Attorney Advertising in Alabama: Concerns, The Law, New Issues, & Effectively Marketing Your Firm While Maintaining Compliance with the Rules

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Attorney Advertising in Alabama: Concerns, The Law, New Issues, & Effectively Marketing Your Firm While Maintaining Compliance with the Rules[1]

I. Advertising Concerns, the Rules, and the Law

A. Is there a lack of taste & decorum-what do you think? See, ABA Journal April 2017 Issue-Thoughts? Do you advertise?[2] What can the Bar do? (hint: see below)

B. Rules

1. Rule 7.1-the advertisement must be truthful (a)

a. Cannot create unjustified expectations or compare quality (b) and (c)-disclaimers: 7.2(e) and extended testimonial disclaimer-#10 in Disciplinary Commission Opinion 2003-1 (https://www.alabar.org/resources/office-of-general-counsel/formal-opinions/2003-01/)

b. Certifications (7.1(d) and 7.4)

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[1] These materials are an amalgam of multiple CLEs I have previously presented on Ethics & Attorney Advertising with updates included for new and emerging issues. As always, if you have any questions or concerns regarding your prospective conduct, I am happy to answer your questions and, if needed, review proposed advertising for compliance with the Rules of Professional Conduct. Please understand that these materials are not a substitute for such an opinion. Lastly, my apologies in advance for the lack of proper sequencing of the roman numerals within this document. Again, these materials include highlights from all prior CLE materials covering the ethics of attorney advertising as well as new information. For general information regarding the Office of General Counsel, who we are, and what we do, please see the conclusion of these materials.

[2] "Of course I don't advertise." Really? Do you have a firm website? Facebook page? Linkedin? If so, you advertise. See, Rule 7.2(e). Any communication about legal services you provide to prospective clients is advertising.

2. Rule 7.2-key points

    a. 7.2(b)-filing requirement: 3 days within dissemination or publication

    b. 7.2(c) cannot give thing of value beyond cost of advertisement

    c. 7.2(d): must include name of at least one lawyer responsible

    d. 7.2(e): THE DISCLAIMER-MUST BE LEGIBLE OR AUDIBLE (unless you don't need it: not communicating about legal services you provide or not marketing to prospective clients)

    e. 7.2(f): if fees stated, you are bound by what you advertise for not less than 60 days

3. Rule 7.3-this one is complicated

    a. 7.3(a) SOLICITATION-you cannot do it in person nor can someone do it on your behalf; CAN solicit via written communication subject to limitations/requirements in this rule

    b. 7.3(b)(1):Timing requirements: 30 days for PI; 7 days after service of defendant in criminal and civil matters

    c. 7.3(b)(2): (i) sample copy must be on file with OGC concurrently which includes names and addresses of recipients; (ii) regular mail; (iii) don't state "approved by

Bar"[3]; (iv) letter cannot resemble a pleading-again, be truthful; (v) "Advertisement" must appear in red 14 point font on each page of the advertisement and on the accompanying envelope; (vi) if send contract sample must be marked sample-practical tip: don't send a contract-lots of potential problems; (vii) first sentence MUST state, "If you have retained an attorney in connection with [insert description of matter here], please disregard this letter"; (viii) if letter prompted by specific occurrence (i.e. a possible BP claim) you must explain how you obtained the recipient's information; (ix) don't reveal on outside of envelope or self-mailing brochure or pamphlet the nature of the potential client's legal problem

4. 7.4-Cannot state specialist unless certified by organization recognized by State Bar

5. 7.5-letterheads and firm names-cannot violate 7.1, imply government agency, or charity

6. 7.6-Cards for non-lawyers-cannot be misleading

7. Rule 8.4-general misconduct: big hitters with regard to advertising: (a) cannot violate or attempt to violate any Rule of Professional Conduct; (c) engage in dishonest conduct; (d) cannot be prejudicial to administration of justice; (e) engage in conduct adversely reflecting on one's fitness to practice law

C. WHAT OGC CAN AND DOES DO RE: ADVERTISING

1. The Office of General Counsel provides advice in response to hundreds of inquiries per year regarding advertising. While Rule 7.2(b), Ala. R. Prof. C., imposes a filing requirement for all

[3] This office does not "approve" advertising. This office is happy to provide an opinion on proposed advertising regarding its compliance with the Rules of Professional Conduct. No "approvals" are provided.

advertising, the Office of General Counsel also encourages lawyers to submit their advertising to the Office of General Counsel in order to review it for compliance with the Rules of Professional Conduct before said advertisement is published or aired. Many lawyers take advantage of this service offered free as part of the cost of one's license to practice law in Alabama. With regards to lawyer discipline regarding advertising, lawyers in Alabama have been disciplined for violating advertising rules.

2. While the Bar would like to regulate attorney advertising with greater scrutiny, the United States Supreme Court and federal courts side almost uniformly with attorneys challenging advertising rules containing heightened scrutiny. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990); Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (2001); Alexander v. Cahill, 598 F.3d 79 (2nd Cir. 2010); Dwyer v. Cappell, 762 F.3d 275 (3rd Cir. 2014); Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997); Public Citizen, Inc. v. La. Atty. Disciplinary Bd., 632 F.3d 212 (5th Cir. 2011); Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000); Searcy v. Florida Bar, 140 F. Supp.3d 1290 (N.D. Fla. 2015); Rubenstein v. Florida Bar, 69 F. Supp.3d 1331 (S.D. Fla. 2014); Harrell v. Florida Bar, 915 F. Supp.2d 1285 (M.D. Fla. 2011)

3. Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (basis for much of the caselaw cited above)

   a. The government may freely regulate commercial speech that concerns unlawful activity or is misleading

b. If the commercial speech concerns lawful activity and is not misleading, the government must meet the Central Hudson test.

c. Under Central Hudson, a restriction on commercial speech is valid only if (1) the asserted governmental interest in restricting the speech is substantial; (2) the challenged restriction directly advances the asserted governmental interest; and (3) the restriction is not more extensive than is necessary to serve that interest. See, e.g., Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999); Central Hudson, 447 U.S. at 563–66, 100 S.Ct. 2343.

II. Marketing-See book by Jabez LeBret/Mark Homer-Marketing 101 Course presented in Lawyer University. *Online Law Practice Strategies*-I'm certainly no marketing expert but digital marketing appears to be the future as nearly all persons ages 10 and up utilize a smartphone. Generally, this is a more cost effective method of marketing.[4]

A. Social Media-see older outline included at conclusion-in Alabama, no formal opinion on social media; the Rules apply to social media-for specific questions, contact this office.

B. Social Media/Advertising/Ethics Update since I first started presenting this CLE

1. Multiple states issued social media opinions-Texas, Washington, New York, DC-limited to social media posts

[4] Please contact the Practice Management Assistance Program for more information effective strategies for marketing your practice.

2. ABA Formal Opinion 477-not binding authority but instructive:

a. factors lawyers must consider when determining the best, most secure method for communicating with clients on a case-by-case basis include: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

b. "fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances."

c. The Committee also cautioned that while using unencrypted email may be appropriate for routine or low sensitivity communications, due to "cyber-threats and (the fact that) the proliferation of electronic communications devices have changed the landscape...it is not always reasonable to rely on the use of unencrypted email."

3. Texas Opinion covers cyber-squatting: Contrasts with only other opinion on this subject. My advice: avoid any conduct that could be construed as dishonest. See, generally, Rules 8.4(c) and (g)

a. 8.3 reporting obligation

b. Meta Tags/Keywords in SEO/Competitive Keyword Advertising

4. ABA's Annual Blawg 100-see materials attached. Great, under-employed resource for emerging trends in the law-example; ethics implicated in advising clients in legal marijuana business. Cannot do this in Alabama. However, many Alabama lawyers licensed in Florida and Arkansas which both recently passed forms of legalized marijuana. I have circled blogs that are particularly useful regarding marketing and technology and others that are useful in my practice.

5. Other issues-see attached materials

ABA JOURNAL

BLAWG 100

10th Annual Blawg 100

POSTED DEC 01, 2016 12:00 AM CST

BY SARAH MUI & LEE RAWLES

The tally of law blogs in our directory has topped 4,000. We present to you our latest roundup of the 100 most compelling ones.

All About Advertising Law

Venable's group blog covers advertising laws of concern to broadcasters and marketers, with special attention paid to implications of Federal Trade Commission and Federal Communications Commission rulings. This year, they ran a very informative series called "Golden Rules (http://www.allaboutadvertisinglaw.com/?s=golden+rules)," all about the advertising and sponsorship issues raised by the Olympics.

Arbitration Nation

"This blawg provides recent news on all sorts of interesting arbitration decisions nationwide and does so accurately, intelligently, concisely and with a sense of humor and, sometimes, savvy political commentary. This may be the best ADR blawg, period. I have not seen a better one, and I read an awful lot of ADR news and edit the ABA ADR website for the Litigation Section." —*Mitchell Marinello, Novack & Macey, Chicago*

Art Law & More

The field of art law is often more swashbuckling than it's given credit for. Posts on Art Law & More contain details about forgeries, heists, hidden masterpieces, colonial cultural looting, mysterious graffiti artists and Nazi-era thefts. But it's not all criminal law; the blog, published by the London firm Boodle Hatfield, also covers things such as museum contracts, public works and the potential effects Brexit could have on the art market.

Asbestos Case Tracker

NEW: This blog "is very well-written by skilled attorneys especially knowledgeable about and devoted to the particular subject matter—asbestos litigation," writes Zachary S. Goldberg of Goldberg Corwin in New York City. "The material covered is always very current, usually describing a significant decision handed down within the past 24 to 48 hours."

Associate's Mind

Alabama lawyer Keith Lee has made helping newbie lawyers the focus of much of his writing. (Lee is also the author of the ABA-published *The Marble and the Sculptor* (http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=213189), a book for those transitioning from law school to law practice.) But you don't have to be a young practitioner to appreciate his mind, which also ponders questions like the legality of "murderbots (http://associatesmind.com/2016/07/09/if-you-own-a-roomba-can-you-own-a-murderbot/)" and Pokemon Go's legal pitfalls (http://associatesmind.com/2016/07/11/is-pokemongo-illegal/) as well as crunches numbers (http://associatesmind.com/2016/03/14/law-schools-turn-pink-women-to-outnumber-men-for-first-time-by-2017/) to report on law school enrollment trends.

THE LIST: Our 10th Annual Blawg 100 (http://www.abajournal.com/magazine/article/10th_annual_bl

THE SURVEY: What bloggers told us about the state of the legal blogosphere (http://www.abajournal.com/magazine/article/what_bloggers_

Attorney@Work

HALL OF FAME: The bloggers of Attorney@Work truly fulfill the promise of their slogan: "One really good idea every day for enterprising lawyers." Law practice management may not be for the faint of heart, but the tips and tricks offered by this blog can make it easier.

THE HALL OF FAME: 50 blogs that achieved our highest honor (http://www.abajournal.com/magazine/article/2013_blawg_10

TWITTER LIST: See what the top bloggers are saying on Twitter (https://twitter.com/ABAJournal/lists/blawg-100-2016)

Before the Bar—ABA for Law Students

NEW: The ABA Law Student Division is invested in helping would-be lawyers succeed early. This blog offers tips on various issues, including the Uniform Bar Exam, handling student loans, conducting oneself professionally, social networking and even managing study habits. Recent grads will also find useful career advice.

BeLabor the Point

NEW: "I'd be pushing up the HR daisies without the solid information this blog provides," writes Jeffrey Biegelsen of the Starrett Building Co. in Fort Lauderdale, Florida. "I cannot quantify how much money this has saved my organization." The blog also has a Spanish-language version: Cafe con Labor (http://www.cafeconlabor.com/).

BeSpacific

NEW: "No one better has her finger on the pulse of the legal information world than Sabrina Pacifici, law librarian and author of the blog BeSpacific," writes blogger Robert Ambrogi (http://www.abajournal.com/blawg/robert_ambrogis_lawsites/). "Launched in 2002, BeSpacific is one of the longest-running legal blogs and, remarkably, Sabrina seems more prolific today than ever. She posts multiple items every day, covering the gamut of law, technology and knowledge discovery and topics ranging from cybersecurity to legal research to government regulation to civil liberties to IP and more. For me, BeSpacific is one of my daily must-reads and has been for 14 years straight."

Best Practices for Legal Education

This is, as the blog's header emphasizes, "a place to discuss" what works in legal ed. It's truly a blog about teaching law. Law professor contributors blog about their classroom experiments and what lesson structures seem to work for students; they share lists of experiential learning resources; and they talk about what they're learning from their students. And they also keep readers informed on the latest American Bar Association guidance.

The Better Chancery Practice Blog

NEW: "In Mississippi, the chancery court can often be a confusing place," writes Amarette Speights of the O'Neal Law Firm in Madison. "Chancellors have a very broad range of power and can pretty much make up the rules as they go. But this is not an insignificant traffic court, this is our family court. Our land court. Our youth court. Our drug court. As such, I love that Judge [Larry] Primeaux gives us regular guidance as to how to practice. Coming from someone with his experience ... I love it. Plus, he is quite funny, and once a week, he just posts amusing items." Readers also love the blog's repository of checklists (https://betterchancery.com/category/checklists/)—lists of factors that apply in various types of chancery court cases.

Big Law Business

NEW: Published by Bloomberg Law, this is a newsy site, full of the latest BigLaw mergers and case decisions, as well as a wider look at the international legal market. The blog is great for readers looking to stay informed at the national and international level. It's also notable for its coverage of news affecting in-house counsel of major companies.

Big Molecule Watch

NEW: For more than a year now, Goodwin Procter has been exhaustively covering all U.S. legal developments related to biosimilars—biologic drug products that closely match but are not identical to their brand-name counterparts. "It has very crisp and precise information," writes Meghal Mistry, a manager at Zydus Cadila in Ahmedabad, India.

Brian Leiter's Law School Reports

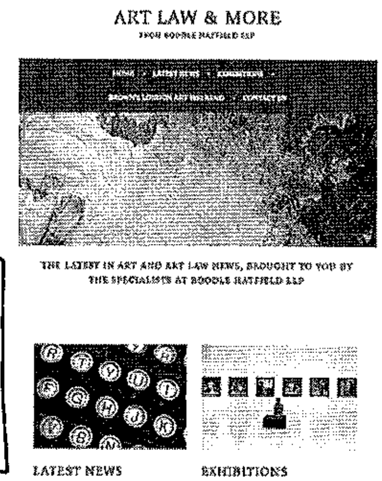
Go to this blog for a look at the state of the legal education field from one of its insiders. Leiter, a University of Chicago Law School professor, does an excellent job of compiling data from scores of surveys and sources to give readers an idea about the prevalent trends affecting law schools, law professors and law students. Frequent contributor Michael Simkovic, a Seton Hall law prof, has also done some interesting posts this year about lawyer earnings.

CAAFlog

CAAFlog states as a motto of sorts: "Military justice blogs are to blogs as military music is to music." That said, this is where to go for coverage of the U.S. Court of Appeals for the Armed Forces and the courts of each military branch. And check out this blog if you want to read about the court-martial case of Army Sgt. Bowe Bergdahl (the subject of season 2 of the popular *Serial* podcast), from the perspective of bloggers with military law expertise.

Cady Bar the Door

NEW: Brooks Pierce attorney David Smyth writes with drama about federal securities law enforcement, insider trading and criminal news-of-the-weird that hits the appellate courts. As former assistant director of the Securities and Exchange Commission's Division of Enforcement, he knows what he's talking about.



Art Law & More

Canna Law Blog

As an increasing number of states legalize the sale of marijuana for at least some purposes, lawyers are needed to sort out the legal needs of cannabis growers, users and distributors. The blog's "State of Cannabis (http://www.cannalawblog.com/?s=state+of+cannabis)" series examines the status of drug laws in each state, ranking them on their openness to the cannabis industry.

Cartel Capers

NEW: Trust this antitrust blog: Robert Connolly, a Justice Department veteran now in private practice, reads cartel prosecution documents and discusses the cases from the Antitrust Division's point of view—although not necessarily without criticism for the approach the DOJ takes in a given case. He also compares and contrasts different countries' approaches to enforcing competition law.

CA3blog

NEW: "This blog gives me practical, concise summaries of all notable (all published and many unpublished) 3rd Circuit decisions as soon as the decisions are issued. The blogger is a practicing lawyer who obviously has a deep understanding of federal appellate practice. His comments include accurate summaries and thoughtful analysis of the key points. He also identifies questionable aspects of the decisions and areas ripe for litigation." *—Valerie Burch, the Shagin Law Group in Harrisburg, Pennsylvania*

CFPB Monitor

Who watches the watchers? In the case of the Consumer Financial Protection Bureau, the answer is the CFPB Monitor. The blog, produced by the firm Ballard Spahr, aims to inform companies of the bureau's latest decisions and how they might be affected. In addition to the mortgage lenders and debt collectors who are normally thought of as targets for the CFPB's oversight, the blog also addresses the specific concerns of auto finance companies.

Compelling Discovery

This blog "keeps readers apprised of changes and evolutions in state and federal discovery rules of civil procedure," writes Johnathan Leavitt of Saggese & Associates in Las Vegas. Some posts highlight and analyze the rare Nevada Supreme Court ruling addressing discovery issues. In other posts, lawyer-blogger Michael Lowry shares discovery-related gaffes he sees in Nevada cases.

Constitutional Law Prof Blog

NEW: Law profs Steven Schwinn and Ruthann Robson provide same-day coverage and analysis of the most newsworthy constitutional law cases at the U.S. Supreme Court, U.S. Court of Appeals and state supreme court levels. Robson's "Daily Read" posts note interesting stories in the mainstream media and law reviews, and she adds her own thoughtful commentary.

Constitution Daily

The National Constitution Center hosts this blog to foster discussion about the role of the Constitution in the United States and illuminate the workings of the U.S. Supreme Court. From the blog, you can also find links to live and archived videos of Constitution Center events, a weekly podcast, an interactive Constitution and the occasional history lesson.

Credit Slips

This blog—which covers consumer law, credit and bankruptcy—marked its 10-year anniversary this year. It's where Massachusetts Sen. Elizabeth Warren, who went on to establish the Consumer Financial Protection Bureau, was blogging until her first Congress. And the blog is still going strong. Law prof contributors cover important bankruptcy rulings, summarize and share their scholarship and talk about how current bankruptcy-related events are changing what they're teaching and how they're teaching it.

Dashboard Insights

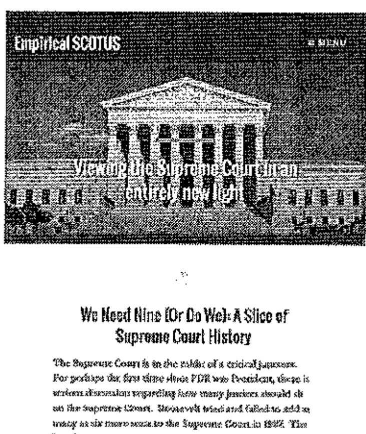
NEW: "The difference between technology companies and automotive companies is getting smaller and smaller," Foley & Lardner's Jeffrey A. Soble writes. As zero-emission and fully autonomous vehicles move closer to reality—not to mention Toyota's two patents related to flying cars (https://www.autoindustrylawblog.com/2016/07/21/could-the-flying-car-finally-take-off/)—liability and regulatory issues abound. And these bloggers want to talk about them.

Defrosting Cold Cases

If you were a fan of *Making a Murderer*, consider delving into Defrosting Cold Cases, which compiles evidence for both wrongful convictions and crimes for which no one has yet been brought to justice.

Dewey B Strategic

HALL OF FAME: Since 2011, Jean P. O'Grady has been a voice for the rarely sung but invaluable information professionals in the industry. Emerging technologies have changed the landscape for law librarians; O'Grady's blog provides guidance on the newest tools available to the profession and on opportunities for librarians to be a driving force for innovation.



