasis added).

[63] *Id*. at 461.

[65] MODEL RULES OF PROF'L CONDUCT Preamble and Scope cmt. 21 (AM. BAR ASS'N 2019).

[66] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2019).

[67] *Ohralik*, 436 U.S. at 465-66 (footnotes omitted) (emphasis added).

[68] *Id*. at 457.

[69] *Id*. at 461.

[70] *Id*. at 465-66.

[71] *Id*. at 466-67.

[72] *Ohralik*, 436 U.S. at 466-67.

[73] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2019).

[74] *Ohralik*, 436 U.S. at 461.

[75] Simon Fodden, *Barratry, Champerty, Maintenance, Oh My!*, SLAW (Sept. 20, 2011), http://www.slaw.ca/2011/09/20/barratry-champerty-maintenance-oh-my/.

[76] *See* MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2019); *Ohralik*, 436 U.S. at 461.

[77] *Ohralik*, 436 U.S. at 461.

[78] Jayne Reardon, *Lawyer Advertising Rules: Overhaul Needed*, 2 CIVILITY (Feb. 7, 2018), https://www.2civility.org/lawyer-advertising-rules-overhaul-needed/.

[79] *See* MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2019) ("The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.").

[80] It is true that estate planners are often called to the bedside of dying clients who wish to change their plans, but the anti-**solicitation** rules do not apply to existing clients, of course, and that situation, while frequent, is not typical of the planning relationship.

[81] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2002).

[82] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2002).

[83] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 3 (AM. BAR ASS'N 2019).

[84] M. Mahdi Roghanizad & Vanessa K. Bohns, *Ask in Person: You're Less Persuasive Than You Think Over Email*, 69 J. EXPERIMENTAL SOC. PSYCH. 223, 224 (2017), https://doi.org/10.1016/jjesp.2016.10.002.

[85] *See, e.g., How Much Does a Direct Mail Campaign Cost & How Can I Optimize Results?*, HYGRADE BUSINESS GROUP (Sept. 12, 2018), https://www.hygradebusiness.com/how-much-does-a-direct-mail-campaign-cost-how-can-i-optimize-results/ ; *Cost of Direct Mail Advertising*, WEBFX, https://www.webrx.com/internet-marketing/cost-of-direct-mail-advertising.html; Washington Direct Mail, *Is It Still Worth Marketing By Direct Mail?*, CEO TODAY ONLINE (Mar. 1, 2018), https://www.ce-otodaymagazine.com/2018/03/is-it-still-worth-marketing-by-direct-mail/.

[86] *See* Anderson & Kumar, *supra* note 40; Perrin, *supra* note 41; Tate, *supra* note 42.

[87] Andrew Perrin, Smartphones *Help Blacks, Hispanics Bridge Some - but Not All - Digital Gaps with Whites*, PEW RESEARCH CENTER (Aug. 20, 2019), http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/

[88] Monica Anderson and Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, PEW RESEARCH CENTER (May 17, 2017), http://www.pewinternet.org/2017/05/17/tech-adoption-climbs-among-older-adults/.

[89] MODEL RULES OF PROF'L CONDUCT r.1.8 (AM. BAR ASS'N 2019).

[90] *See, e.g.*, Susan Barry, *Face to Face*, PSYCHOLOGY TODAY (Mar. 25, 2013), https://www.psy-chologytoday.com/us/blog/eyes-the-brain/201303/face-face; Christopher Bergland, *Face-to-Face Social Contact Reduces Risk of Depression*, PSYCHOLOGY TODAY (Oct. 5, 2015), https://www.psychologyto-day.com/us/blog/the-athletes-way/201510/face-face-social-contact-reduces-risk-depression; Lawrence Blenke, The Role of Face-to-Face Interactions in the Success of Virtual Project Teams, (Fall 2013) (unpublished Ph.D. dissertation, Missouri University of Science and Technology) (https://scholarsmine.mst.edu/cgi/viewcontent.cgi?article=3306&context=doctoral_dissertations).