Empirical SCOTUS

Divorce Discourse

HALL OF FAME: Lee Rosen's blog may have the word *divorce* in its name, but its usefulness extends beyond family law practitioners. Any attorney who runs a law practice can benefit from the practical, concrete advice Rosen gives readers for marketing and managing a firm.

Empirical SCOTUS

NEW: The U.S. Supreme Court is notorious for inscrutability and unpredictability, a reputation encouraged by many justices. But Empirical SCOTUS provides a new window into understanding the court by crunching numbers. Blogger Adam Feldman analyzes contemporary and historical cases—and the lawyers, law firms, justices and other participants—to determine everything from which firms (https://empiricalscotus.com/2016/07/31/cert-leaders/) are filing the most cert petitions to whether the Roberts court (https://empiricalscotus.com/2016/07/27/the-three-shifts-roberts/) can still be considered conservative.

The Employer Handbook

"Eric Meyer does an amazing job of presenting employment law information by discussing entertaining cases and giving useful takeaways for HR professionals and other attorneys," writes Brooke Kozak of Shaw Valenza in Sacramento, California. "I love both the snarky style and the substance. It's my can't-miss blawg—first thing I read every morning. And it makes me laugh."

Employment & Labor Insider

Lawyer Robin Shea's loyal following of human resources professionals love her Friday posts—complete with punchy headlines—that keep them up-to-date on their field. Posts take close looks at cases that make the appellate courts or hit the mainstream media. She's also given to fun but informative listy posts like "Five things about religion in the workplace that you may not have known (http://www.employmentandlaborinsider.com/discrimination/hallelujah-5-things-about-religion-in-the-workplace-that-you-may-not-have-known/)" or "25 quick takes (no kidding!) on the EEOC's proposed national origin guidance (http://www.employmentandlaborinsider.com/discrimination/25-quick-takes-no-kidding-on-the-eeocs-proposed-national-origin-guidance/)."

EvidenceProf Blog

University of South Carolina law professor Colin Miller posts on studies about eyewitness suggestibility, proposed legislation related to penalties for withholding or falsifying evidence and much more. Miller also posts about Adnan Syed—his murder case was the subject of the first season of *Serial*—who was granted a new trial based on new evidence unearthed by the podcast.

Excess of Democracy

Pepperdine University law professor Derek T. Muller takes his blog's name from a speech given during the Federal Convention of 1787, and he writes about how our democracy is reflected in election law, legal education, the U.S. Supreme Court and other organs of government. He also compiles an annual 10-year retrospective (http://excessofdemocracy.com/blog/2016/8/where-are-they-now-supreme-court-clerks-ot-2006) on the fates of various Supreme Court clerks, offering an illuminating glimpse at what careers can await those who land those coveted positions.

Fault Lines

A group blog hosted by Mimesis Law, Fault Lines provides plain-speaking, irreverent takes on criminal justice issues. Contributing writers provide a wide range of views on how the criminal justice system should function and debate each other on issues brought into focus by current events and cases.

FCPA Professor

Law professor Mike Koehler's "coverage of the U.S. and global enforcement of anti-bribery laws is unsurpassed in its breadth and depth," writes Warren Faure, senior environmental counsel at Sun Chemical Corp. Robert Wilhelm, a legal editor at Bloomberg BNA, writes that the blog "doesn't just give lip service to DOJ press releases. Koehler goes behind the rhetoric and digs into the actual nuts and bolts of [Foreign Corrupt Practices Act] prosecutions."

FDA Law Blog

Hyman, Phelps & McNamara's blog masters cover the Food and Drug Administration's regulation and enforcement actions, the FDA's reports to Congress, the guidance documents it releases, and complaints filed against the administration. The bloggers also maintain a spreadsheet tracking FDA-related legislation.

FMLA Insights

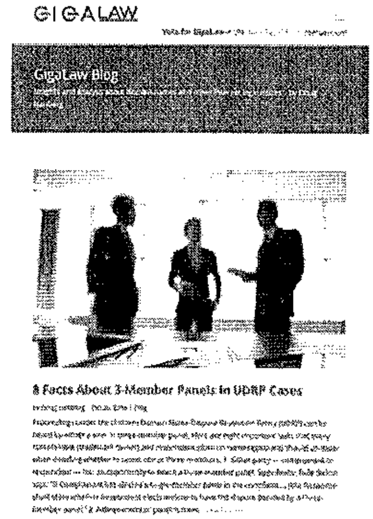
HALL OF FAME: "As employment counsel, I review all of the [Americans with Disabilities Act] reasonable accommodations as well as [Family Medical Leave Act] issues. For that reason, this blog is a critical resource to me and my staff. I tell all of our EEO and HR employees to sign up for the newsletter and to use this blog for information concerning FMLA and ADA issues." —*John Kim, NYC Health and Hospitals*

FourthAmendment.com

The evidentiary rules of search and seizure—and the police power to carry out those searches—have been a recent hot-button issue in the United States. Criminal defense lawyer John Wesley Hall's site provides meticulous descriptions of Fourth Amendment decisions across the nation, as well as links to articles and blog posts with interesting takes on law enforcement and the militarization of police.

The Gen Why Lawyer

NEW: Millennial lawyer Nicole Abboud found that practicing law in a traditional firm made her deeply unhappy. She launched a solo practice and created the *Gen Why Lawyer Podcast* and website to talk with other young lawyers about the ways in which they're shaking up the profession. The podcast also includes tips on career advancement and managing your practice.



GIGALAW

GigaLaw Blog

What's in a name? For businesses and individuals trying to register internet domains, the answer is "plenty." Doug Isenberg provides a look at the latest regulations and disputes over domain names, as well as other internet law and copyright topics including DMCA takedown notices.

The Ginger (Law) Librarian

NEW: Jamie J. Baker, a law librarian and legal writing instructor for Texas Tech University School of Law, runs a blog that is a mix of research tips and links to articles of interest—and some adorable cat photos. One of the challenges facing librarians in general is how to preserve and archive data and make it accessible for scholars, researchers and the general public—something that's also of paramount interest to e-discovery folks. Baker frequently discusses articles addressing this dilemma.

Golf Dispute Resolution

The game of golf can have an astonishing variety of legal implications, from real estate and property disputes to tort cases, contract negotiations, bankruptcy decisions and even custody disputes. All are lovingly cataloged by attorney Rob Harris. With the election year shining a bright light on candidates' business interests, litigation over Donald Trump's chain of golf courses (http://www.golfdisputeresolution.com/?p=5920) has provided much fodder for Harris.

Grand Jury Target

"Great blog about developments in the white-collar world. Less of a deep dive into the legal issues in specific cases, but more of general reporting on case," writes Assistant U. S. Attorney Brandon Essig. Washington, D.C., solo Sara Kropf "makes great effort to recognize successes of fellow practitioners. As a federal prosecutor, this blog run by a white-collar defense lawyer is an excellent way to see what the other side is thinking."

Herston on Tennessee Family Law

"I read Herston on Tennessee Family Law almost every day, and it's my main source for keeping up with developments in my main area of practice: family law. In fact, I sometimes start there when considering my own cases. It usually points me in the right direction to start my research. The blog is well-written, consistently updated with the latest opinions and advertisement/clutter-free." —*Julie Dyess, solo practitioner in Clarksville, Tennessee*

In Custodia Legis: Law Librarians of Congress

Blog posts—sometimes complete with historical photos from its own prints and photographs division—cover everything from recent Law Library of Congress reports to fun historical facts from its rare books and special collections division. "Tends to motivate you to learn more about a specific subject—and to use one's reader card more often at Library of Congress," writes Theodore Defosse, a senior archival specialist at the U.S. Government Printing Office.

Inside Privacy

See over

NEW: Covington & Burling bloggers address the struggles of courts and governments around the United States and the world to apply existing privacy laws to evolving technology—and the struggles of entities that face liability when their data security measures aren't up to snuff. Posts also cover relevant congressional legislation, White House policy directives and industry best practices related to cybersecurity.

IP News for Business

NEW: Trademark, copyright and patent laws can feel like murky waters for many businesses. Written by Golan Christie partner Beverly A. Berneman, this blog focuses on providing succinct examples of how businesses ran into intellectual property disputes and what the results were. One of our favorite elements is her pithy "Why You Should Know This" section at the bottom of most of her posts, which provides excellent context for how the specific IP outcomes could affect others.

Jost on Justice

U.S. Supreme Court watcher Kenneth Jost's weekly posts handicap the high court's upcoming decisions and thoroughly analyze what SCOTUS has handed down. Jost also covers appellate cases that look ripe for review by the justices and other current events that raise constitutional questions.

Jotwell

Want a peek at what legal scholars are working on without having to read a dry law review article? Jotwell—an acronym for Journal of Things We Like (Lots)—is a space for law professors and legal scholars to discuss their topics of study in an approachable way. Sponsored by the University of Miami School of Law, the blog is also broken down into sections by topic for easy browsing.

Jurist—Paper Chase

Here, law faculty and law students from the University of Pittsburgh cover hard legal news—quirky news is eschewed on principle. And don't expect the tight U.S. focus embraced by most of the mainstream media: A given post is just as likely to cover a prosecution or the actions of a legislature from a nation halfway across the world as a stateside federal court ruling.

The Legal Genealogist

Lawfare

This 6-year-old blog, published in cooperation with the Brookings Institution, has some profile. FBI Director James Comey did a guest post (https://www.lawfareblog.com/we-could-not-look-survivors-eye-if-we-did-not-follow-lead) when the bureau was seeking Apple's help in unlocking the iPhone of the San Bernardino, California, shooting suspect. Conflicts like that one are at the heart of Lawfare's mission: to explore "hard national security choices" the nation faces when actions it takes or contemplates to protect citizens run counter to its laws.

The Law for Lawyers Today

NEW: Do you have an ethical dilemma, or do you just like thinking your way through touchy hypothetical situations? The mission of Law for Lawyers Today is to be a resource for lawyers and firms, keeping them up-to-date on the newest ethics rules and being on the forefront of emerging legal ethics issues. From Microsoft's acquisition of LinkedIn to the wild popularity of Pokemon Go, the blog tries to anticipate possible conflicts and offer its readers ways to minimize their risk.

LawProse

HALL OF FAME: For any lover of language, Bryan A. Garner's LawProse is an invaluable resource. From the eternal "lay" or "lie" conundrum to more arcane issues of textualism such as "last-antecedent canon vs. series-qualifier canon," the archives of LawProse probably have an answer.

Law School Cafe

Ohio State University law professor Deborah Merritt's blog takes the crises in legal education and the legal profession head-on—declining law school enrollment, heavy debt loads for law school graduates, fewer lawyer jobs—and explores what the legal academy can be doing about it.

Law21

Guess who's back? After signing off the legal blogosphere for more than 18 months, Canadian management consultant Jordan Furlong started posting again in July and hit the ground running: tracking the technology that more innovative law firms are using, opining on the future of the partner-associate model, and questioning whether the legal industry has truly been "disrupted."

The Lawyer Whisperer

NEW: "This is practical advice on a range of real-world scenarios and includes topics where market knowledge is hard to come by for practicing lawyers (versus recruiters who are steeped in these issues day in day out)," writes Erin MacLeod, a senior corporate attorney at Ancestry, about legal career strategist Julie Brush's advice blog. "Plus, her writing style is entertaining as well as informative."

Legal Cheek

London-based Legal Cheek covers all the bases for Blighty—commentary on the legal issues of the day, timely law firm news, law school news and career advice—with a fun tabloid feel. The blog also has comprehensive rankings of the top 60 London law firms and the top 50 barristers' chambers (by salary, by number of women—you name it).

The Legal Geeks

Does Professor Xavier of X-Men violate privacy by reading minds? Could Anakin Skywalker have claimed legal insanity for his acts as Darth Vader? These questions and more are given a thorough legal analysis by the bloggers. Blog co-founder Josh Gilliland also has a long-running podcast, *The Legal Geeks* (http://thelegalgeeks.com/the-legal-geek-podcasts/), in which he and his guests discuss the newest legal questions posed by pop culture.

The Legal Genealogist

Judy G. Russell is a master of paperwork. That's not surprising, given her qualifications as a JD and genealogist. Her blog offers a fascinating take on how old legal records cast light on the lives of people long since passed. But she also addresses myriad other legal issues related to the work of genealogists, including copyright, privacy laws, records access and the laws regarding DNA tests, as well as explaining the science behind that testing.

The Legal Whiteboard

Writing on the Whiteboard can be a bit sporadic, but we admit we like to check in with this blog for its numbers rather than its words. University of St. Thomas law prof Jerry Organ takes the time to crunch the numbers on Law School Admissions Test scores, law school enrollment and even American Bar Association employment numbers, identifying important trends.

Letters Blogatory

Boston litigator Ted Folkman covers international judicial assistance, which Folkman describes (https://lettersblogatory.com/about-letters-blogatory/) as "getting judicial authorities in one state to take actions on your behalf in aid of a proceeding in another state." You can get a feel for this topic by checking out his "Case of the Day (https://lettersblogatory.com/?s=case+of+the+day)" posts. He has also been covering the Chevron/Lago Agrio litigation for years. And at the time of Merrick Garland's nomination to the U.S. Supreme Court, he evaluated Garland's stands on international issues.

Litigation & Trial

We've enjoyed reading this blog for years. Sometimes, plaintiffs-side tort litigator Max Kennerly takes readers on fun trips through high-profile civil cases—the Trump University case and Hulk Hogan's lawsuit against Gawker, for instance—writing about the actual law involved or bad decisions made by participating lawyers. Other posts discuss legislation or science that would affect some of the clients Kennerly represents in pharmaceutical lawsuits.

Lyle Denniston Law News

Lyle Denniston left SCOTUSBlog earlier this year, after working as its U.S. Supreme Court correspondent for 12 years. But anyone who misses his insightful reporting can still read his work on his personal blog, Lyle Denniston Law News. Though some of the entries are cross-posted from his new employer, the National Constitution Center's Constitution Daily (http://www.abajournal.com/blawg/constitution_daily/), Denniston's own blog includes additional pieces about legal issues outside his customary Supreme Court beat. As a legal reporter since 1948, Denniston has an incredibly valuable vantage point on the legislative and judicial trends of the day.

Marler Blog

HALL OF FAME: Bill Marler has consistently earned a place on our Blawg 100 list, and it's not just because the tales of food poisoning outbreaks recounted on his blog keep us up at night. We feel he has truly proven how blogs can help lawyers with niche practices become sought-after experts.

Minnesota Litigator

Those who read Seth Leventhal's blog "improve not only their own legal knowledge but also strengthen the Minnesota bar as a whole," writes Christopher Boline of Dudley & Smith in St. Paul. It's a strong statement, but we agree. Some of his posts ask big questions: Why can judges be reluctant to sanction (http://www.leventhalpllc.com/2016/07/11835/) lawyers? Does the way the legal system determines the reasonableness of fees (http://www.leventhalpllc.com/2016/08/another-minnesota-haircut-this-time-did-the-court-nick-its-nose-to-spite-its-face/) make sense? Other posts cover civil litigation that is making headlines in his state or cases that are just offbeat. Check out his amusing blow-by-blow coverage (http://www.leventhalpllc.com/2016/07/codecracking-crackling-precooked-bacon-unitherm-hormel/) of litigation between Unitherm and Hormel over a precooked bacon process.

Not Guilty No Way

Criminal defense and immigration lawyer Mirriam Seddiq writes what she feels about the state of American law in general and the criminal justice system in particular—and her posts aren't always predictably politically correct or profanity-free. Seddiq sometimes shares her perspective as a Muslim-American woman on topics, and in fact, she launched the American Muslim Women Political Action Committee this year. She also started a podcast this year (https://itunes.apple.com/us/podcast/not-guilty-no-way/id1076060853?mt=2) with the same title as her blog.

On the Case

Reuters reporter Alison Frankel runs the On the Case blog and focuses her reporting on big-ticket litigation and Securities and Exchange Commission news. If you want to keep up with the legal wranglings of tech giants from a perspective outside Silicon Valley, On the Case is a blog to follow.

Open Law Lab

For the visual thinkers among you, Open Law Lab hopes to make the law more accessible. Creator Margaret Hagan's mission is to use the principles of design to help make the law more engaging and understandable. Proponents of access to justice causes and attorneys wanting to make their law practice more streamlined and efficient will find great material here.

Pardon Power

NEW: P.S. Ruckman Jr.'s Pardon Power blog is the most thoroughly researched and updated chronicle of historical and contemporary pardons we've come across. Ruckman, a great proponent for the use of pardon powers as a tool for criminal justice reform, provides a look back at the clemency actions of previous presidents as well as current news updates.

Patents Post-Grant

The patent may be issued, but there is often much lawyering left to do. Alexandria, Virginia, lawyer Scott McKeown covers the U.S. Patent and Trademark Office's post-grant proceedings (including cases before the Patent Trial & Appeal Board and the U.S. Court of Appeals for the Federal Circuit), its decisions and its rule-making.

Persuasive Litigator

HALL OF FAME: If you're a trial lawyer, understanding jury psychology can provide crucial insight into how you should be approaching your case. The jury consultants behind Persuasive Litigator offer advice on convincing techniques and explanations for jury behavior that might otherwise seem baffling.

Pirated Thoughts

This is a lighthearted IP blog with a pop culture bent, written by Michael Lee of the New York City firm Morrison Lee. Pirated Thoughts covers issues like video game creators trying to sue the makers of cheating software (http://morrisonlee.com/riot-sues-over-league-of-legends-cheating/); TV shows fighting to protect the naming rights of a fictional burger bar (http://morrisonlee.com/foxs-legal-battle-with-unauthorized-bobs-burgers-restaurants/); and multinational companies trying to protect their brands by making borderline-ludicrous trademark attempts.

Prawfsblawg

HALL OF FAME: The group blog Prawfsblawg provides a smorgasbord of information valuable to law professors. Topics range from its authors' most recent legal research, to how to advance in academia, to the implications of recent case decisions and legislation. Though founder Dan Markel died tragically in 2014, the other professors who blog on Prawfsblawg have kept up the quality and frequency of posting.

Presnell on Privileges

NEW: Nashville, Tennessee, litigator Todd Presnell offers facts and analyses about rulings from federal and state courts around the country on attorney-client privilege issues. The decisions (as well as privilege-related lawsuits, legislation and op-eds) that he doesn't get a chance to blog in-depth, he squeezes into a "Monthly Privilege Roundup (https://presnellonprivileges.com/category/monthly-privilege-roundup/)."

Prison Law Blog

NEW: A new addition to our list, Prison Law Blog captured our attention by serving an audience of criminal justice workers, attorneys, prisoners and prisoners' loved ones. It's a great resource for the latest court decisions that could affect the lives of inmates or prison administrators and for prisoners who are attempting to do work on their own or others' cases. The majority of the focus is on federal prisons, but state prison laws are also discussed.

Procedurally Taxing

NEW: "This blog contains a wealth of substantive expertise presented in a digestible and conversational manner. It is admittedly very focused on a specific area of law—federal income tax procedure—but in that regard is a valuable resource to anyone working in that area. Updates address issues that are both emerging and long-standing, and the archives are a great library of information from some top academics and practitioners in this area of law. I read it just about every day." —*Dave Rohlfing, staff attorney, Alaska Business Development Center Taxpayer Clinic, Anchorage*

Race and the Law Prof Blog

NEW: This blog, launched last fall, highlights legal scholarship and calls for papers that tackle racial themes. Posts address issues like race and policing, anti-Muslim violence and voter suppression. In other posts, the law prof-authors discuss the experiences of immigrants to the United States—in some cases sharing their own experiences and hardships.

Rebecca Tushnet's 43(B)log

HALL OF FAME: Imitation may be the sincerest form of flattery, but it can also be a violation of trademark law. Rebecca Tushnet has been chronicling astounding accounts of trademark violations and false advertising cases on this blog since 2003, making her one of the most lasting and prolific bloggers on our list.

Reinventing Professionals

NEW: Ari Kaplan's frequent posts are in fact podcasts—10- to 15-minute interviews that focus on technology's impact on the legal industry. Among his interview subjects are leaders of companies who develop legal document products, practice management software or e-discovery tools; as well as cybersecurity experts, BigLaw knowledge officers and small-firm lawyers who leverage technology in their practices.

Retail Law Advisor

NEW: Bloggers from Goulston & Storrs cover new innovations and trends in retail in the United States and around the world. They include the use of selfies (http://www.retaillawadvisor.com/2016/08/17/selfies-changing-the-face-of-retail/) for market research and fraud prevention, cashless restaurants (http://www.retaillawadvisor.com/2016/08/10/no-cash-no-problem-the-emergence-of-cashless-retailers/) and the use of geolocation (http://www.retaillawadvisor.com/2016/08/03/digitizing-brick-and-mortar-geofencing-and-geolocation-can-help-retailers-win-at-omnichannel/) via Wi-Fi for stores to send promotional text messages to shoppers inside their establishments—and the attendant legal issues.

Sarah Poriss, Attorney at Law LLC

Connecticut lawyer Sarah Poriss' posts focus as much on what she can do to help her clients—a group of whom she says she took to the movies (http://www.sarahporiss.com/back-at-the-movies/) earlier this year—as what they can do to help themselves. She focuses mainly on mortgage issues and foreclosures as well as credit-card debt. "Practical and well-written material that helps both lawyers and Sarah's potential client base," writes San Francisco lawyer Albert Stoll.

Screw You Guys, I'm Going Home

In a blogosphere bursting with employer-side blogs, Florida practitioner Donna Ballman continues to champion the worker's perspective in very chatty, readable posts, although her blogging pace has slowed quite a bit in recent years. Read about state legislation related to paid sick leave, noncompete agreements, breast-feeding discrimination and more.

SecuritiesLawBlog.com

NEW: Laura Anthony's blog "superbly navigates the complex securities regulation environment regarding, among other things, securities disclosure, going-public matters and [Securities and Exchange Commission] filings," says Clermont, Florida, lawyer Frederick Lehrer. Anthony also publishes LawCast (http://www.securitieslawcast.com/) videos on securities industry news at least as often as she writes posts.

ShariaSource

NEW: This is the eponymous blog of the initiative of Harvard Law School's Islamic Legal Studies Program. The aim of the initiative is to tap Islamic policy experts around the world for resources and analysis on Islamic law. The aim of the blog is to knock ideas around. Footnoted posts discuss misconceptions about Sharia, compare and contrast Western law with Islamic law, and even explore regulation of halal food.

Sidebars

NEW: George Washington University law professor (and former prosecutor) Randall Eliason's posts delve into the big white-collar crime cases of the day, sometimes exploring the lawyers' tactics. This year, he also did a two-part series, "In Defense of the Grand Jury (https://rdeliason.com/2016/11/17/in-defense-of-the-grand-jury-part-3-disclosure-of-exculpatory-information/)."

Socially Aware

-See over

It seems ~~like every week, we hear stories of~~ how someone's interactions on social media went awry. In this MoFo blog, there are plenty of cautionary tales, but also advice on how to ethically handle social media as an individual or business owner. Socially Aware also tackles issues such as internet fraud, copyright disputes, federal regulations, data security and cyberbullying.

Space Thoughts

NEW: For every attorney who has ever looked up into the night sky and dreamed of going to space—and those who eventually devoted their careers to space law—Space Thoughts produces original posts on aerospace efforts and legislation around the globe and acts as a roundup of significant articles published elsewhere. The blog is written by attorney Michael J. Listner of the Space Law & Policy Solutions think tank, who has announced plans for a quarterly publication, *The Precis*, to keep subscribers up- to-date on special issues in space law.

Strategic Legal Technology

Lawyer and knowledge management consultant Ron Friedmann has been blogging for 13 years. He covers law-tech conferences day by day, discusses new technologies and their impact on law firms, and otherwise shares his frank opinions about what clients actually want and what forward-thinking law firms need to do to keep them.

Suits by Suits

NEW: Lawyer-bloggers from Zuckerman Spaeder cover disputes between companies and their executives—often in the context of criminal investigations into possible corporate wrongdoing. Can a "suit" be fired for taking the Fifth (http://www.suitsbysuits.com/fired-for-taking-the-fifth-famous-firings-in-history) or otherwise not cooperating with an investigation (http://www.suitsbysuits.com/employees-who-don-t-cooperate-with-company-investigations-can-be-terminated-for-cause)? If your client is accused of misappropriating trade secrets and his or her computer is seized (http://www.suitsbysuits.com/what-employers-and-employees-need-to-know-about-the-defend-trade-secrets-act), what recourse is there? If former company directors or officers face legal claims, can they demand the company advance legal fees (http://www.suitsbysuits.com/some-but-not-all-delaware-court-awards-advancement-to-former-officer-but-only-for-part-of-a-case)?

Technology & Marketing ~~Law Blog~~

HALL OF FAME: This year, Santa Clara University law prof Eric Goldman put his *Forbes* blog Tertium Quid (http://www.forbes.com/sites/ericgoldman/#7fc57a463664)—written more for a lay audience—on pause and refocused on this one he's been writing since 2005. Posts cover topics such as lawsuits related to keyword advertising, online contracts, and court rulings related to the Defend Trade Secrets Act and the Communications Decency Act.

Texas Agriculture Law Blog

Everything's bigger in Texas, and that includes the legal battles. Environmental laws, animal safety, real estate and property issues, food safety and fracking are all issues that Texas farmers and ranchers have to contend with, and this blog does a great job of analyzing how recent court decisions or state legislation can affect them. Texas has long been on the cutting edge of energy law, and this blog also offers excellent examinations of how energy companies and agriculturists are dealing with their often-competing interests.

Trademark & Copyright Law

This Foley Hoag blog has a fun mix of new and relevant copyright and trademark rulings, explorations of atypical historic cases, and links to the law firm's other relevant intellectual property publications and webinar recordings. If you don't think this area of the law is interesting, this blog will prove you wrong.

Trademarkology

Pick the wrong name for your business or product, and you will face legal consequences. This blog, written by Stites & Harbison lawyers who help their clients choose such names and defend them in court, focuses largely on litigation related to contested names. The increasing proliferation of trademark applications and particularly interesting ones—such as hoops star Stephen Curry's efforts to trademark four iterations of his name on the day of game six (http://www.trademarkologist.com/2016/06/curry-scores-on-trademark-applications/) of the NBA finals—also catch the eyes of these bloggers.

Trial Insider

Anyone with a stake in decisions coming out of the San Francisco-based 9th U.S. Circuit Court of Appeals or Northern California should be following Trial Insider. Blogger Pamela A. MacLean offers focused coverage of the cases and opinions coming out of the region, and attorney Katie Burke provides perspective on family law decisions.

2Civility

Published by the Illinois Supreme Court Commission on Professionalism, the blog tackles issues of ethics and civility in the profession, such as harassment, mentoring and the implications of new legal technologies. It also offers candid advice about how law schools can set their students up for ethical practices long before they take the bar exam, and how young lawyers can meet the standards of decorum expected of them.

Understanding the Americans with Disabilities Act

The ADA can be difficult for the layperson—and even law enforcement—to fully understand. Attorney William Goren lays out how the ADA is applicable in a variety of situations, from what a service establishment can be required to provide to what police should bear in mind when arresting someone with a possible mental illness. His posts are well-researched and detailed without being incomprehensible for readers.

The Venture Alley

NEW: A must for any venture capitalists, investors or startups, Venture Alley is edited by DLA Piper's Trent Dykes and Megan Muir. From the difficulties of choosing a corporate name to deciding whether to launch internationally, the contributing authors walk readers through the steps that should be considered. The tone is technical and should be highly informative to the entrepreneurs it's aimed at.

Verdict

If you're looking for robust opinion pieces contributed by a wide range of legal experts, Verdict should be in your bookmarks. Run by Justia, the blog offers analyses of issues from across the legal spectrum and updates throughout the workweek.

The White Bronco

NEW: "Dan Werly's blawg ... is a must-read daily. If you enjoy reading sport law cases and current news on NFL and NBA contracts, then this is the blawg for you. Dan posts the reports and sports cases that are the most difficult to find. Plus, he gives detailed information about each case presented through sharing court documents and actual contracts. As a sport law professor, the White Bronco is a vital tool for keeping myself and students current." —*Courtney Flowers, assistant law professor at Texas Southern University*

Workplace Class Action Blog

NEW: This Seyfarth Shaw blog is worth reading for any employer-side labor law attorneys or in-house counsel. In addition to giving readers summaries of the outcomes of various lawsuits, the blog publishes Seyfarth's *Annual Workplace Class Action Litigation Report*, which compiles vital information for corporate counsel about what companies can and should be doing to stay ahead of lawsuits.

Forbes

Jimmy Rohampton Under 30

I cover how to use social media to level up your career

UNDER 30 3/09/2017 @ 5:36AM | 2,161 views

Beyond LinkedIn: How Lawyers Are Using Social Media For Business

Shutterstock

LinkedIn has always been the go-to social platform for business professionals of any kind. But lawyers have noticed the benefits of other social platforms and are starting to branch out. According to MyCase, 73% of lawyers have a personal presence on LinkedIn, 27% use Facebook for professional purposes, and 23% use Twitter for professional purposes.

Here's how they're using social media for business.

1. Promoting a blog

Lawyers are slowly beginning to reap the benefits of blogging for their business success. 26% of law firms maintained a legal blog in 2016, up from 22% the year before. And social media platforms are great places to promote a blog and bring in traffic. But some legal blogs are better than others at attracting social community interest.

Media strategist Drew Keller said, "Too many of the blog posts, videos and articles I see in the legal community feel like a closing argument. Your storytelling needs to reflect the human experience."

Use your blog as a storytelling platform, not a place to post your legal arguments. Then you can make the most of social media to promote it.

2. Engaging with hashtags

Some lawyers are taking advantage of already trending hashtags to broaden their reach on social media.

"No social media presence is effective without using hashtags," said Chris Vernon, attorney at VernonLitigation. "Every industry has them, and they're a great way to engage with your target audience. For example, #LegalTech is a popular hashtag lawyers use to join conversations about new legal technology solutions. Another example is the #ShutItDown hashtag that became popular during the Eric Garner protests. Many lawyers used the hashtag to tweet their contact information, offering legal services to protesters who were arrested."

3. Becoming industry thought leaders

In recent years, social platforms have become gateways to the news, and news about the legal profession is no exception. Many lawyers are building their reputation as industry thought leaders by sharing and commenting on the latest news in their field.

Another option is to curate and share news on industries related to your practice area. That's what Bob White, a Florida attorney does. He uses Twitter to share tech articles he finds every week. According to Mashable, Bob has managed to bring in a few tech companies as clients as a result.

Becoming a thought leader in your industry is a lot more than just sharing content. Instead you should ask, "Why is this information important to me?" and "What should I do about it?" The answers to these questions will help you brainstorm ways to engage your audience through interviews. Gathering feedback, you can create your own blog content based on industry news and the thoughts of your audience.

4. Word-of-mouth marketing

Most businesses turn to social media to connect with their target customers or clients, but that's not the case for lawyers. Most legal offices aren't on the lookout for "walk-in" clients that found them on Twitter.

Instead, they're looking to make connections with other credible thought leaders that may know someone who needs legal help. It's a way to vet prospective clients as they come from a credible source.

So how can you get these valuable social contacts? Attorney Nicole Black said, "One way to connect with other attorneys is to locate and follow blogs in your practice area or your geographical region. Leave comments after posts that interest you. Engage in conversation in the comments with other readers and the owner of the blog and link to your blog or website when commenting."

5. Keep it ethical and stay safe

Probably the most important part of the way lawyers use social media is following ethical guidelines, according to The Rodriguez Law Group. As a public platform, social media puts your activities and mistakes in public. People use tools like Checkthem to carry out background check on firms and persons before they deal with them, so using social media makes it more important than ever to follow ethical guidelines at all times.

The New York State Bar Association issued Social Media Ethics Guidelines for New York attorneys. But it's prudent for all lawyers to follow these on social media. Here are some points to consider:

- **Existing attorney advertising and solicitation rules apply to social media posts**

Whenever promoting legal services on social media, you must include the same information required in print advertisements. This is a challenge when you're limited to 140 characters.

- **Protecting a client's identity and data**

The American Bar Association Model Rule 1.1 has always required attorneys to be competent in their areas of practice but starting from 2012, it required them to be adept in the use and risk of technology. Hence, lawyers using social media for business must take precautionary steps like encrypting clients' sensitive documents they send, using secured WiFi networks and protecting their computers against ransomware.

- **Attorneys should be careful using "Pre-Defined" headings on social media**

Twitter personalities can call themselves whatever they want on social media, but that's not the case for lawyers. If you describe yourself as a "specialist" in a certain area of law, that means you're legally certified by the American Bar Association, no matter your experience in the area.

As more lawyers join social media for business purposes, the benefits and best practices will likely become even clearer.

For more social media tips and lifehacks, follow me on Twitter @JimmyRohampton and check out my website, HowToCreateABlog.org.

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LEGAL ETHICS

Beware of sites importing your contacts, and watch your social media comments, ethics opinions say

POSTED NOV 21, 2016 07:00 AM CST

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)

The ethics committee of the District of Columbia Bar is advising lawyers about some social media dangers in two ethics opinions released this month.

Many issues addressed in the opinions have been widely explored in ethics opinions in other jurisdictions, but a couple of topics haven't gotten much treatment in prior opinions, according to the ABA BNA Lawyers' Manual on Professional Conduct (http://www.bna.com/tweeting-blogging-lawyers-n57982082828/?utm_campaign=LEGAL_NWSLTR_Lawyers%27+Prof+Conduct+Update_111816&utm_medium=email&utm_source=Eloqua&elqTrackId=14d8be8f85634e0585319d9259a05189&elq=9a9ab6d22da3457a9855e5e0de2a307c8

The D.C. opinions are here (http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm) and here (http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm).

One "apparently novel warning" is about lawyers who take positions on legal issues when blogging or tweeting, according to the ABA BNA Lawyer's Manual. The ethics opinion says a lawyer's positions on social media could be adverse to the interest of a client, inadvertently creating a conflict.

Those online positions could violate a D.C. ethics rule that prevents lawyers from representing clients if their professional judgment will be, or reasonably may be, adversely affected by a lawyer's own financial, property or personal interest, the ethics opinion says.

Another new topic addressed is about the danger of allowing social media websites such as LinkedIn to access email contacts. Such access can allow a social media site to suggest potential connections with people the lawyer may know who are already members of the website, or to invite nonmembers to join and connect with the lawyer, explains D.C. Bar Ethics Opinion 370 (http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm).

"However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts," according to the opinion. "Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. ...

"For attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure."

ABA issues guidance on electronic transmission of protected client information

CHICAGO, May 11, 2017 — The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 477 that expands guidance to lawyers on what steps to take to enhance confidentiality in the transfer of sensitive information by electronic means.

The new opinion builds upon Formal Opinion 99-413 issued in 1999 that discusses protecting the confidentiality of unencrypted email. It also ties in amendments made to ABA Model Rule 1.6 and the official Comments of Rule 1.1 adopted since 1999.

Formal Opinion 477 notes that in the years since Opinion 99-413, when multiple methods of communicatons were prevalent, today "many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers and even with persons who are assisting in delivering legal services to clients."

"Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyers' ethical duties," FO 477 said.

The guidance covers many factors, from understanding the nature of the threat to sensititve information to taking a pro-active role in ensuring electronic communications are protected to ensuring that lawyer and nonlawyer colleagues are trained in technology and information security. In addition, the guidance recommends that the lawyer fully inform the client of the "risks involved" in the transmission of sensitive information.

The ABA Standing Committee on Ethics and Professional Responsibility periodically issues ethics opinions to advise lawyers, courts and the public in interpreting and applying ABA model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior.

Formal Opinion 477 and previous ABA ethics opinions are available on the ABA Center for Professional Responsibility website under "Latest Ethics Opinions."

With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. View our privacy statement on line. Follow the latest ABA news at www.americanbar.org/news and on Twitter @ABANews.

This entry was posted on Thu May 11 09:44:24 CDT 2017 and filed under News Releases and The Center for Professional Responsibility.

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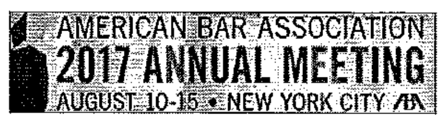

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A legal tiptoe through the hot world of influencer advertising

Competing Interests

Written by Steve Szentesi
Posted Date: May 29, 2017

Anyone who has spent more than a few minutes on social media recently will know that influencers are the hot — actually the hottest — thing in marketing.

From Twitter to Instagram and Snapchat to vloggers and bloggers and more, celebrities great and small are creating entire businesses around their brands and the seemingly endless consumer appetite to see celebs holding, wearing or using products in one social media message after another.

It used to be that testimonials (what endorsements were called in the print age) were a somewhat lackluster backwater of advertising law. While I did start practising when there were already computers, I can't recall advising clients about testimonial-related rules more than a handful of times in my first 10 years in practice.

Now, with the explosion of social media and corresponding growth of celebrities (many of whose only occupation appears to be travelling, sharing and being seen — increasingly with a brand), endorsements by influencers seem to be the only channel for advertisers. Banner advertising? You're kidding, right? We want that YouTube guy holding our thingy.

"Testimonials" are now "endorsements," "paid spokespeople" (the experts you used to see in white lab coats on TV telling us why to use a product) are now "influencers" and there is a whole emerging, if slightly unsettled, area of law growing around the influencer phenomenon.

Testimonials — er, endorsements — are also now potentially pretty lucrative with some influencers commanding $100,000 to $200,000 or more per tweet. That's $200,000 for a tweet — nice work if you can get it.

However, raining slightly on the emerging army of influencers sharing about their favourite brands, advertising law enforcers (probably few of whom are social influencers) are growing increasingly restless with endorsements without disclosures (what used to be called disclaimers).

The main players in the "we have to cool things down" camp are the United States Federal Trade Commission, Canadian Competition Bureau and, to some extent, industry self-regulators such as Advertising Standards Canada.

Our Canadian bureau has issued two bulletins that discuss the importance for influencers to disclose material connections with brands. The FTC, however, has largely led the disclosures charge, issuing a set of detailed endorsement guides (with many specific examples) and a helpful set of endorsement-related

FAQs (The FTC's Endorsement Guides: What People Are Asking. The FTC also recently sent 90 warning letters to influencers reminding them that they should clearly and conspicuously disclose any material relationships with brands.

Late last year, the ASC also issued a specific guideline on disclosing material connections in endorsements (Interpretation Guideline #5 — Testimonials, Endorsements, Reviews).

Several international bodies — for example, the Word of Mouth Marketing Association and the International Consumer Protection and Enforcement Network have also issued quite helpful guidelines to assist influencers, brands and others in the influencer supply chain. These include WOMMA's White Paper – Ethical Word of Mouth Marketing Disclosure Best Practices in Today's Regulatory Environment and ICPEN's Online Reviews & Endorsements guidelines.

While the appropriate type of disclosure will vary according to the type of media and material connection, in general testimonials/endorsements should be true (e.g., the person giving the endorsement exists, has used the product, etc.), reasonably current and not misleading.

In particular, any material connection between a brand and influencer ("material connections" are the key disclosure issue for the FTC, bureau and ASC) should be clearly and prominently disclosed, close to the endorsement (e.g., beginning of the tweet, top of the blog, above the jump for a mobile message), easy to read and clear on all media including space-constrained platforms.

What is a material connection? Well, that depends. It can include where an endorser is being paid to hold the brand's product, is receiving free product to try, is employed by the brand (though generally a bad idea to have your employees endorse your products) or incentivized to promote a brand (e.g., "Tweet X" about a brand for a chance to win in a contest).

What is the magic language for disclosing material connections? That remains a little challenging. None of the major enforcers has provided any specific language that must be used. It will largely depend on whether there is a material connection that should be disclosed and the nature of the connection.