[91] John Council, *Galveston Attorney Charged with Representing Clients He'd Never Met*, TEXAS LAWYER (Jan. 2, 2019), https://www.law.com/texaslawyer/2019/01/02/galveston-attorney-charged-with-representing-clients-hed-never-met/; *But see* Nicole Garton-Jones, *Is It Ethical to Draft a Will for a Client You Have Never Met in Person?*, SLAW (April 22, 2010), http://www.slaw.ca/2010/04/22/is-it-ethical-to-draft-a-will-for-a-client-you-have-never-met-in-person/; Legal Profession Prof, *The Client He Never Met*, LAW PROFESSOR BLOGS NETWORK (Aug. 2, 2018), https://lawprofessors.typepad.com/legaljrofession/2018/08/the-always-excellent-dan-trevas-has-a-summary-of-an-ohio-supreme-court-case-the-ohio-supreme-court-today-dismissed-rule-viol.html (dismissing disciplinary charges against attorney who lost case for client he never met).

[92] Laura Vanderkam, *The Science of When You Need In-Person Communication*, FAST COMPANY (Sept. 30, 2015), https://www.fastcompany.com/3051518/the-science-of-when-you-need-in-person-communication; Jude Trederwolf, *The Curative Power of Face-to-Face Interaction*, MEDIUM (Feb. 20, 2019), https://medium.com/publishous/the-curative-power-of-face-to-face-interaction-a4c022dd6bc0; Nick Morgan, *Why Communicate Face-to-Face? Why Not Exist Virtually?*, FORBES (Nov. 12, 2015), https://www.forbes.com/sites/nickmorgan/2015/11/12/why-communicate-face-to-face-why-not-exist-virtually/#65eadfcd630e.

[93] *Estate Planning and the Nonmarital Child*, 83-AUG. N.Y. ST. B. J. 34 (July/August 2011).

[94] PETER T. WENDEL & ROBERT G. POPOVICH, CALIFORNIA WILLS AND TRUSTS: CASES, STATUTES, PROBLEMS, AND MATERIALS, 141-143 (2017); *see also* Davan Maharah, *Leisure World Law-yer Heir to Clients' Millions: Estates: James D. Gunderson Who Prepared Wills for Thousands of Retirees, Vigorously Denies Wrongdoing*, L.A. TIMES (Nov. 22, 1992), http://articles.latimes.com/1992-ll-22/news/mn-2315_1_lesiure-world.

[95] MODEL RULES OF PROF'L CONDUCT r.1.8(c) (AM. BAR ASS'N 2019).

[96] MODEL RULES OF PROF'L CONDUCT r.1.8(c) (AM. BAR ASS'N 2019).

[97] WI ST 853.01; TX EST 254.003; IN 29-1-7-17; *But see* Sandford v. Metcalfe, 954 A.2d 188, 110 Conn.App. 162, certif. denied, 958 A.2d 160, 289 Conn. 931 (2008).

[98] CAL. PROB. CODE §§ 21380 (2019)

[99] CAL. PROB. CODE §§ 21380 (2019). There is a way around this provision, and that is to obtain a Certificate of Independent Review, as provided under Section 21384. Under Section 21384, "an attorney who drafts an instrument may not review and certify the instrument."

[100] R.I. GEN. LAWS § 33-19.1-3 (2019).

[101] MODEL RULES OF PROF'L CONDUCT r.7.3(b) (AM. BAR ASS'N 2019).

[102] See 1. above, the immediately preceding section, and footnotes thereto.

[103] MODEL RULES OF PROF'L CONDUCT r.1.5 (AM. BAR ASS'N 2019).

[104] MODEL RULES OF PROF'L CONDUCT r.1.5 (AM. BAR ASS'N 2019).

[105] MODEL RULES OF PROF'L CONDUCT r.l.5(b) (AM. BAR ASS'N 2019).