Some of the language the FTC likes includes "sponsored," "promoted," "paid," #Ad and #ad (the FTC's Endorsement FAQs include helpful guidelines). On the other hand, the FTC recommends avoiding more cryptic disclosures such as #sp (for sponsored), "#partner" or burying disclosures — even if a single word — in longer lines of hashtags.

In sum, in the endorsements world, short, clear, upfront and understandable to most consumers are the main rules for disclosures.

So, there it is, my short legal tiptoe through the world of influencer marketing. And, of course, I am available as an influencer — with a going rate typically less than $200,000 a tweet.

Steve Szentesi

Steve Szentesi is a competition and advertising lawyer based in Toronto. He is a

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Column: Competing Interests

ABA JOURNAL

ABA TECHSHOW

Avvo, LegalZoom and Rocket Lawyer CEOs say their products help bridge access-to-justice gap

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BY VICTOR LI (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/27587/)

The ABA Techshow's highly anticipated, and somewhat controversial (http://www.abajournal.com/news/article/aba_techshow_2017_keynote/) keynote session took place on Friday afternoon at the Hilton Chicago. As promised, Avvo CEO Mark Britton, LegalZoom CEO John Suh and Rocket Lawyer CEO Charley Moore took part in a panel discussion that focused on their careers, their thoughts on the regulatory landscape, and their visions about the future of the legal industry.

In a panel moderated by Judy Perry Martinez, former chair of the American Bar Association's Commission on the Future of Legal Services, and Paula Frederick, general counsel for the State Bar of Georgia, the trio underscored their commitment to

Avvo CEO Mark Britton; Rocket Lawyer CEO Charley Moore and LegalZoom CEO John Suh. Photo by Monica Burciaga.

bridging the gap in access to justice while reiterating their common, customer-oriented philosophy.

"It all starts with the consumer," Britton said. "There are large numbers of people who just aren't using lawyers." Suh noted that LegalZoom's primary commitment is to middle-class families and small-business owners—groups that have seen radically diminished access to justice over the last 30-40 years.

Moore agreed, stating: "Most of people who hire a lawyer through Rocket Lawyer have never hired a lawyer before."

While all three CEOs have frequently faced questions about regulations governing the unauthorized practice of law, the trio did not use the Techshow stage to rage about the issue, or about regulations in general. Moore instead argued that regulations are a good thing and perform a valuable service for the public—a notion that Britton mostly agreed with. The Avvo CEO, while praising the role of legal ethics in maintaining high standards and "taking care of customers in a way so that they continue to look at the legal industry as exalted," warned that the threat of regulation can have a chilling effect on lawyers. Additionally, he argued that customers aren't as concerned about regulations and are really just worried about their own problems.

Suh agreed with Britton that the customer's needs come first and posited that regulations often get in the way of finding truly innovative ways to solve their problems. "What has really hamstrung a lot of lawyers is the regulatory structure around the law," Suh said. "In some ways, lawyers hamper their own ability to be creative and create solutions."

Looking ahead, Moore said he anticipates that local ethics rules will become less important, thanks to the rise in global and transnational business.

Suh, meanwhile, brought up the prospect of robot lawyers (http://www.abajournal.com/news/article/the_robot_lawyers_are_coming_to_help_not_to_take_your_jobs) and asserted that lawyers should be focusing on other matters.

"Terminators will never replace lawyers, but that's a weird fear that people have," he said. "Instead, you should be looking at how you can utilize technology to have a solution that scales. Technology has got to work for customer first, and it has to work for every member of the supply chain."

The three also reflected on how far they've come and noted that they no longer face as much resistance from lawyers as they did a few years ago. "I think we're long over that hump," Britton said, pointing out that Avvo is about to hit its 10th anniversary, while Rocket Lawyer has been around for eight years and LegalZoom for 16. "We drive billions, literally billions, of dollars a year for lawyers. Half of solos and small firms are on the Avvo platform, so I'd say go talk to the other half."

Moore agreed and said he takes pride in the number of lawyers using Rocket Lawyer's forms in their everyday practice.

Suh, meanwhile, pointed out that solos and small firms shouldn't be worried about legal service providers. "There are deep structural problems with being a solo practitioner that have very little to do with alternative legal providers," he said. "There's been a real decline in solo practice income, the bulk of which happened in the '80s and '90s, so you can't blame that on the internet."

That may be true, but the reception the three executives received was considerably less warm than the raucous ovation that greeted last year's keynote speaker, Cindy Cohn

Panel moderators Judy Perry Martinez, chair of the ABA Commission on the Future of Legal Services, and Paula Frederick, State Bar of Georgia general counsel. Photo by Monica Burciaga.

(http://www.abajournal.com/news/article/effs_cindy_cohn_calls_for_lawyer_support_in_fight_over_mass_surveillance?utm_source=internal&utm_medium=navigation&utm_campaign=navbar) of the Electronic Frontier Foundation. Then again, she was speaking about her experiences relating to a hot-button political topic that had many in the audience concerned. In that vein, the loudest cheers the three men received came during the Q&A session, when all reiterated their commitment to access to justice and promised to do what they could to protest President Donald Trump's proposed budget eliminating funding for the Legal Services Corp. "If you can't afford a lawyer, then you don't live in a democracy," Moore said.

Follow along with our full coverage of the 2017 ABA Techshow

(http://www.abajournal.com/topic/aba+techshow)

Ethics Opinions

Advertising and Solicitation

Texas Issues First-in-Nation Ethics Opinion Approving 'Competitive Keyword Advertising'

The Texas bar's ethics committee issued a groundbreaking July opinion that affirmed the propriety of using the name of a competing lawyer or firm as a hidden "meta tag" or "keyword" to boost the visibility of online advertisements purchased from search engine companies (Tex. State Bar Prof'l Ethics Comm., Op. 661, 7/16).

The opinion marked the first time that an ethics panel has endorsed the validity of "competitive keyword advertising," a controversial but increasingly common marketing strategy that critics have decried as a form of trademark-infringing cybersquatting.

The panel described the practice as one of "various search-engine optimization techniques" that a lawyer can use "to try to ensure that his name appears on the first page of the search results obtained when a potential client uses a search engine to seek a lawyer."

Disagreeing with the only other state bar opinion on the topic, the Texas panel said "the use of a competitor's name as a keyword" in online ads "would not in normal circumstances" violate ethics rules that prohibit dishonest conduct and misleading advertisements or communications about a lawyer's services.

"A lawyer does not violate [ethics rules] by simply using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company."

TEXAS ETHICS OP. 661

The authors of a recent law review article on competitive keyword advertising told Bloomberg BNA that the Texas opinion is significant because it could convince other state bar panels to affirm the propriety of a marketing strategy that has reduced barriers to entry in an increasingly stratified legal profession.

Another Remedy Bites the Dust? Many businesses have faced trademark infringement lawsuits for deploying marketing strategies that utilize competitors' names to boost search engine visibility.

While some of those early lawsuits succeeded, the vast majority have failed. A January 2016 law review article said that although many businesses still routinely bring keyword-related trademark claims, "those lawsuits rarely succeed anymore."

"To our knowledge, no trademark owner has achieved a courtroom victory in a competitive keyword advertising lawsuit since 2011," coauthors Eric Goldman and Angel Reyes III wrote in the article.

In an interview with Bloomberg BNA, the coauthors said a handful of attorneys and law firms that object to competitive keyword advertising have begun to realize the futility of challenging the practice in court and have thus seized on another potential remedy not available to other professionals and businesses: intervention from authorities tasked with interpreting ethics rules.

The requests for intervention have taken the form of inquiries that ask bar panels and courts to either find that competitive keyword advertising violates current ethics rules or to promulgate new rules prohibiting the practice.

Goldman, who teaches intellectual property at Santa Clara law school, said in an Aug. 2 blog post that the Texas ethics opinion affirming the ethical propriety of competitive keyword advertising may help shut down that avenue of relief across the nation.

"Texas has the third most lawyers in the country, . . . so this opinion should get a lot of attention from other states when they confront competitive keyword advertising," Goldman wrote. "If so, the Texas opinion should accelerate the end of debates over the legitimacy of competitive keyword advertising by lawyers."

Reyes, the managing partner of a Dallas personal injury firm, said the Texas panel made the right decision because "the ethical canons are designed to protect clients," and competitive keyword advertising doesn't harm clients—it actually benefits them.

"There are no clients complaining about this," Reyes said. "The only people complaining about this, frankly, are lawyers who compete with each other."

Reyes said he suspects the Texas opinion was "driven by a lawyer who spends a lot of money advertising" on television and radio and is upset that the internet has allowed lesser-known attorneys to challenge the market dominance of established competitors.

'The Texas Hammer.' Reyes's hypothesis has support: the Texas opinion was in fact prompted by an inquiry from an attorney renowned for the size of his mass-market advertising budget.

The inquirer, Houston personal injury attorney Jim S. Adler, has become a household name in the Lone Star state through attention-grabbing ads that brand him as "The Texas Hammer."

In March 2014, Adler asked the ethics panel to consider whether competitive keyword advertising violates three Texas Disciplinary Rules of Professional Conduct:

- Rule 7.01(d), which prohibits lawyers from holding themselves out as being associated with lawyers with whom they are not associated;
- Rule 7.02(a), which bars misleading communications about a lawyer's qualifications or services; and

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■ Rule 8.04(a)(3), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

Adler also asked the Texas Supreme Court to adopt new rules banning competitive keyword advertising.

Adler didn't get the results he hoped for.

The ethics panel rejected his argument that existing rules prohibit using a rival lawyer's name as a keyword to drive internet traffic. And Charles L. "Chip" Babcock, the chair of the Texas Supreme Court's Advisory Committee, said in an e-mail that his panel considered Adler's rule-making request "but did not make a recommendation to the Court one way or the other."

"As I recall the Court did not request further consideration of the issue," Babcock told Bloomberg BNA.

Conflicting Authority. The committee said the marketing techniques described in Adler's inquiry did not violate any of the suggested ethics rules.

Adler described a scenario involving a lawyer who buys keywords that include the name of a competitor who practices in the same region and legal field.

The keyword selection causes the advertising lawyer's name and website link to be displayed when internet users search for the competitor. According to the opinion, the advertising lawyer's information "will appear to the side or above the search results in an area designated for 'ads' or 'sponsored links.' "

The committee said this wouldn't violate Rules 7.01(d) and 7.02(a) unless the advertising lawyer's use of his rival's name as a keyword generated search engine results that "would lead a reasonable person to believe that [the lawyers] are associated in some way."

"[S]ince a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on web pages showing search results, it appears highly unlikely that a reasonable person using an internet search engine would be misled into thinking that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer whose name was used," the opinion said.

The committee cited *Habush v. Cannon*, 828 N.W.2d 876, 29 Law. Man. Prof. Conduct 122 (Wis. Ct. App. 2013), which relied on the same reasoning to find that a law firm had no claim under Wisconsin's right-of-privacy statute against a competitor that used its name as a keyword in search engine advertising.

The committee also rejected the argument that competitive keyword advertising is inherently dishonest and thus violates Rule 8.04(d).

In doing so, the committee the said it did not concur with a North Carolina bar panel that issued the first opinion on competitive keyword advertising. In North Carolina Ethics Op. 2010-14 (2012), that panel said the practice violated that state's version of the ethics rule prohibiting dishonest conduct:

> Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness. The intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of [North Carolina] Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.

'You Don't Want Competition.' Adler said through a spokesperson that he is "shocked by the [Texas] opinion." He declined to comment further, but one of his associates previously suggested that Adler's firm could pursue other remedies—such as a trademark infringement lawsuit—if the Texas ethics panel didn't follow the lead of the North Carolina committee.

That assertion came at a Dec. 2014 hearing in which the Texas Supreme Court's Advisory Committee agreed to consider Adler's request for new rules prohibiting competitive keyword advertising.

One committee member said he wasn't impressed with the proposal because it appeared that "what you're saying is you don't want competition."

"I know you wouldn't phrase it that way, but I am," committee member Richard G. Munzinger said.

The "internet is a new way of advertising" and "a new way of getting information to consumers," Munzinger said. "It's the cat's meow, and you want to stop people from finding out that there's other people who do [similar work]," he added.

Goldman and Reyes concurred with that assessment during their interviews with Bloomberg BNA.

"What TV was 40 years ago, the internet is now," Reyes said. "TV was the only game in town. Now, the internet has gobbled that all up. Going forward, if you don't work at a big law firm that doesn't rely on its hundred-year-old reputation, internet advertising will in some way or form will be crucial as a practice builder."

Goldman also observed that the whole rationale for loosening restrictions on lawyer advertising four decades ago was that it "gave potential legal clients more options, more exposure to the legal community."

"And it's ironic that folks who were fully supportive of that open advertising environment are now not so supportive of losing their potential monopoly because they [have] quasi-national brands," Goldman said.

Goldman also said that Adler would not likely succeed if he followed through on his promise to explore legal remedies against rivals who use his name in keyword advertisements.

"Trademark law turns fundamentally on whether or not consumers are confused in the marketplace about the goods and services they are buying," Goldman noted. And most courts and juries that have heard trademark claims in this context "have said that they 'just don't see the confusion,' " Goldman said.

The process of obtaining new legal clients is "a multi-iteration sales cycle for lawyers," and "there are lots of conversations that take place between lawyer and client before a client signs on the dotted line," Goldman said.

"So normally clients understand who they are transacting with," Goldman said, and that precludes a trademark plaintiff from "show[ing] the essential element of consumer confusion."

By Samson Habte

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Full text at https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-661.aspx.

News

Misconduct

Attorneys Used Fake Lawsuits to Nix Bad Online Reviews, Suit Alleges

Two lawyers used contrived lawsuits to get negative online reviews about their clients pulled from search engine results, in an effort to sidestep speech protections and anti-SLAPP laws, a federal lawsuit filed in San Francisco said (*Consumer Opinion LLC v. ZCS, Inc.*, N.D. Cal., No. 4:16-cv-06015, *initial case management order* 10/24/16).

The suit alleges that the defendant "reputation management" companies would orchestrate lawsuits in California Superior Court, Contra Costa County, by their client businesses against "stooge" defendants who would purport to be the authors of the negative online reviews. The parties would then immediately stipulate to a judgment of injunctive relief, which the reputation management companies would use to get Google Inc., Yahoo Inc., Microsoft Corp. and other platforms to pull the unwanted reviews from search results, the complaint by the parent company of review site pissedconsumer.com said.

"At first blush, Defendants' scam appears rather brilliant but incredibly unethical," the filing in the U.S. District Court for the Northern District of California said.

The defendants include entities that file or benefit from the lawsuit, such as companies that had negative reviews; the lawyers who "knowingly and unethically file and prosecute the fraudulent lawsuits;" the straw or "stooge" defendants in fake lawsuits; and the reputation management companies that allegedly devised the schemes, the filing said.

"There's a lot of ways you can do this that don't involve committing a crime," said Marc Randazza, of Randazza Legal Group PLLC in Las Vegas, Nev. He represents Consumer Opinion Corp. LLC, owner of pissedconsumer.com.

"But I would say if you don't like an opinion, you probably shouldn't try to get rid of it by suborning perjury and perverting the court process," Randazza told Bloomberg BNA.

That's One Way to Do It. "Understanding the difficulties of removing reviews consisting of negative opinions or statements of true fact, Defendants conspired to misuse California's legal system to hide the unflattering statements from the consuming public by having popular search engines such as Google to deindex the webpages containing the comments," the filing said.

The bogus judgments were presented to get search engines to remove or deindex the reviews, depriving "consumers of information posted about the businesses and professionals benefited by these fake lawsuits, and thereby undermined the value of the pissedconsumer.com website to the consuming public," the lawsuit said.

Sidestepping the Law. The First Amendment and various state anti-SLAPP, or "strategic lawsuits against public participation," statutes protect the right to public opinions and true statements of fact. "Therefore, aside from improving their business standards, there is little a company can do to prevent individuals from publishing negative opinions or true facts about them," the lawsuit said.

Section 230 of the Communications Decency Act creates a safe harbor for online platforms from being sued for the statements posted on their sites.

Defendant Owen T. Mascott, a Palm Desert, Calif., attorney, told Bloomberg BNA Oct. 28, "I'm going to get rid of it with a motion to dismiss." He declined further comment.

Mascott was disciplined and suspended in 2009, and disciplined in 2007 and 1995, California Bar records show.

Attorney Mark W. Lapham, a Danville, Calif., solo practitioner, is also a named defendant. Lapham's voicemail box was full and not taking messages when Bloomberg BNA tried to contact him.

The California Bar has disciplined and suspended Lapham three times.

Randazza said his client had brought the allegations "to the attention of the bar."

Thousands Charged. Some reputation management services charge tens of thousands of dollars to help clients repair their online reputation, said Eric Goldman, a Santa Clara University law professor.

"We have no idea who is using online reputation management tools, so unless somehow someone gets caught using them, we'll never know," Goldman told Bloomberg BNA.

"There's absolutely no justification [of] anything close to the alleged facts" for such attorney conduct, Goldman said Oct. 28. "I'm hoping the alleged facts are not true. And if they are true, that's a huge problem."

"Nothing can justify a fake lawsuit but it may be a review has more than an opinion," said Daphne Keller, the Director of Intermediary Liability at the Stanford Center for Internet and Society.

"There's no one answer. But I think what we're seeing here is people gaming an answer that Google had arrived at, which I think was a really good answer," said Keller, who formerly worked on policy issues at Google. "Google's position is don't write to us and claim something someone said on the internet is defamatory. We're not a court and can't determine whether something is defamatory."

"But if you went to a court and a court adjudicated it's defamatory, we still don't have an obligation to take it down but will do it voluntarily," Keller told Bloomberg BNA.

By Joyce E. Cutler

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Full text of the complaint at http://src.bna.com/jNk.

Fees

Who Pays Third Party's Defense Costs In Sexual Assault Case?

The California Supreme Court will decide whether an insurance company must reimburse a construction company for legal fees paid defending a lawsuit from a teenager sexually assaulted by an employee.

Seven justices Oct. 19 agreed to answer the U.S. Court of Appeals for the Ninth Circuit's question after a trial court found Ledesma & Meyer Construction Co. liable to the teenager.

Ledesma & Meyer hired a twice-convicted registered sex offender in 2003 to work at a construction project at a San Bernardino Unified School District middle school, the lawsuit said. The 34-year-old man was convicted of raping a girl at the school. The middle school student sued the district and construction company, which covered the district's legal costs under the contract.

The issue extends beyond employment and will resolve an unsettled area of insurance law—whether claims of negligence in hiring, retaining and supervising an employee who intentionally injures a third party fall within a policy's coverage for an "occurrence," which is defined as an accident.

"The certified question is of considerable importance to employers, insurers, and third parties injured by the willful acts of employees," the Ninth Circuit said. "Moreover, we note that the resolution of this question will extend beyond the employment context, affecting many insured entities and persons, and the third parties that are injured by the willful acts of those individuals supervised by the insured."

District Defense Paid. Liberty sued Ledesma & Meyer, which countersued to recover the cost of defending the district. The U.S. District Court for the Central District of California granted Liberty summary judgment. The court found L&M's negligent hiring, retention and supervision was too attenuated from the injury-causing conduct committed to constitute an occurrence under Liberty's policy.

"L&M bought liability insurance to protect itself," Steven Murray, a Sherman Oaks, Calif., attorney not affiliated with the case said in a Sept. 9 letter to the California Supreme Court urging review. "Like many employers, it found itself saddled with a liability from a bad apple it had hired. At this point there was nothing more L&M could do except to tender the claims to Liberty."

Oral arguments are not yet scheduled.

By Joyce E. Cutler

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Text of the question is at http://src.bna.com/jyy.

Discrimination

Sex Bias Class Action Against Chadbourne Adds Six Male Partners as Defendants

The former managing partner of Chadbourne & Parke's Kiev office has joined the $155 million sex bias class action against the law firm, and six male senior members of the firm have been added as individual defendants (*Campbell v. Chadbourne & Parke LLP*, S.D.N.Y., No. 1:16-cv-06832, *amended class complaint* 10/27/16).

The amended complaint should signal to other law firms and companies with a history of sex discrimination that things just "get worse in litigation" after the opportunity for an early resolution has passed, lead class counsel David Sanford told Bloomberg BNA.

"It's important to examine what went on and to take care of things at the front-end" before litigation becomes necessary, he said Oct. 27. Sanford is the chairman of Sanford Heisler LLP in Washington.

Abbe Lowell, who heads Chadbourne's litigation department, is among the new defendants. According to the amended class complaint filed Oct. 27, Lowell reacted to Kerrie Campbell's filing of the original complaint by placing a cartoon on her office wall and tearing down a postcard containing a quote by Nelson Mandela about equality. Lowell's actions were caught on videotape, the new complaint asserts.

Lowell didn't respond Oct. 27 to Bloomberg BNA's request for comment. The firm issued a statement that said the new complaint is "riddled with falsehoods."

Pay Gripe Preceded Ousting. Campbell, a former partner in Chadbourne's Washington office, sued the firm Aug. 31, accusing it of systematically mistreating female partners based on sex, including with regard to pay and power in the firm.

Campbell says she generated more than $5 million in "total collections" for Chadbourne in her little more than two years as a partner in the firm's Washington, D.C., office but was paid consistently less than male partners who originated less—and in some instances, no—business. She complained, and the firm's all-male management committee secretly voted to oust her from the firm, telling her she didn't fit Chadbourne's "strategic direction."

The other new defendants are current or former members of Chadbourne's management committee who decided to fire Campbell.

The new class representative is Jaroslawa Z. Johnson, the former managing partner of Chadbourne's Kiev office who currently is the chief executive officer of a private equity firm, according to an Oct. 27 statement from Sanford Heisler.

Complaint Still 'Riddled With Falsehoods,' Firm Says. The lawsuit against Chadbourne, which originally sought $100 million in damages, now seeks $155 million for Campbell, Johnson and all female lawyers who are, were or will be partners in any of the firm's offices at any time between August 2013 and the date of judgment.

The amended complaint adds new allegations and additional claims, including against Lowell and the management committee members individually. It also

MEET YOUR SPEAKERS

Jabez LeBret is co-author of the best-selling legal technology book *Online Law Practice Strategies*. He is an international technology expert who has delivered CLE presentations at the Alaska, Ohio, Florida, Wyoming, New Mexico, Colorado, Washington State, Maryland, and Indiana State Bar Associations, the ABA and LMA, plus over 50 other bar associations. Jabez writes a regular business and technology column for Forbes and is also a contributor to the ABA Journal and NBC Chicago. He is also co-founder of the legal marketing agency GNGF, winner of the 2014 Best Places to Work by the Cincinnati Business Courier and runner-up for Business of the Year by the Cincinnati Chamber of Commerce. He loves coffee and is a craft beer enthusiast.

Tom Methvin is the managing partner of Beasley Allen, one of the most successful plaintiffs firms in the nation. Tom is a national spokesperson for the rights of consumers and the law that applies to their rights. He has appeared on Good Morning America, The O'Reilly Factor, and on all the major networks to discuss these issues. He also has appeared in numerous publications, including the New York Times, The Wall Street Journal, Business Week Magazine and Fortune Magazine. In 2011, the Birmingham Business Journal named him a "Leading Lawyer of Alabama." In 2011 and again in 2016, he was selected by The Trial Lawyer magazine as a member of The RoundTable: America's 100 Most Influential Trial Lawyers.

AGENDA

8:30 – 9:00 AM
Registration and Coffee

9:00 – 10:00 AM
Legal Marketing: It's Not an Option Anymore

10:00 – 11: 00 AM
Legal Marketing Ethics

11:00 – 11:15 AM
Break

11:15 – 12:15 PM
Real Life Marketing Strategies that Work

12:15 PM
Adjourn

Ethics Opinions

Social Media

Blogging or Tweeting About Legal Issues Can Create 'Positional' Conflict, Bar Panel Warns

Lawyers who blog or tweet about legal developments should be cautious "when stating positions on issues" because "those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict," the District of Columbia bar's ethics committee advised in November.

The guidance came in one of two simultaneously issued opinions that discuss a host of ethical issues involving lawyers' use of social media (D.C. Bar Legal Ethics Comm., Ops. 370 and 371, 11/16).

The opinions—which respectively address the use of social media for "marketing and personal" purposes and "in the substantive practice of law"—cover a range of topics that have drawn attention from bar panels across the nation.

Ethics opinions on attorneys' social media usage have piled up in recent years, and the D.C. committee borrowed from the analyses of at least 19 other bar panels on a number of issues—including whether lawyers have an ethical duty to monitor a client's social media postings, or to investigate the online activities of adversaries, jurors and judges.

But the D.C. panel also highlighted a few risks that were not emphasized in prior ethics opinions.

One apparently novel warning was on the risks of creating so-called "positional" conflicts when blogging or tweeting about legal developments. These are conflicts that can arise when a lawyer advances one position but needs to argue the opposite on a client's behalf.

The D.C. opinions also appear to be the first bar advisories to warn lawyers about the practical dangers of allowing social networking websites like LinkedIn to access their e-mail contact lists.

Transactional and Regulatory Practice. Most ethics opinions on attorney social media usage have focused on risks unique to litigators, who increasingly must wrestle with what one bar panel recently described as "the growing volume of litigation regarding social media discovery." New York County Ethics Op. 745, 29 Law. Man. Prof. Conduct 438 (2013).

The D.C. panel addressed a number of litigation-related issues, urging lawyers to expressly include social media evidence in discovery requests and to not overlook such evidence in discovery responses.

But the panel also acknowledged "potential issues in transactional and regulatory practices, which are infrequently discussed," said Jan L. Jacobowitz, who teaches legal ethics at the University of Miami School of Law.

The panel said social media evidence may be relevant to a "broad array of transactional and advisory practices, including regulatory work."

Transactional lawyers should "includ[e] social media in due diligence requests" and review "client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements," the panel said. That could be important "because inconsistency could create rights or remedies for counterparties," the panel said.

And regulatory lawyers may have to advise clients on "whether social media postings or use violate statutory or rule-based limits on public statements or marketing," which several federal and state agencies have promulgated, the panel noted.

"Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media," the panel said, citing Securities and Exchange Commission rules. And "[i]nadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices," the panel said, citing Federal Trade Commission guidelines.

Blogging Dangerously. The panel warned that lawyers who blog or tweet about legal developments may run into ethical problems if they state positions on legal issues that conflict with positions they have advanced, or may be called on to advance, on a client's behalf.

The committee said lawyers who engage in online musings of this sort may inadvertently create a positional conflict under D.C. Rule of Professional Conduct 1.7(b)(4). That rule says a lawyer may not represent a client in a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own financial, property or personal interests."

The committee didn't devote any more attention to the risks of creating positional conflicts through online commentary, but a few legal ethics scholars and professional responsibility lawyers have discussed this issue in law review articles and CLE presentations.

University of Tennessee law professor Judy M. Cornett has said the "definition of positional conflicts is limited to positions taken 'in different tribunals,' " and thus "would seem to be inapplicable to positions taken" on legal blogs ("blawgs") or social media sites.

"However, it is conceivable that positions taken by a blawger may create a conflict if she subsequently takes a position contrary to her previously stated position," Cornett wrote in *The Ethics of Blawging: A Genre Analysis*, 41 Loy. U. Chi. L. J. 221, 259 (2009).

Accordingly, Cornett said, "If a blawger whose reputation is entwined with her blawg needs to take a contrary position in order to advance a client's interests, she may be 'materially limited' from doing so because of that reputational interest."

'Public Relations Issue,' Not 'Hard Conflict.' Jacobowitz told Bloomberg BNA that "an attorney expressing his views online regarding particular case decisions or current events is more likely to create a public relations issue than a hard conflict under the rules."

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"In other words, it is not inconceivable that a lawyer might lose a client or fail to attract a certain client, if that lawyer has a significant social media presence in which he is outspoken on issues that are contrary to a client's business interests," said Jacobowitz, who is co-authoring a book on attorney social media usage with John G. Browning of Passman & Jones P.C. in Dallas.

Firm-Wide Social Media Policies. New York attorney Ronald C. Minkoff has advised law firms to adopt a "social media policy" with a provision that takes positional conflicts into account.

Minkoff, who heads the professional responsibility group at Frankfurt Kurnit Klein + Selz P.C., has provided CLE participants with a sample social media policy that includes the following language:

> **Avoid business conflicts.** Please exercise discretion when opining about court decisions, regulatory changes, or other developments that affect our clients' businesses, or that may be inconsistent with positions that the firm has taken on behalf of its clients.

LinkedIn Lesson. Bar panels have issued conflicting opinions on whether lawyers violate ethics rules that prohibit communications with jurors and judges when they browse profiles those individuals maintain on LinkedIn, which automatically alerts users that their profiles have been viewed. See Colorado Ethics Op. 127, 31 Law. Man. Prof. Conduct 698 (2015).

LinkedIn has also been the subject of opinions that deal with prohibited claims of expertise. See, e.g., New York County Ethics Op. 748, 31 Law. Man. Prof. Conduct 156 (2015).

The D.C. panel addressed those topics but also highlighted another—LinkedIn's "Imported Contacts" feature—that hasn't received attention in past opinions.

That feature enables LinkedIn to gain access to a user's e-mail address book so that it can connect existing members and send messages that ask nonmembers to join the site and connect with an existing member.

The committee said this could be problematic for lawyers because their contact lists "frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site."

"The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure," the panel said.

Lawyers should thus exercise "great caution" when asked to grant a social media site access to their e-mail contacts, the committee said.

The committee's ethics counsel, Hope C. Todd, told Bloomberg BNA that this "prudential guidance" was a "practical tip that came from understanding how the social networks access personal information and send emails 'on your behalf.' "

Social Media Checklist. The committee also offered guidance on several topics that have been covered in prior ethics opinions. Among other things, it said:

- the duty of confidentiality may require a lawyer to seek "explicit informed client consent" before blogging about a case, and to share drafts of any proposed blog posts with the client;
- the so-called "self-defense" exception to the duty of confidentiality "does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review";
- using "a prominent disclaimer" may help avoid the inadvertent formation of attorney-client relationships when discussing legal issues with internet users;
- the duty of competent representation may require lawyers to review client social media posts to ensure they are consistent with a client's "claims, defenses, pleadings, filings or litigation/regulatory positions";
- lawyers "may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection";
- lawyers may need to advise clients on whether "obstruction statutes, spoliation law and procedural rules" in a given jurisdiction permit them to "modify their social media presence once litigation or regulatory proceedings are anticipated"; and
- the duty of competent representation "may require investigation of potentially relevant social media postings" of adverse parties, opposing counsel, jurors and judicial or administrative "decision-makers."

By Samson Habte

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The ethics opinions can be found at http://www.dcbar.org/bar-resources/legal-ethics/opinions/.

Confidentiality

Attorney Can't Use Angry Ex-Client's Secrets To Counter Negative Internet Reviews

An attorney can't disclose confidential information about a former client to respond to negative reviews that individual posted about the lawyer on consumer rating websites, the Nassau County Bar Association's ethics committee advised in a recent opinion (Nassau County (N.Y.) Bar Ass'n Comm. on Professional Ethics, Op. 2016-1, 5/9/16).

Adopting the reasoning of other bar panels that have considered this issue, the committee said the so-called "self-defense exception" in the ethics rule governing confidentiality would not insulate a lawyer from discipline for disclosing confidential information "solely to respond to a former client's criticism" on the internet.

"The language of the exception, and the comments thereto, suggest that it does not apply to informal complaints such as posting criticisms on the Internet," the Nassau County panel said, reaching the same conclusion reached in N.Y. State Ethics Op. 1032, 30 Law. Man. Prof. Conduct 757 (2014).

"Our conclusion properly respects the vital purpose of [New York Rule of Professional Conduct] 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception, Rule 1.6 (b)(5)(i), which applies to a charge of wrongdoing against the attorney," the committee said.

Lawyer Wants to Tell 'His Side.' The opinion responds to an inquiry from a lawyer who had a fee dispute with a client and was subsequently described as a "thief" in comments someone claiming to be the client's "brother" posted to a lawyer-review website.

The inquirer asked about the ethical propriety of including confidential information about the former client in responses to the negative reviews.

The committee said that would violate Rules 1.6 and 1.9, which govern the duties of confidentiality to current and former clients.

Like a number of other ethics committees, the panel rejected the notion that the "self-defense" exception in Rule 1.6(b)(5)(1) would protect a lawyer who disclosed client confidences in response to online criticism.

That exception provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."

"The Key Word Is 'Accusation.'" The committee said the "key word" in Rule 1.6(b)(5)(1) is "accusation," which Black's Law Dictionary defines as a "formal charge against a person to the effect that he is guilty of a punishable offense" or a "charge of wrongdoing, delinquency, or fault."

Quoting a legal treatise, the committee said an accusation "means something more than just casual venting." Roy D. Simons, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.)

The committee said courts have held that the self-defense exception may apply when a lawyer is forced to "defend against pending civil or criminal charges," and that another ethics panel has suggested that "there may be circumstances in which the material threat of a proceeding would give rise to a right to disclose confidential information."

But the exception "does not apply to informal complaints such as posting criticisms on the Internet," the committee concluded.

Such complaints "are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice," the committee said.

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Full text at http://src.bna.com/gDu.

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as a flat fee from a client who was incarcerated for not appearing in a child support case.

About three weeks after the client hired Montclare, the state released the client without communicating with his lawyer. The client then asked for the property back. The lawyer refused, saying he'd earned it, and instead deeded half of the property to his office manager as payment for her services.

During the disciplinary proceeding the transfer prevented Montclare from returning the property to the client without getting the office manager's cooperation. He would have been suspended for six months if he hadn't finally managed to transfer the property back to the client, the court indicated.

The court found that Montclare charged an unreasonable fee in violation of Rule 16-105. The property was an unreasonable fee because he didn't earn the full value of the property before transferring an interest in it to his office manager, it said.

The court also found that Montclare violated Rule 16-108(A) because he acquired ownership of the client's property without advising him to seek independent counsel, without obtaining his informed consent and without ensuring that the terms of the transaction were fair and reasonable to the client. That rule, the court said, was designed to prevent an attorney from taking advantage of a client's desperation.

In addition, the court found that Montclare failed to hold client property separate from his own as required by Rule 15-115(A). The rule requires any retainer or flat fee not yet earned to be safely kept and held in trust for the client, separately from the client's own money, the court said.

Requirements for Nonmonetary Flat Fees. "We clarify that the acceptance of a flat fee in the form of real property is not in itself contrary to our Rules of Professional Conduct," Daniels wrote.

However, the fee must be reasonable and must be fully refundable until it's earned, he said.

Moreover, lawyers must keep records that will enable them to determine the ongoing status of the flat fee, the court said. A lawyer who is fired before a flat fee is fully earned can't keep more than the reasonable value of the services he rendered, even if the discharge was without cause, it said.

The court also said that a lawyer who accepts property as a fee must minimize any potential conflicts with a client by complying with Rule 16-108. That rule prohibits lawyers from acquiring ownership interests adverse to a client unless they satisfy enumerated requirements.

Safeguarding Property. In addition, the court said that lawyers who take property as a fee must safeguard the property as required by Rule 15-115(a). The lawyer must identify the property as belonging to the client, safeguard it and promptly return it when the client is so entitled, the court said.

The court said that one way to accomplish this would be to have a neutral third party hold the deed in escrow until the lawyer has earned its full value.

However, the court said it wouldn't necessarily be unethical to transfer the title into the lawyer's name and record the transfer before the lawyer is entitled to ownership, because these steps might be necessary to safeguard the interests of the lawyer and the client in the absence of a third-party escrow arrangement.

Montclare wouldn't have violated the rule if he had transferred and recorded the deed but safely kept it and transferred it back to the client when asked, the court said.

Jane Gagne, Albuquerque, N.M., represented the disciplinary board. Jason Montclare, Alamogordo, N.M., represented himself.

By Joan C. Rogers

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Full text at http://www.bloomberglaw.com/public/document/In_re_Montclare_No_S1SC34920_2016_BL_192348_NM_June_16_2016_Court.

Reciprocal Discipline

UPL in States Where Lawyer Wasn't Licensed Brings Follow-On Disbarment in Home State

A lawyer deserves to be disbarred in Oklahoma as reciprocal discipline for his unauthorized practice of law in other states, the Oklahoma Supreme Court decided June 28 (*State ex rel. Okla. Bar Ass'n v. Auer*, 2016 BL 206495, Okla., No. SCBD-6213, 6/28/16).

Disbarment is the appropriate sanction because the lawyer committed UPL in Colorado and Wyoming, misrepresented his licensing status and harmed clients and firms along the way, Justice Joseph M. Watt said in his opinion for the court.

The decision is a reminder that flagrant UPL in a state where lawyers aren't licensed can get them disbarred in the state where they are licensed. (*See box.*)

UPL's Interstate Ripple

The ABA in 2002 changed Rule 22 of the Model Rules of Lawyer Disciplinary Enforcement to underscore that a state's discipline of a lawyer—even one who isn't licensed there—should in most instances be respected and enforced through reciprocal discipline in the state where the lawyer is licensed.

Accordingly, "disbarment" for UPL in a state where a lawyer isn't licensed can result in disbarment in a lawyer's home state. See, e.g., *In re Harper*, 785 A.2d 311, 17 Law. Man. Prof. Conduct 721 (D.C. 2001) (lawyer lost his D.C. law license through reciprocal discipline after being "disbarred" in Maryland, where he wasn't licensed, for engaging in extensive unauthorized practice there as well as other misconduct); *Disciplinary Counsel v. Glover*, 876 N.E.2d 576, 23 Law. Man. Prof. Conduct 624 (Ohio 2007) (Ohio disbarred lawyer who had been previously "disbarred" in Delaware for practicing without a license there).

CPA + Lawyer. David B. Auer had a law license in Oklahoma and was licensed as a certified public accountant in Oklahoma, Colorado and Wyoming.

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A Colorado disciplinary tribunal found that Auer practiced law there without a license for more than three years and that he acted dishonestly by misrepresenting his status to practice law in Colorado.

Auer didn't respond to the complaint or attend the hearing, and he didn't notify Oklahoma about the Colorado disbarment order.

Oklahoma authorities lodged a reciprocal discipline proceeding against Auer based on the Colorado disbarment. A panel held a hearing and recommended a six-month suspension that would be deferred pending one year of probation, with a public censure if Auer satisfactorily completed the probation.

The Oklahoma Supreme Court rejected that recommendation. Disbarment is the appropriate discipline, it concluded.

'Here's Your Golden Ticket.' The court found that Auer willfully engaged in UPL in Colorado and Wyoming in violation of Oklahoma Rule of Professional Conduct 5.5(a), which prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession there.

The court said the evidence showed that Auer enlisted Colorado and Wyoming lawyers and their firms to promote his accounting business in those states. When the accounting business overlapped with the legal work, he apparently felt insulated from the threat of discipline for UPL because another lawyer worked with him, it said.

However, Auer wasn't authorized to practice law in Colorado and Wyoming, and he didn't fully explain his licensing status to the lawyers he worked with, the court said.

The court also said that Auer held himself out as a lawyer in both states, including through a flyer he distributed in Wyoming which stated, "Here's your golden ticket for a free consultation with David Auer, Attorney." When the lawyers Auer worked with realized his actions, they severed their associations with him, the court said. Auer twice applied for reciprocity in Colorado, but either withdrew his applications or allowed them to lapse, it said.

Lesser Discipline Won't Suffice. The court noted that under Rule 8.5(a), an Oklahoma lawyer is subject to Oklahoma's disciplinary authority regardless of where the lawyer's conduct occurs. "The disciplinary authority of this state over its attorneys does not cease when the attorney goes to another jurisdiction," Watt wrote.