[106] Concerns about care custodians marrying persons in their last months of life and obtaining improper bequests or inheritances have also led to the enactment of an amendment to CAL. PROB. CODE § 21380, 21382, and 21611.

[107] MODEL RULES OF PROF'L CONDUCT r.7.3(c)(2) (AM. BAR ASS'N 2019).

[108] MODEL RULES OF PROF'L CONDUCT r.7.3(b)(1) (AM. BAR ASS'N 2019).

[109] MODEL RULES OF PROF'L CONDUCT r.7.1 (AM. BAR ASS'N 2019).

[110] MODEL RULES OF PROF'L CONDUCT r.7.1 (AM. BAR ASS'N 2019).

[111] MODEL RULES OF PROF'L CONDUCT r.7.1 cmt. 1 (AM. BAR ASS'N 2019).

[112] *See e.g.*, MODEL RULES OF PROF'L CONDUCT r.1.5 cmt. 3 (AM. BAR ASS'N 2019) (truthful reports of a lawyer's achievements that creates unjustified expectations); MODEL RULES OF PROF'L CONDUCT r.7.1 cmt.4 (AM. BAR ASS'N 2019) (statements improperly implying ability to influence a government agency or official); MODEL RULES OF PROF'L CONDUCT r.7.1 cmt.5 (AM. BAR ASS'N 2019) (misleading firm names).

[113] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.3 (AM. BAR ASS'N 2002).

[114] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.3 (AM. BAR ASS'N 2002).

[115] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.3 (AM. BAR ASS'N 2002).

[116] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.4 (AM. BAR ASS'N 2019).

[117] The Old Comment drafters also seemed unaware that on the Internet, everything is forever: "realtime electronic contact conversations" - text messages, direct messages (DMs), Google "chats," and so on - are all as recoverable as a direct mail postcard or a radio spot. This is perhaps reflected in the amended Comment and Rule.

[118] I thank Prof. Alex Boni-Saenz for raising this objection as the chair/discussant at the LSA panel on June 1,2019.

[119] CARPETBAGGER, https://www.britannica.com/topic/carpetbagger (last visited Oct. 16, 2019).

[120] Am. Jur. Attny. Sec. 136, Methods of Restraining Unauthorized Practice of Law

[121] See, e.g., Jay M. Zitter, *Drafting of Will or Other Estate-Planning Activities as Illegal or Unauthorized Practice of Law*, 25 A.L.R.6th 323.

[122] One study suggests 34 times better. *See* Roghanizad & Bohns, *supra* note 75.

[123] MODEL RULES OF PROF'L CONDUCT r.7.3 (AM. BAR ASS'N 2019).

[124] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.5 (AM. BAR ASS'N 2019).

[125] MODEL RULES OF PROF'L CONDUCT r.7.3 cmt.3 (AM. BAR ASS'N 2019).

[126] MODEL RULES OF PROF'L CONDUCT r.l.5(b) (AM. BAR ASS'N 2019).

[127] Note that contract capacity and testamentary capacity are not the same. The standard for testamentary (and donative) capacity is lower than contract capacity. It is therefore at least possible that a person competent to execute a valid will lacks the capacity to enter into a binding fee agreement for its preparation, leaving the will-drafting attorney to rely upon a *quantum meruit* determination of the fee.

[128] *See* Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888, 895 (Cal. Ct. App. 2003); *see also* Restatement (Third) of the Law Governing Lawyers § 51.

[129] *See*, e.g. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888, 895 (Cal. Ct. App. 2003); Deroy v. Reck, 204 A.3d 785 (Conn. App. Ct. 2019); Young v. Van Buren, 130 Hawaii 349 (2010) - unpub.

[130] *See, e.g.*, CAL. PROB. CODE §§ 259, 859 (2019); 33 R.I. GEN. LAWS § 33-19.1-3 (2019).

[131] Ohralik v. State Bar of Ohio, 436 U.S. 447,461. (1978).