The court acknowledged that it imposed a public censure rather than disbarment in two previous reciprocal discipline cases. But a sanction other than disbarment wouldn't be adequate here, the court decided.

Justice Yvonne Kauger concurred in part and dissented in part.

Assistant General Counsel Katherine M. Ogden, Oklahoma City, represented the Oklahoma Bar Association. Richard W. Walden, Tulsa, Okla., represented Auer.

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Full text at http://www.bloomberglaw.com/public/document/State_ex_rel_Okla_Bar_Assn_v_Auer_2016_OK_75_Court_Opinion.

Regulation of Bar

Panel Advises One-Year Suspension of ABA's Power To Accredit New Law Schools

An independent advisory panel recently recommended that the U.S. Department of Education issue a one-year suspension of the ABA's authority to accredit new law schools.

The recommendation came at a June 24 meeting of the National Advisory Committee on Institutional Quality and Integrity (NACIQI), which advises the Secretary of Education on whether to renew the accreditation power of entities that are authorized to certify institutions of higher learning.

The recommendation was first reported by the trade publication *Inside Higher Ed*, which said members of the NACIQI panel rebuked the ABA "for its lack of attention to student achievement" and failures to adequately audit law schools' efforts to monitor graduates' debt levels.

A Department of Education spokesperson said a transcript of the NACIQI hearing will be posted on the internet in coming days. The material was not posted to NACIQI's website when this article went to press on July 12.

The ABA currently oversees the accreditation of 203 law schools. Institutions that fail to obtain accreditation are cut off from access to federal funds made available for student loans and grants.

The NACIQI recommendation was passed to the Secretary of Education's chief of staff, Emma Vadehra, who must now make her own recommendation to the secretary on whether to renew the accrediting body's authority. Vadehra will make that decision within 90 days of receiving NACIQI's recommendation, sources told Bloomberg BNA.

Barry A. Currier, the managing director of the Council of the ABA Section of Legal Education and Admissions to the Bar, said in a written statement that his group "believes it is operating in compliance with the recognition criteria but will make any changes to its accreditation standards and rules of procedure that are necessary to stay in good standing with NACIQI and the Department of Education."

By Samson Habte

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Social Media

New Mexico Ethics Guidance Shows Judges' Facebook Use Risky

Recent ethics guidance from the New Mexico Supreme Court shows social media is risky business for judges, scholars told Bloomberg BNA (*State v. Thomas*, 2016 BL 195991, N.M., No. 34,042, 6/20/16).

A judge's Facebook posts about a murder trial on his campaign website prompted the high court's guidance in a June 20 opinion by Chief Justice Charles W. Daniels.

Judges "can be tempted by the illusion" that a social media post will reach "only the intended audience," James Gardner, a professor and interim dean at State University of New York Buffalo Law School, told Bloomberg BNA in a June 27 e-mail.

Online comments should be considered public and "can easily be misconstrued and create an appearance of impropriety," the court said.

It also said judges shouldn't post messages on their campaign websites other than a statement of qualifications.

Facebook Folly. Before sentencing, District Judge Samuel L. Winder posted on his unsuccessful election campaign's Facebook page that justice "was served" in his " 'first' first-degree murder trial as a judge."

That was because "the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch."

"Thank you for your prayers," Winder said.

Gardner said that for "a judge to discuss an ongoing case on social media" shows "extremely poor judgment."

"And it is only worse to do so on a campaign site, because it suggests that the judge's stance in a case might be influenced by a completely improper desire to appeal to potential voters and financial contributors," Gardner said.

'Friending,' Privacy Settings. The defendant Truett Thomas argued that the postings showed judicial bias, the court said.

The court reversed Thomas's conviction on alternate grounds but took "this opportunity to discuss our concerns over the use of social media by members of our judiciary."

Judges' websites "should allow no posting of public comments, and should engage in no dialogue, especially regarding any pending matters that could either be interpreted as ex parte communications or give the appearance of impropriety."

New Mexico Supreme Court

Judges must promote "public confidence in the independence, integrity, and impartiality of the judiciary," the court said, quoting Rule 21-102 of the New Mexico Code of Judicial Conduct.

That rule applies "with equal force to virtual actions and online comments" by judges.

The court declined to issue a "bright-line ban" on social media.

But "we caution that 'friending,' online postings, and other activity can easily be misconstrued and create an appearance of impropriety," Daniels wrote.

"Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement," the court said.

Ethics Opinions

Advertising and Solicitation

Ohio Opinion Points Out Potential Tripwires Inherent in Lawyer-Client Matching Service

Ohio lawyers can't take part in an online, nonlawyer-owned service that matches a prospective client with a lawyer for a particular legal service unless the business complies with the state's rule on lawyer referral services and the professional conduct rules, the Ohio Supreme Court's ethics board advised June 3 (Ohio Supreme Court Bd. of Prof'l Conduct, Op. 2016-3, 6/3/16).

Lawyers must steer clear of services that would involve fee-sharing with nonlawyers or present a risk of mishandling client funds, improper payment for referrals, interference with independent legal judgment, assisting unauthorized legal practice, unethical advertising or solicitation, breach of confidentiality or violation of any other ethics rules, according to the board.

The opinion is the latest word on lawyers' participation in private ventures that aim to connect lawyers and clients. Many other ethics panels have offered guidance on the issue, providing a wide range of advice. See Helen W. Gunnarsson, "Staying on the Right Side of the Blurry Ban Against Paying for Referrals," 30 Law. Man. Prof. Conduct 541.

Lawyer Referral Service. A lawyer asked the Ohio board for advice about participating in a hypothetical online referral service that matches potential clients with an attorney for a particular legal task.

The board said this business model functions as a lawyer referral service even if it doesn't call itself that. A lawyer referral service refers prospective clients to lawyers based on factors such as area of practice, experience and geographic location, it said.

Lawyers may participate in a lawyer referral service only if it's registered with the Ohio Supreme Court and meets the requirements of the Ohio Rules of Professional Conduct, the board pointed out.

Registration is required by Rule XVI of the Ohio Supreme Court's Rules for the Government of the Ohio Bar, it said.

That rule also mandates that lawyer referral services be open to any Ohio-licensed lawyer who maintains a specified level of malpractice insurance, and that participating lawyers must disclose disciplinary complaints, the board said.

The opinion pointed out that Ohio Rule of Professional Conduct 7.2(c) prohibits lawyers from paying anyone for recommending their services, with exceptions for paid advertising and charges of a registered lawyer referral service.

On this issue, the board cited Ohio Supreme Court Ethics Op. 2001-2, 17 Law. Man. Prof. Conduct 287 (2001), which described factors that distinguish permitted forms of paid advertising from impermissible compensation for referrals.

Referral services similar to the proposed business model must operate in a manner consistent with the guidance in that opinion, the board said.

Fees and Fee-Splitting. The proposed business model calls for participating lawyers to pay a "marketing fee" for each client matter based on the fee generated by that matter.

That aspect would violate the prohibition in Rule 5.4 against fee-splitting with nonlawyers, the board said.

A fee-sharing arrangement that depends on the number of clients obtained or the legal fee earned is unethical, it said.

The board noted that under the proposed model the client pays the fee in advance to the referral service and the lawyer receives payment only after the representation is concluded. This arrangement apparently envisions a contingent fee, which is prohibited in some types of cases under Rule 1.5, it said.

Moreover, the arrangement may be contrary to the duty under Rule 1.15 to hold client funds in trust, the board said.

Nonlawyers' Role. In the hypothetical service, the client chooses the lawyer, but the company defines the types of legal services offered, the scope of the representation and the fees charged.

This arrangement eviscerates the lawyer's ability to exercise independent judgment, the board said. Rule 5.4(c) requires lawyers not to allow their professional judgment to be directed by a person who recommends or pays the lawyer, it noted.

Lawyers should be wary of a referral service that makes decisions within a lawyer's professional judgment, such as how much time a lawyer can spend on each client's case or the scope of a client's representation, according to the opinion.

The board also said participating lawyers should verify that the company is not engaging in the practice of law, or else the lawyer could be responsible for assisting unauthorized practice under Rule 5.5.

In addition, lawyers who take part must make reasonable efforts to ensure that the company's nonlawyers act in a manner that complies with professional conduct rules as required by Rule 5.3, the board said.

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Private Firm

Partner in UK Firm With Nonlawyers Can Be Partner in New York Law Firm as Well

A New York-licensed lawyer who is admitted in a foreign jurisdiction and practices with nonlawyer partners there may also practice in a separate New York law firm under certain conditions, according to a May 20 opinion from the New York state bar's ethics committee (N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1093, 5/20/16).

This arrangement won't violate New York Rule of Professional Conduct 5.4, which bars law partnerships with nonlawyers, so long as the lawyer principally practices in the foreign jurisdiction that allows such a partnership or the predominant effect of the lawyer's practice there is in the foreign jurisdiction, the committee advised.

The opinion sheds light on how to determine whether Rule 5.4 applies when a lawyer practices in a foreign law firm that includes nonlawyer owners. Several other recent New York opinions have addressed that issue in other factual contexts, the committee noted.

Choice of Law Analysis. The opinion tackled this question: May a lawyer with a United Kingdom firm that has nonlawyer partners and shareholders, as permitted by U.K. law, also become a partner of a New York firm?

The answer depends on whether Rule 5.4 applies to the lawyer's conduct, which in turn depends on Rule 8.5, the committee said.

Rule 8.5 specifies which jurisdiction's ethics rules govern a lawyer's conduct outside litigation when the lawyer is admitted in New York and another jurisdiction. It says the rules that apply are those of the jurisdiction in which the lawyer principally practices, except that the other jurisdiction's rules apply to particular conduct if its predominant effect is in the other jurisdiction.

The committee concluded that under Rule 8.5, New York's ban on partnership with nonlawyers would not apply to a New York lawyer who is also admitted in a foreign jurisdiction and practices with nonlawyer partners there, so long as the lawyer principally practices in the foreign jurisdiction or the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction.

The opinion made clear, however, that the New York firm must include the foreign firm's representations in its conflicts of interest system. When two firms share a common partner, they are treated as one for conflicts purposes under Rule 1.10, the committee said.

Across the Pond. In the scenario the committee considered, the inquirer is admitted to practice both in New York and the U.K. He practices principally in the U.K. with an "alternative business structure" that has nonlawyer directors and shareholders, as permitted by U.K. law. However, he also wants to become a partner in a separate New York firm that won't hold shares in the U.K. firm.

The committee said the lawyer would need to determine whether he still principally practices in the U.K. after becoming a partner in the New York firm. There's a possibility he might principally practice in New York even though he plans to play only a top managerial role in the New York firm, it said.

The U.K.'s rules will apply if the lawyer still practices primarily in the U.K. after joining the New York firm, the committee said.

But if the lawyer principally practices in New York, that jurisdiction's rules would apply to the lawyer's activities in the U.K. unless the conduct at issue has its predominant effect in the U.K. The lawyer would need to determine whether his actions in serving as a partner of the U.K. firm have their predominant effect in the U.K., the committee said.

The committee said it didn't have jurisdiction to make that determination. It pointed out, however, that apparently the U.K. firm's nonlawyer directors and shareholders wouldn't own any interest in the New York law firm, wouldn't be officers or directors in the firm and wouldn't share legal fees with it.

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Full text at http://www.nysba.org/CustomTemplates/Content.aspx?id=63844.

Ethics Opinions

Advertising and Solicitation

Avvo's Client Referral Program Dinged By Third Bar Panel in Just Four Months

Attorneys risk violating several ethics rules if they participate in a newly launched Avvo program that connects lawyers with consumers seeking limited-scope legal services, the Pennsylvania bar's ethics committee advised in a September opinion (Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2016-200, 9/16).

The opinion marked the third time in four months that an ethics panel has warned attorneys about participating in an Avvo-branded client referral program that one legal technologist has described as a harbinger of the coming "Uberization of Legal Services."

None of the ethics opinions mentioned Avvo, but the company's chief legal officer, Josh King, said it was clear that the opinions were about Avvo Legal Services, which has been introduced in 25 states since itsFebruary launch.

Avvo Legal Services connects consumers seeking "limited scope" legal services with lawyers willing to do that work for a flat fee. The fee, which Avvo sets and and collects in advance, varies by task—from $295 for creating a will to $2,995 for preparing a green card application. Avvo remits the full fee to lawyers after the services are completed, and lawyers then pay Avvo a "marketing fee" that is calculated as a percentage of the legal fee, typically between 20 and 30 percent.

All three ethics panels—in South Carolina, Ohio and now Pennsylvania—concluded that lawyers who participate in such a program would violate ethics rules that prohibit fee-sharing with nonlawyers, and would risk violating a number of other ethics standards.

Avvo Att'y: Bad For Consumers. King told Bloomberg BNA that the South Carolina opinion, issued in July, caused his company to temporarily "pull back" its launch in that state because some lawyers who had agreed to participate "got cold feet."

In a subsequent e-mail, King also criticized the Pennsylvania opinion as "overly cautious" and short-sighted.

"Maybe the Bar is just being careful, or maybe it's trying to protect its Lawyer Referral Service from something it views as competitive," King said. "But it's a real shame the Bar isn't recognizing the benefit to consumers and lawyers here."

"I'm happy to take any feedback from [state] Bars on ways we can improve Avvo Legal Services for consumers, but our opinion of the ethics of the program is certainly different than that of the Bar," King said.

Fee-Sharing. The Pennsylvania committee said the "marketing fee" lawyers pay to participate in the "Flat Fee Limited Scope" (FFLS) program addressed in the opinion was a disguised fee-sharing arrangement with a nonlawyer and would thus violate Pennsylvania Rule of Professional Conduct 5.4(a).

"Ethics opinions that have considered similar compensation arrangements have concluded that marketing, advertising, or referral fees paid to for-profit enterprises that are based upon whether a lawyer received any matters, or how many matters were received, or how much revenue was generated by the matters, constitute impermissible fee sharing under RPC 5.4(a)," the committee said.

The opinion cited Ohio Supreme Court Ethics Op. 2016-3, 32 Law. Man. Prof. Conduct 394 (2016), and South Carolina Ethics Op. 16-06 (2016).

The committee rejected the notion that the marketing fee might be authorized under Rule 7.2(c)(1), which permits lawyers to pay the "reasonable cost" of advertisements.

The committee noted that the "marketing fee" a lawyer must pay is tied to the cost of the underlying legal services—an arrangement that "do[es] not correspond to any traditional model of compensation for advertising."

"Advertising and marketing fees are typically based upon a before-the-fact assessment of the likely value and effectiveness of such services and not on an after-the-fact calculation of the revenue the advertiser actually derived from such services," the committee said.

Delegation Problems. The committee said the FFLS program also improperly "delegates to a non-lawyer several critical decisions and functions that fall within the exclusive domain of the practice of law."

"This includes, for example, the decision whether the professional services the client requested of the lawyer have been satisfactorily completed, such that the advance fee has been earned by and is payable to the lawyer," the committee said. "Such delegation violates RPC 2.1, which requires a lawyer to exercise independent professional judgment, and RPC 5.4(c), which prohibits a lawyer from allowing a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

The committee said this delegation hampers a lawyer's ability to comply with Rule 1.16(d), which requires lawyers to refund any fees that have not been earned at the end of a representation. "Because, under the procedures described above for the FFLS program, the lawyer never possesses or controls the advance fee, the lawyer is unable to ensure that those obligations are fulfilled," the committee said.

"The delegation of the possession and distribution of advance fee payments to a non-lawyer [also] violates RPC 1.15(i)," the committee said. That rule requires lawyers to deposit any advance fees in their trust accounts, and to refrain from withdrawing those fees until they have been earned.

The committee said the "only way to rectify" these problems would be for the program operator "to immediately remit advance fee payments to the lawyer ... as soon as a lawyer-client relationship is established."

Limited Scope Problems. The committee said the FFLS program also makes it difficult for lawyers to follow Rule 1.2(c), which says a lawyer may limit the scope of a representation only if doing so is "reasonable" and the client gives informed consent.

The committee said the FFLS operator "cannot properly assess" whether a limitation on the scope of representation is appropriate. The importance of having a lawyer make that assessment is "heightened," it added, by the "broad and vague descriptions of limited scope services" offered through "a typical FFLS program operator."

"Even if the prospective client selects the correct general category of service, the prospective client's perception of what is needed may differ from what is actually required, and the lawyer would have no way of ascertaining the scope and magnitude of the effort required to meet the prospective client's true needs until after speaking with the client, possibly at great length," the committee said.

Confidentiality. The committee said the "structure of the FFLS programs exposes the [operator] to significant information that would ordinarily be considered confidential" under Rule 1.6(a), which generally prohibits revealing any "information relating to representation" of a client.

The committee noted that the FFLS program operator would be privy to the potential client's legal needs and to the fee arrangement. "This information, as well as the very existence of the lawyer-client relationship, would typically be considered 'information relating to representation of a client' and therefore confidential under RPC 1.6(a)," the committee said.

Assisting UPL. The committee said a lawyer who participates in an FFLS program might also run afoul of Rule 5.5(a) by assisting the unauthorized practice of law.

"[M]any of the aspects of the FFLS programs described above involve the operators of such programs at least initially making judgments and decisions which are only appropriately made by lawyers," the committee said.

By Samson Habte

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Ending the Pursuit: Releasing Attorney Advertising Regulations at the Intersection of Technology and the First Amendment

By Jan L. Jacobowitz

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In 2012, I characterized the enactment and enforcement of contemporary attorney advertising regulations as an endless pursuit to capture technology at the intersection of attorney advertising and the First Amendment.[1] I invoked the image of Wile E. Coyote and his ongoing pursuit of the evasive Road Runner. Five years later, I have concluded that the pursuit is indeed endless and the "chase" should be abandoned in deference to both the First Amendment and the public's ability to identify the proverbial wheat from the chaff in the world of Internet driven advertising.[2] While professionalism remains a concern, the courts have found that professionalism concerns alone are not sufficient to chill commercial speech.[3]

In lieu of a detailed set of professional conduct advertising rules, state bars should apply a general standard that prohibits advertising that is misleading or fraudulent. Most states and the American Bar Association Model Rules of Professional Conduct provide such a standard in Rule 8.4(c), which states that *[i]t is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation.*[4] The 8.4(c) standard should enable the state bars to protect the public while simultaneously permitting attorneys the flexibility required to advertise in the digital age.

This article explores the premise that state regulation that governs attorney advertising by employing a standard that prohibits false and misleading advertising is the fair, efficient, and logical approach to advertising in the digital age. The article first provides a brief history of attorney advertising from the nineteenth century to the seminal *Bates*[5] decision through today. Next, the article reviews a few of the recent court decisions and state bar ethics opinions that attempt to apply detailed advertising rules and guidelines to constantly changing technology. The article then reviews the tenor of the current national debate about attorney advertising and the Association of Professional Responsibility Lawyers (APRL) recent proposals to reform the advertising rules. Finally, the article concludes that streamlining the regulation of attorney advertising to require honest advertising that does not mislead the public is an approach that both adheres to the commercial speech doctrine and provides the public with access to information about legal services.