[132] MODEL RULES OF PROF'L CONDUCT r. 1.0(b)(AM. BAR ASS'N 1983) ("confirmed in writing"); MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 1983) ("informed consent"); MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 1983) (when conflicted concurrent representation is permitted); MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (AM. BAR ASS'N 1983) (when former client conflict is permitted); N.Y. RULES OF PROF'L CONDUCT r. 1.11(a)(2) (N.Y. STATE BAR ASS'N 2018) (former government attorney conflicts); N.Y. RULES OF PROF'L CONDUCT r. 7.1(e)(4) (N.Y. STATE BAR ASS'N 2018) (governing use of testimonial from former client in

attorney advertising).

[133] Terry Calvani, James Langenfeld, and Gordon Shuford, *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761 (May 1988).

[134] *See, e.g.*, Comment, *A Critical Analysis of Rules Against* ***Solicitation*** *by Lawyers*, 25 U. CHI. L. REV. 674, 675 (1958).

[135] *See, e.g., Preference for Testacy*, 64 CAL JUR.3D *Wills* § 4.

[136] *See* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1134-38 (2015).

[137] *See Id*. at 1138-47.

[138] Annotation, Proof of Due Execution of a Lost Will, 41 A.L.R. Fed. 2d Art. 393 (1955); Annotation, *Proof of Lost or Destroyed Will*, Surrogate's Ct. Proc. Act § 1407 (1966).

[139] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 1983).

[140] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 1983).

[141] *List of U.S. Cities with Large African-American Populations*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._cities_with_large_African-American_populations (last visited Sept. 14, 2019).

[142] *Hispanics and Latinos in Houston*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hispanics_and_Latinos_in_Houston (last visited Sept. 14, 2019) (Houston has a large undocumented population, perhaps as many as 400,000; and the most recent numbers are already several years old).

[143] National Association for Law Placement, *2018 Report on Diversity in U.S. Law Firms*, NALP REPORT ON DIVERSITY, 14-16, (Jan. 2019), https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf.

[144] American Bar Ass'n, *10-Year Trend in Lawyer Demographics*, ABA NATIONAL LAWYER POPULATION SURVEY (Dec. 31, 2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf.

[145] National Association for Law Placement, *supra* note 116.

[146] U.S. CENSUS BUREAU QUICKFACTS (DEC. 31, 2018), https://www.census.gov/quick-facts/fact/table/US/PST045218.

[147] ABA, *supra* note 117.

[148] LOS ANGELES COUNTY, CALIFORNIA, https://en.wikipedia.org/wiki/Los_Angeles_County,_California (last visited Sept. 14, 2019).

[149] Anna Brown & Mark Hugo Lopez, MAPPING THE LATINO POPULATION, BY STATE, COUNTY AND CITY (Aug. 29, 2013), https://www.pewhispanic.org/2013/08/29/mapping-the-latino-population-by-state-county-and-city/.

[150] National Association for Law Placement, *supra* note 118.

[151] U.S. Census Bureau, *supra* note 119.

[152] ABA *supra* note 120.

[153] Race matching and cultural competence have been deeply explored primarily in the context of adoption. *See, e.g.*, Ralph Richard Banks, *The Multiethnic Placement Act and the Troubling Persistence of Race Matching*, 38 CAP. U. L. REV. 271, 274 (2009) ("I examine two race-related practices that even some opponents of race matching might regard as justifiable: social workers' consideration of a family's preference to adopt a child of a particular race and social workers' assessments of the cultural competency of families seeking to adopt racial minority children."); There is also research in the health care setting. Emily Ihara, CULTURAL COMPETENCE IN HEALTH CARE: IS IT IMPORTANT FOR PEOPLE WITH CHRONIC CONDITIONS?, https://hpi.georgetown.edu/cultural/ (last visited Sept. 14, 2019).

[154] Rabbi Tarfon, *Jewish Holy Scriptures: Ethics of the Fathers*, PIRKEI AVOT, 2:16, https://www.jewishvirtuallibrary.org/ethics-of-the-fathers-pirkei-avot (last visited Oct. 17, 2019).