The Historical Roots of Advertising

When discussing the history of attorney advertising, Abraham Lincoln is often cited as both a man of integrity and an attorney who strategically advertised his services.[6] Lincoln not only advertised in the newspaper noting "that his firm handled business with 'promptness and fidelity,'"[7] but also was known to have solicited business through both letters and personal conversation.[8] He practiced in the nineteenth century and therefore was not prohibited from advertising his services. In fact, attorney advertising was not prohibited by the organized bar until the American Bar Association ("ABA") enacted the Canons of Professional Ethics in 1908.[9]

The policy concerns that compelled the Canons' absolute prohibition on attorney advertising may have stemmed from the nineteenth century's liberal standards for admission to the bar and the resulting significant increase in the number of lawyers in the United States. The growing population of lawyers is thought to have created an increased competition for clients, aggressive attorney advertising, a waning of ethical standards, and a diminished perception of lawyers—all variables that have been cited as reasons for the 1908 ban on attorney advertising.[10]

The ban on attorney advertising remained in place for six decades through several revisions and iterations of the ABA's rules of professional conduct until 1977 when the U.S. Supreme Court decided Bates v. Arizona, finding that attorneys have a First Amendment right to advertise in accordance with the commercial speech doctrine.[11] Thus, *Bates* opened the door and attorney advertising burst through, ultimately creating controversy in its midst.[12]

Bates and Its Early Progeny

Bates acknowledged that a state may regulate false, deceptive, and misleading attorney advertising,[13] as well as the time, place and manner of the advertising; however, the opinion did not provide the states with specific guidance as to how to regulate commercial speech in a constitutional manner. In 1980, the U.S. Supreme Court decided the *Central Hudson* case and provided standards with which to analyze whether a government regulation passes constitutional muster.[14]*Central Hudson* provides:

> [The regulation]...must concern lawful activity and not be misleading. Next,... ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, ... determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[15]

Central Hudson became a litmus test for government regulation of commercial speech. During the 1980's the U.S. Supreme Court employed the *Central Hudson test* in several attorney advertising cases in which the advertisements were deemed to be protected commercial speech and therefore the state's regulation of that speech was found to be unconstitutional.

The early post *Bates* cases predated the Internet. The cases often involved an attorney advertising regulation that completely banned a particular category of commercial speech.[16] The Court reviewed issues such as the failure to adhere to a state proscribed "laundry list" of permitted content in direct mail advertisements,[17] the use of a picture, where all illustrations were prohibited, of a Dalkon Shield uterine device in a newspaper advertisement,[18] and an attorney's letterhead that included his board certification in violation of a prohibition against referencing expertise.[19] The Court reiterated in each case that a total prohibition on commercial speech that is truthful and not misleading will not withstand constitutional scrutiny unless the government can demonstrate both that it has a substantial interest and that the regulation not only advances the government's interest, but also that there is not a less restrictive means of accomplishing the government's goal.[20]

Bates and its Digital Age Progeny

The advent of the Internet and social media revolutionized attorney advertising. Attorneys now have a multitude of low cost digital methods through which to reach a wide audience. Law firm websites, Facebook, LinkedIn, and blogs have proliferated over the past decade. In fact, the speed of technological innovation and the inability of state regulators to maintain pace with the constant changes inspired the metaphorical reference in my prior article to the plight of Wile E. Coyote and his never ending pursuit of the Road Runner.[21]

The article was prompted by the fact that The Florida Bar was attempting a significant revision of its advertising rules that was designed to address commercial speech concerns and the impact of the Internet on attorney advertising. The Florida Supreme Court eventually approved a new version of the rules; however, to carry the metaphor one step further, the result has been somewhat reminiscent of Wile E. Coyote's attempts to employ various Acme Corporation equipment to capture the Road Runner—only to fail again.

Thus, although The Florida Bar's 2013 attorney advertising rules acknowledge the commercial speech doctrine and include a consideration of the digital age, the regulations have been subjected to First Amendment challenge and the impact of technological innovation. For example, in the *Rubenstein* case,[22] the Eleventh Circuit District Court found The Florida Bar's guidelines that interpreted the parameters in which past results could be used in advertising to be unconstitutional because the guidelines prohibited all references to past results on indoor and outdoor display, television and radio media based upon the premise that these "specific media . . . present too high a risk of being misleading."[23]

In another case, Searcy v. Florida Bar,[24] the Searcy law firm challenged the "objectively verifiable" requirement as applied to statements about the law firm, past results and a client's testimonial. Searcy initially sought guidance from The Florida Bar and submitted thirteen sample pages from its website, LinkedIn account, and blog for The Florida Bar's review. The Florida Bar concluded that Searcy had violations on each page, such as the use of wording "resulting in justice" and "successfully represent," which were deemed to be subjective despite being truthful; therefore, the language did not comply with the objectively verifiable standard mandated by the regulations.

The Searcy law firm has a significant Internet presence. The Florida Bar's guidance lacked sufficient clarity, and Searcy filed suit rather than risk being in noncompliance. Searcy challenged both the objectively verifiable standard and the regulation that prohibited a lawyer from referring to his expertise unless he is board certified despite the fact that board certification is unavailable in many areas of law.[25]

The Eleventh Circuit District Court's summary judgment order in the Searcy case enjoined The Florida Bar from enforcing the rule on expertise, but found the objectively verifiable challenge not ripe for consideration based upon a failure to exhaust administrative remedies. However, the Court appeared to have a sympathetic ear as it noted that Searcy "can hardly be criticized for fearing the worst" based upon The Florida Bar's enforcement history of restrictive advertising regulations.[26] Indeed, as I concluded in 2012, "...the history of attorney advertising in Florida indicates that [another] such challenge is likely, if not inevitable."[27]

Although my original article was focused upon Florida's proposed advertising amendments, Florida is by no means alone in defending constitutional challenges to its advertising cases. Both New York and Louisiana have federal court decisions that are worthy of note.

In 2006, New York's Appellate Division adopted new attorney advertising regulations designed to prohibit potentially misleading advertising, which included barring techniques such as portrayal of a judge, use of testimonials, special effects and language that contains irrelevant information.

Prior to the adoption of the regulations, a New York personal injury law firm's marketing strategy included the use of special effects, comical scenarios, slogans, testimonials and the portrayal of a judge. The law firm terminated its marketing as a result of the new rules and filed suit to challenge several provisions including the prohibition of "the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and... the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter."[28]

The Second Circuit found that New York's regulation was unconstitutional as it categorically banned commercial speech that the court found was not even likely to be misleading.[29] Regardless, the court concluded that a categorical ban on *potentially misleading* commercial speech would not likely survive the *Central Hudson* test.[30] Moreover, the court concluded that even assuming that all of the regulations at issue could survive the first three prongs of the *Central Hudson* test, the regulations would not survive the fourth requirement that requires a regulation be narrowly tailored—an absolute prohibition generally fails the fourth prong of the test.[31]

Louisiana adopted new attorney advertising regulations in 2009, which like New York and Florida, contained absolute prohibitions in various areas including testimonials and other references to past results and the portrayal of a judge. The regulations were challenged and the Fifth Circuit opinion offers a thoughtful application of the *Central Hudson* test.[32]

The Court acknowledged the U.S. Supreme Court precedent finding that a government has a substantial interest in maintaining ethical conduct in licensed professions as well as in assuring the accuracy of information in the commercial marketplace.[33] However, the Court concluded that the government's interest in maintaining the dignity of attorney's communications with the public falls below the substantial interest mark. [34] In fact, the Fifth Circuit quoted the U.S. Supreme Court's language from *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. at 648,"[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."

The Fifth Circuit ultimately concluded that most of the regulations did not pass constitutional muster because a total ban on content, such as testimonials or references to past results, fails *Central Hudson's* requirement that regulations that restrain commercial speech must directly advance the government's interest in the least restrictive way possible.[35]

The Florida, New York and Louisiana cases are provided not for the purpose of engaging in a comprehensive First Amendment analysis of each state's regulations, but rather to support the notion that despite the state bars' best efforts to revise the attorney advertising rules, the changing digital environment renders the application of the rules challenging at best and unconstitutional in the worst case scenario.

The resulting confusion caused by various states enacting and revising regulations that are then not universally interpreted throughout the country (and the mere fact that there are not national advertising standards) renders it all the more difficult for lawyers to gain clarity as to permissible advertising. When clarity becomes impossible, then litigation ensues and conjures up visions of Wile E. Coyote chasing the Road Runner with yet a new Acme Corporation tactic that will require a tremendous expenditure of resources and energy, but will not lead to a final resolution of the tumultuous situation.

Ethics Opinions and Practical Realities

Another vehicle through which the state bars have attempted to provide guidance on the application of the advertising rules is through state ethics advisory opinions. California has issued an opinion that parses various Facebook posts to determine which are advertising as opposed to a gleeful sharing of a successful day at work.[36] California also recently issued an opinion that delineates the factors that subject a blog that is written by a lawyer to the advertising rules.[37]

Florida has produced social media guidelines and a best practices guide for effective electronic communication.[38] New York, Pennsylvania, Philadelphia, West Virginia, and the District of Colombia have all issued ethics advisory opinions that respond to social media inquires and include some guidance as to advertising issues related to social networking. [39]

North Carolina issued an opinion to guide attorneys as to "deal of the day" type of advertising.[40] South Carolina opined on advertising involving a designated expert on an interactive website.[41] Ohio and Florida both permit attorneys to use texting for solicitation if the text follows applicable guidelines. [42] The list continues to grow along with the nuances and availability of new technological opportunities for advertising.

The ethics opinions are advisory, and may vary in both substance and application from state to state. In some situations, there are practical realities that cause compliance problems. For example, an attorney using Twitter in a state where requisite information must be included in an advertisement may have a problem complying with both the state's advertising regulation requirements and Twitter's 140-character limitation.

Moreover, attorneys and law firms that practice in more than one jurisdiction are caught in a dizzying array of regulations. The literature suggests that this endless pursuit to regulate advertising in a technological environment that is constantly evolving not only frustrates bar regulators and practicing lawyers, but also limits the amount of beneficial legal information that is being provided to the public.[43]

Furthermore, although the jurisprudence recognizes the protection of the public as a substantial government interest, survey results indicate that the public does not require the degree of protection that state regulators often assert as a justification for advertising regulations.[44] In fact, the public is bombarded with advertising from many businesses and professions and appears to be fairly savvy at filtering the 24/7 information environment in which we all now reside.

So what are we to do now?

The Association of Professional Responsibility Lawyers Report

In 2013, The Association of Professional Responsibility Lawyers ("APRL") decided to investigate the state of attorney advertising regulation in an attempt to answer the question and find a solution. APRL formed a committee to study attorney advertising regulations throughout the country.[45] The committee gathered data from various sources and sent a survey to state regulators that inquired about the number and type of advertising complaints that are received and how the complaints are resolved. [46]

In June 2015 the committee's efforts were published in a report that is garnering national attention and facilitating discussion about possible revisions to the ABA Model Rules of Professional Conduct that govern attorney advertising, revisions which would then hopefully be adopted by the states.[47]

APRL's 2015 report did not analyze the solicitation rules and early feedback indicated that for a national overhaul to take place, solicitation needed to be addressed. Thus, in April 2016 APRL's advertising committee issued a supplemental report that specifically addressed solicitation.[48]

The APRL reports illuminate the need to simplify the current advertising regulatory scheme to both assist the legal profession and to provide the public with greater access to information. The 2015 report, which addresses the rules pertaining to information about legal services, explains its methodology and conclusions in its executive summary:

> Based on the survey results, anecdotal information from regulators, ethics opinions, and case law, the Committee concludes that the practical and constitutional problems with current state regulation of lawyer advertising far exceed any perceived benefits associated with protecting the public or

maintaining the integrity of the legal profession, and that a practical solution to these problems is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer's services.

The Committee believes that state regulators should establish procedures for responding to complaints regarding lawyer advertising through non-disciplinary means. Professional discipline should be reserved for violations that constitute misconduct under ABA Model Rule 8.4(c). The Committee recommends that violations of an advertising rule that do not involve dishonesty, fraud, deceit, or misrepresentation under Rule 8.4(c) should be handled in the first instance through non-disciplinary means, including the use of advisories or warnings and the use of civil remedies where there is demonstrable and present harm to consumers.[49]

APRL followed the 2015 report with an analysis of the solicitation rules and the U.S. Supreme Court precedent that provides the standards and underlying policy considerations for limiting commercial speech when it is targeted to solicit an individual who is not an established client, family member or friend.[50]

"The committee concluded that most of the current restrictions on solicitation in the attorney advertising rules as well as the underlying public policy at play are based primarily upon lawyers approaching prospective clients in a face-to-face encounter without regard to today's digital world of electronic communications." [51]

Thus, the committee recommended that a prohibition on solicitation be limited to face-to-face and live telephone communication rather than any other type of electronic communications. Additionally, APRL included "sophisticated users of legal services" on the list of individuals to whom lawyers may solicit without violating the rule.[52]

APRL's reports contain a draft of revised model rules, which collapse the current five ABA model rules on advertising into two rules; language from the current rules has been edited, eliminated, or relocated to the comment sections of the Revised Rule 7.1 Communications Concerning a Lawyers Services or the Revised Rule 7.2 Solicitation.

APRL's logistical approach is perhaps best viewed in the charts created by APRL's past president Lynda Shely. The charts were included in her PowerPoint presentation at the Center for Professional Responsibility Annual Conference in 2016.

The charts indicate that many of the comments that were contained in the deleted rules have been merged into the comment section of Rule 7.1. The solicitation rule was moved from Rule to 7.3 to Rule 7.2 and amended as discussed above. Thus, general advertising resides in Rule 7.1 and targeted advertising remains independently considered in Rule 7.2. A "clean" version of the proposed new rules is attached, as Appendix A. APRL's proposals will be the subject of a Public Forum hosted by American Bar Association Standing Committee on Ethics and Professional Responsibility in Miami, Florida on February 3, 2017.

[insert 3 charts]

Revisiting the Purpose and Underlying Policy for Regulating Attorney Advertising

As discussed above, Abraham Lincoln advertised that he provided his legal services with "promptness and fidelity"— a description that probably fails Florida's objectively verifiable test. He also approached "sophisticated users of legal services" to offer his services, no doubt an unacceptable solicitation practice under our current rules. Historical literature indicates that the legal profession significantly expanded in the nineteenth century; apparently many of the lawyers at the time would not have earned the title "honest Abe." The nineteenth century legal profession is described as being somewhat "out of control."

Often when chaos ensues, the proverbial pendulum swings far to the other side in a corrective attempt. Perhaps that was what occurred when the legal profession moved from virtually unregulated advertising practices in the nineteenth century to a total ban on any type of advertising at the start of the twentieth century.

Maintaining the integrity of the profession and protection of the public are often cited as both the purpose and the policy for regulating attorney advertising. In fact, as discussed above, those standards also support the substantial governmental interest prong of *Central Hudson* in U.S. Supreme Court jurisprudence that addresses attorney advertising. However, it is not sufficient for a state bar to merely articulate its governmental interest without providing evidence that the regulation actually advances its interest in a narrowly tailored manner. Thus, the state bars that lost the cases referred to above were unable to convince the courts that the detailed advertising regulations at issue were actually preserving the integrity of the legal profession or protecting the public, especially when the regulation categorically banned content.

Perhaps it is time for the pendulum to gently swing back to the center. The twenty-first century is characterized by technological innovation, unprecedented access to information, and Internet platforms that facilitate both sharing and obtaining information. One only needs to peruse the Internet and Google attorney advertisements to quickly realize that attorney advertising, like many other types of advertising, is omnipresent.

While some attorney advertising may be deemed unprofessional, that does not necessarily render it dishonest or misleading. And much of the available information proves beneficial to a significant segment of the population who might not otherwise consult a lawyer to learn about their rights. (Remember that the *Bates* case arose because the lawyers involved were trying to provide lower cost legal services and realized that they needed to advertise to reach the people most in need.) The public, as indicated by the surveys mentioned above, and anecdotal observation has become accustomed to analyzing online marketing whether it is for a restaurant, purchasing a car, finding a new doctor, or retaining a lawyer.

Additionally, it is impossible for any state bar to completely monitor attorney advertising. The resources do not exist and one wonders whether even if there were resources, would surveying advertisements be the best use. (APRL's survey demonstrated that at least in the thirty-six states that responded, there are not many complaints. Moreover, competitors rather than consumers often file those complaints.) So that leaves most state regulators in a reactive posture. If the bar receives a complaint, then it is investigated. Of course, many states require attorneys to prophylactically file advertisements for approval. However, it is a fair assumption that the worst offenders do not file. On the other hand, the law firms attempting to comply are often the ones that ultimately file suit when they cannot square their marketing plans with the state bar rules.

Thus, revisiting the purpose and policy of attorney advertising regulations compels the query: Has the time come to release the attorney advertising regulations from the intersection of the First Amendment and technology where the regulations are creating chaos and inefficiencies on the twenty-first century's information highway?

Releasing the Advertising Regulations at the Intersection of the First Amendment and Technology

So how do we lessen the enormous amount of time and energy spent on the endless pursuit of revising and reinterpreting attorney advertising regulations in an attempt to keep pace with the constantly evolving technology? The APRL report and recommendations are a terrific place to begin. In fact, I am proud to be a member of APRL's committee and a co-author of the report. Adopting APRL's proposed revisions would significantly simplify and improve the attorney advertising regulations.

But here's one more idea—Why not return to the days of Abraham Lincoln and abandon the advertising rules altogether? It may sound like a radical suggestion, but consider the fact that unlike the nineteenth century legal profession we have a host of other rules. Specifically, Rule 8.4 (c), which prohibits all lawyers from engaging in any conduct *involving dishonesty, fraud, deceit or misrepresentation.* Doesn't 8.4(c) suffice to prosecute any bad actors that engage in advertising or solicitation that is dishonest or misleading?

Speaking of actors, I have learned that the descendants of our metaphorical buddies, Wile E. Coyote and Road Runner, were (somewhat controversially) reimagined and created as the characters Tech E. Coyote and Rev Runner in a futuristic cartoon that takes place in the year 2772.[53] Apparently, the two characters collaborate on innovations despite the historical cultural animosity between Coyotes and Road Runners.[54]

Perhaps, like the descendants of Wile E. Coyote and the Road Runner, it is time to collaborate to end the pursuit of perfecting a detailed rubric of attorney advertising regulations that ultimately cannot maintain pace with technology and the times in which we live. Let's release the advertising regulations into the past and move forward with an innovative, contemporary standard that simply, but significantly, prohibits false and misleading advertising.

Have you heard of this new thing called the Internet? It's giving people new expectations. It's allowing them to become their own expert. Knowledge lies anxious at their fingertips. Gloss over the truth in your advertising and you'll quickly be dismissed as a poser.[55]

–Roy H. Williams

APPENDIX A

APRL Proposed Changes to the ABA Model Rules of Professional Conduct—2015 [CLEAN VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

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

Comments

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. [From MR 7.2 Comments]

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. [From MR 7.2 Comments]

Areas of Expertise/Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. [From MR 7.4 Comments]

Firm Names

[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal

Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. [From MR 7.5 Comments]

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. [From MR 7.5 Comments]

Rule 7.2 Advertising
Comments (Comments 1, 2, and 3 moved to MR 7.1 Comments)

Rule 7.3 Solicitation of Clients
No changes (But note that solicitation moved to 7.2 and amended in supplemental report as shown below)

Rule 7.4 Communication of Fields of Practice and Specialization
Comments (Comments 1 and 3 were moved to MR 7.1 Comments)

Rule 7.5 Firm Names And Letterheads
Comments (Comments moved to MR 7.1 Comments)

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges
No changes

APRL Proposed Changes to the ABA Model Rules of Professional Conduct—2016 [CLEAN VERSION]

Rule 7.2 Solicitation of Clients

Solicitation
(a) A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services for a particular matter.

(b) Except as provided in paragraphs (c) and (e), a lawyer shall not solicit in person by face—to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer;

(2) is a sophisticated user of legal services;

(3) is pursuant to a court-ordered class action notification; or

(4) has a family, close personal, or prior professional relationship with the lawyer.

Written Solicitation
(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4).

Limitation on Solicitation
(d) A lawyer shall not solicit professional employment from any person if:

1. (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
2. (2) the solicitation involves coercion, duress or harassment.

Prepaid and Group Legal Services Plans
(e) Notwithstanding the prohibitions in paragraph (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Paying Others to Recommend a Lawyer
(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

(1) pay the reasonable costs of advertisements and other communications permitted by Rule 7.1, including online group advertising;

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

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

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement.

Comments

Solicitation

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

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. 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 being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.1 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 misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication 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. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[5] The requirement in paragraph (c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (d)(1) is prohibited. Moreover, if after sending a solicitation or other communication as permitted by Rule 7.1 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.1.

[8] Paragraph (e) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.1 and this Rule. See Rule 8.4(a).

Paying Others to Recommend a Lawyer

[9] Except as permitted under paragraphs (f)(1)-(f)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rules 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by Rule 7.1 and this Rule, including the

costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (see Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet—based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in returnfortheundertakingofthatpersontoreferclientsorcustomerstothelawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be

reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Endnotes

1. Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of theFirst Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63, 64 (2012).

2. Although my conclusion stems from real time events, it is interesting to note that Chuck Jones, the creator of the Road Runner, developed list of rules for the writers of Road Runner episodes, which included "RULE 3. The Coyote could stop anytime—if he were not a fanatic. 'A fanatic is one who redoubles his effort when he has forgotten his aim'—*George Santayana*." Robert Patrick, *Fun Facts About Wile E. Coyote and the Road Runner*, CHUCK JONES BLOG (Apr. 17, 2009), http://blog.chuckjones.com/chuck_redux/2009/04/fun-facts-about-wile-e-coyote-and-the-road-runner.html. While I am not in any way referring to The Florida Bar regulators or any state's regulators as fanatics, perhaps the redoubling of the legal profession's effort to regulate advertising on the Internet with the aim of protecting the public is somewhat analogous.

3. Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd. (*Pub. Citizen*), 632 F.3d 212, 220 (5th Cir. 2011).

4. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2016).

5. Bates v. State Bar of Arizona (*Bates*), 433 U.S. 350 (1977).

6. Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547 (1982).

7. Mylene Brooks, *Lawyer Advertising: Is There Really a Problem*?, 15 LOY. L.A. ENT. L. REV. 1, 7 (1994). *See also* the Complaint in Searcy et al. v. The Florida Bar et al. (*Searcy*), case number 4:13-cv-00664 (N.D. Fla. 2015), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement (Complaint at 2).

8. Boden, *supra* note 6, at 548. Boden describes Lincoln's successful efforts to be retained in the seminal Illinois case that ultimately prevented counties from taxing railroad properties. Lincoln spoke with and wrote to county officials about retaining him. When he was not retained, Lincoln wrote to the general solicitor of the railroad who ultimately retained Lincoln. Boden comments on page 548 that, "At the worst, Lincoln's preretainer activities in this case could be barratry, solicitation or "ambulance chasing." Viewed in the best light, they could be called examples of "direct mail" advertising. "Boden offers this anecdote because Lincoln is a nineteenth century lawyer who is considered to be of "unquestionable integrity and morality."

9. MODEL RULES OF PROF'L CONDUCT Preface (2001).

10. Boden, *supra* note 6, at 549; Brooks, *supra* note 7, at 6-9. *See also* ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE (2015) [hereinafter APRL 2015 REPORT], *available at*http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf.

11. *Bates, supra* note 5.

12. Jacobowitz, *supra* note 1, at 2.

13. *Bates, supra* note 5, at 384.

14. Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557 (1980).

15. *Id.* at 566.

16. An in depth constitutional analysis of the various cases is beyond the scope of this article, but examples are provided to demonstrate the evolution and challenges of regulating attorney advertising post *Bates.*

17. *In re* R.M.J., 455 U.S. 191, 197 (1982).

18. Zauderer v. Office of Disciplinary Counsel (*Zauderer*), 471 U.S. 626, 647 (1985).

19. Peel v. Attorney Registration & Disciplinary Comm'n (*Peel*), 496 U.S. 91, 93-94 (1990).

20. *Id.See also In reR.M.J.*, 455 U.S. at 197; *Zauderer*, 471 U.S. at 647.

21. Jacobowitz, *supra* note 1, at 1.

22. Rubenstein v. Florida Bar No. 14-CIV-20786, 2014 WL 6979574, at *2 (S.D. Fla. 2014).

23. *Id.* at *20.

24. Searcy et al. v. The Florida Bar et al., case no. 4:13-cv-00664 (N.D. Fla. 2015), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DB-B8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement.

25. *See* Complaint, Searcy et al. v. The Florida Bar et al. (Dec. 11, 2013), *available at*http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement.

26. *Searcy, supra* note 24, at 9.

27. Jacobowitz, *supra* note 1, at 80.

28. Alexander v. Cahill, 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of "common sense"—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve "important communicative functions: [they] attract the attention of the audience to the advertiser's message, and [they] may also serve to impart information directly. " Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, at 647.

29. *SeeCahill*, 598 F.3d at 96.

30. *Id.*

31. *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

32. *Pub. Citizen, supra* note 3.

33. *Id.* at 220.

34. *Id.*

35. *Id.* at 229. Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's Cahill opinion by indicating that the Bar had produced evidence in the form of survey results that supported that the requirement that the regulation materially advanced the government's interest in protecting the public.

36. Cal. State Bar Formal Op. 2012-186 (2012).

37. Cal. State Bar Formal Op. 2016-196 (2016). This opinion replaced Cal. State Bar Formal Interim Op. 12-0006 (2014), which went through two comment periods before becoming a final opinion.

38. THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING GUIDELINES FOR NETWORKING SITES (Revised May 9, 2016), *available at*http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement; THE FLORIDA BAR BEST PRACTICES FOR EFFECTIVE ELECTRONIC COMMUNICATION (Aug. 7, 2015), *available at*https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/867146754B88854A85257E600075565F/$FILE/E-communication.pdf?OpenElement.

39. *See* N.Y. State Bar Ass'n Formal Op. 2013-972 (2013); N.Y. Cnty. Bar Ass'n Formal Op. 748 (2015); N.Y. City Bar Ass'n Formal Op. 2015-7 (2015) (application of attorney advertising rules to LinkedIn); Pa. Bar Ass'n Advisory Op. 2014-300 (2014); Pa. Bar Ass'n Advisory Op. 2014-5 (2014); W. Va. L.E.O. 2015-02 (2015); D.C. Bar Op. 370 (2016).

40. N.C. State Bar Formal Op. 2013-10 (2013).

41. S.C. Bar Advisory Op. 12-03 (2012).

42. Ohio Sup. Ct. Bd. Comm'rs on Grievances & Discipline Advisory Op. 2013-2 (2013); *see alsoBar board finds texting is not prohibited solicitation*, THE FLORIDA BAR NEWS (Aug. 15, 2015), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/e060eb44c677d6e085257e9d00424f90!OpenDocument.

43. APRL 2015 REPORT, *supra* note 10. Note: I am a member of APRL's advertising committee and a co-author of the advertising report.

44. *Id.* at 24 & 28-29.

45. *Id.* at 3.

46. *Id.*

47. *See, e.g.*, Joan C. Rogers, *APRL: Pare Down Rules on Lawyer Ads To Single 'False or Misleading' Standard*, ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT (June 26, 2015); Joan C. Rogers, *APRL Says Get Rid of Total Ban on 'Real-Time Electronic Contact'*, ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT (May 16, 2016).

48. ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS REGULATION OF LAWYER ADVERTISING COMMITTEE SUPPLEMENTAL REPORT (Apr. 26, 2016) [hereinafter APRL SUPPLEMENTAL REPORT], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.

49. APRL 2015 REPORT, *supra* note 10, at 1-2.

50. APRL SUPPLEMENTAL REPORT, *supra* note 48, at 1-2.

51. *Id.*

52. *Id.* at 5.

53. *See* George G. Gustines, *It's 2772. Who Loves Ya, Tech E. Coyote?*,N.Y. TIMES, June 6, 2005, *available at* http://www.nytimes.com/2005/06/06/arts/television/its-2772-who-loves-ya-tech-e-coyote.html?_r=0.

54. *Id.*

55. See *Roy H. Williams Quotes*, BRAINY QUOTE,http://www.brainyquote.com/quotes/authors/r/roy_h_williams.html (last visited Jan. 27, 2017).

Colorado's PMBR subcommittee first worked on developing regulatory objectives designed to promote the public interest. This project came to fruition in April 2016, when the state supreme court adopted a new preamble to its regulatory rules governing the practice of law.

The preamble sets forth the court's objectives in regulating the practice of law, and expresses its interest in proactive programs that improve lawyer competence and client service, Coyle said.

Colorado's new preamble fits in with a larger trend. In February 2016 the ABA's policy-making House of Delegates adopted a set of Model Regulatory Objectives, and urged states to consider them in assessing the existing regulatory framework and developing regulations for nontraditional legal service providers. See 32 Law. Man. Prof. Conduct 114, 2/24/16.

The U.K. and some other countries have also enacted regulatory objectives in recent years. See 31 Law. Man. Prof. Conduct 623, 10/21/15.

The self-assessment tool under development in Colorado and the state's new regulatory objectives are only part of the subcommittee's efforts to implement PMBR.

The Colorado Supreme Court's website includes an "Innovations" segment that describes the PMBR subcommittee and provides a link to information about PMBR in Colorado, the U.S., and other countries.

The Colorado PMBR materials include minutes of the subcommittee meetings, a PMBR roadmap for Colorado, 10 PMBR principles under study by working groups, and a Colorado self-audit checklist.

National Wellness Task Force. One of the working groups in Colorado's PMBR subcommittee is focusing on lawyer wellness. An important aspect of PMBR involves helping law firms have policies and procedures that steer lawyers toward a better balance in their lives, Coyle said.

Coyle and Bree Buchanan, director of the Texas Lawyers' Assistance Program, are co-chairing a new national task force on lawyer wellness.

The ABA Commission on Lawyer Assistance Programs (CoLAP) launched the task force in 2016 after a groundbreaking study by CoLAP and the Hazelden Betty Ford Foundation revealed widespread levels of substance use, depression and anxiety among U.S. lawyers.

Coyle said the wellness task force includes representatives from a wide range of groups, including APRL, NOBC, CoLAP and other ABA groups, the Conference of Chief Justices, and the National Conference of Bar Examiners, along with the co-authors of the ABA/Hazelden Betty Ford study and others.

The task force hopes to complete initial reports done by mid-March, Coyle said.

By Joan C. Rogers

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Full text at new rule at http://www.illinoiscourts.gov/SupremeCourt/Rules/Amend/2017/012517_756.pdf. Illinois Supreme Court's press statement is at http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf.

Advertising and Solicitation

Proposed Overhaul of Lawyer Ad Rules Get Public Airing at ABA Forum

A proposal to streamline the legal profession's ethics rules on advertising and solicitation garnered lots of interest Feb. 3 at a public forum during the American Bar Association's midyear meeting in Miami.

The proposal is the work of the Association of Professional Responsibility Lawyers, which wants the ABA and states to strip down lawyer advertising standards to just two rules. Current legal ethics rules on advertising and solicitation are difficult to apply to newer forms of marketing in a borderless world, APRL says.

The ABA Standing Committee on Ethics and Professional Responsibility convened the forum to get feedback on APRL's draft changes.

"We had an incredible turnout," with well over 50 people attending the forum, Lynda C. Shely told Bloomberg BNA. Shely is APRL's immediate past president and served on the APRL committee that drafted the proposed reforms.

"There were at least a half-dozen different voices heard, with very useful feedback on things that could be clarified and things to consider in the draft," Shely said.

Shely said the president of the New Jersey state bar and a couple of other speakers expressed concerns about the proposals. However, "this is all helpful feedback," she said.

"We're excited to see the profession recognizing that to address the issues of underemployed and unemployed lawyers and rapidly changing technology, we need to update the advertising rules," Shely said.

The ABA ethics committee is still seeking feedback on APRL's proposals. Its website says to send comments to modelruleamend@americanbar.org by March 1.

Working Group to Do Report. Shely said the Standing Committee on Ethics and Professional Responsibility has designated a working group to review the draft changes and comments, and give a report to the full committee.

The working group has representatives from all five committees of the ABA Center for Professional Responsibility, as well as the National Organization of Bar Counsel and APRL. Shely's a member of the group.

The group hopes to make a report to the Standing Committee on Ethics and Professional Responsibility by May. The goal is to get a resolution to the ABA House of Delegates for its consideration in February 2018, she said.

Shely said she's advocating APRL's proposals because she represents many firms as outside counsel and sees the advertising rules as a major problem. She's the founder of the Shely Firm P.C., Scottsdale, Ariz. Most large law firm websites violate the rules, Shely said.

"We've got to catch up with technology, and we have to help lawyers embrace changes while ensuring they don't engage in false or misleading communications," Shely said.

People need access to information about available legal services, and right now the profession's rules restrict that, she said.

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APRL's Proposals and Report. APRL's proposed amendments would radically overhaul the Model Rules on lawyer advertising if the ABA endorses them and states embrace them.

APRL detailed its draft reforms in a 2015 report exhorting the ABA to eliminate most of its model rules on lawyer advertising, leaving a single rule against false or misleading statements. The report also urged states to deal with complaints about lawyer advertising through nondisciplinary means in most cases. See 31 Law. Man. Prof. Conduct 376, 7/1/15; 31 Law. Man. Prof. Conduct 469, 8/12/15.

A supplemental APRL report in 2016 recommended updates to the ABA's model rule on solicitation of clients, including an end to the ban on certain forms of real-time electronic contact. See 32 Law. Man. Prof. Conduct 289, 5/18/16.

Panelists at an ABA program discussing APRL's reports suggested that for the most part the changes would simply make it easier for lawyers to understand what they can't do when promoting their services. See 32 Law. Man. Prof. Conduct 362, 6/15/16.

By Joan C. Rogers

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The ABA ethics committee's public comment notice, with links to the proposed amendments and the two APRL reports, can be viewed at http://src.bna.com/l03.

Confidentiality

Class Action Parties in N.D. Cal. Must Disclose Litigation Funding Agreements

Critics of the burgeoning litigation finance industry scored a minor victory last month when a California federal court adopted a policy that will allow class action defendants to discover whether their opponents are getting funding from outside investors.

The first-in-the-nation policy, announced Jan. 23, will only apply to litigants with cases before the U.S. District Court for the Northern District of California.

More significantly, the new disclosure policy will only apply to class action cases. That limitation was a disappointment for groups like the U.S. Chamber of Commerce, which has described litigation finance as "a major threat" to the integrity of the civil justice system.

The Chamber had urged the California federal court to adopt a broader disclosure rule that would require all civil parties to reveal funding arrangements with third-party investors.

But industry observers told Bloomberg BNA that the narrower policy the court ultimately announced was at least an incremental victory for critics of litigation finance. They said litigation funders—who have largely steered clear of class action cases but are clearly interested in exploring those investment opportunities—may be more hesitant to take that leap if courts around the country begin adopting policies mandating the disclosure of third-party funding.

"There are a lot of funders out there who want to get into financing class action litigation because it's kind of the holy grail, at least in terms of returns," said Elizabeth Chamblee Burch, a professor at the University of Georgia Law School.

Unmasking Funders. The Federal Rules of Civil Procedure currently do not address whether litigants must disclose any funding agreements with third parties.

The absence of black letter guidance has made it more difficult for defendants in civil litigation to discover whether outside investors have agreed to underwrite a plaintiff's litigation costs in exchange for a share of the anticipated recovery.

Defendants who suspect that outside investors are bankrolling lawsuits have tried to unmask those funders in discovery, by demanding access to any funding agreements a plaintiff may have entered into with third-party investors and any communications the plaintiff may have exchanged with those investors when requesting funding.

Several plaintiffs have resisted such discovery requests by asserting the attorney-client privilege and work product doctrine. The case law on whether those documents are privileged is "embryonic," according to Todd Presnell, a partner at Bradley Arant Boult Cummings LLP in Nashville and author of the blog Presnell on Privileges.

Because the discoverability of third-party funding agreements remains uncertain, opponents of the litigation finance industry are pushing for rules that would circumvent the privilege by automatically requiring litigants to disclose whether they have received outside backing.

Last summer, the U.S. District Court for the Northern District of California asked its rules committee to consider whether to amend the local rules in that jurisdiction to automatically require such disclosure at the outset of a case.

Partial Victory for Chamber. Last month, the court's rules committee proposed a black letter change to that jurisdiction's Local Rule 3-15, which deals with the disclosure requirements for parties who appear in civil disputes before the court.

That local rule, like others around the country, requires parties to an action to disclose all "non-party interested entities or persons" with financial interests in the subject matter of the litigation or business or other ties to the parties to the litigation.

Local Rule 3-15 gives a few specific examples of the sort of "interested" non-parties that litigants must disclose. For instance, corporate subsidiaries must disclose their parent corporations.

The court's rules committee proposed a black letter change to Local Rule 3-15 that would include "litigation funders" among those examples.

But the court declined to go that far. Instead, it announced a narrower disclosure requirement—one that would only apply in class action cases—and it did so through a "standing order" to the judges in the Northern District of California, rather than through a change to the black letter of the rule.

The order says, "In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."

Unlike revisions to local rules, standing orders do not need to be circulated for public comment.

Join 'em if you can't beat 'em? NC considers ethics rule changes to aid Avvo-like services

Blog The Law for Lawyers Today

Thompson Hine LLP

USA | May 25 2017

Avvo Legal Services has been meeting with North Carolina bar regulators, resulting in a draft proposal that would amend several legal ethics rules and make it easier for Avvo to operate in the Tar Heel State, according to Prof. Alberto Bernabe, a Chicago law professor who has seen some of the relevant documents, and blogged about them last week.

Ethical problems?

Several state legal ethics opinions have recently found client-referral services using an Avvo-like model to be ethically problematic, including opinions from regulators in Pennsylvania, South Carolina, and my home state, Ohio. Rule revisions in Florida now pending for approval by the state supreme court there likewise call aspects of the model into some question.

Some of the identified ethical issues raised by Avvo-like referral services, as identified by various ethics opinions are:

- the company — and non-lawyers — control significant aspects of the attorney-client relationship, including functions that can constitute the practice of law (see Model Rule 5.5(a));
- the structure can interfere with the lawyer's exercise of independent legal judgment on behalf of the client (see Model Rule 5.4(c));
- the way the fees are managed could constitute or invite commingling of clients' funds and lawyers' funds (see Model Rule 1.15(a));
- the fee structure makes it difficult to comply with the duty to refund unearned fees at the end of the representation (see Model Rule 1.16(d));

- a model where the lawyer is paid only after the representation is concluded makes the fees contingent on the outcome, which can violate the prohibition on contingent fees for certain kinds of cases (see Model Rule 1.5(d));
- receiving and holding client funds paid in advance may violate the lawyer's duty to hold those funds in a trust account (see Model Rule 1.15(c));
- although part of the fee paid by the client and kept by the company may be designated as a "marketing fee," the fact that such fees are calculated as a percentage of the full fee makes the arrangement likely to be impermissible fee-splitting with a non-lawyer (see Model Rule 5.4(a));
- the business model can threaten the confidentiality of the lawyer-client relationship (see Model Rule 1.6).

North Carolina considers amendments

In light of these issues, Avvo has tried to allay concerns, including by saying that its model actually comports with ethics rules, and that it is providing advertising that is protected by the First Amendment. (A recent *Georgetown Law Journal* article by Prof. Bernabe details Avvo's arguments.)

According to Prof. Bernabe, North Carolina may now be considering a different regulatory approach: amending its lawyer conduct rules to "make it acceptable for lawyers to participate in services like Avvo."

Documents he has seen include a proposal to amend the fee-splitting rule to permit payment of a portion of the lawyer's fee to an on-line platform if the amount is a reasonable charge for administrative or marketing services and there is no interference with the lawyer's independent professional judgment.

Another proposed comment amendment would allow lawyers to participate in Avvo-like rating services without fear of being held in violation of the prohibition against giving something of value in exchange for a recommendation of employment. (See Model Rule 7.2(b).)

Yet another amendment would allow the company to keep the client's payment until the end of the representation, imposing on the lawyer the obligation of ensuring that such "intermediaries" "adequately protect client funds" — instead of placing such advance payments in the lawyer's trust account.

Brave New World

Although nothing is certain yet, and the documents that Prof. Bernabe describes are certainly preliminary and might be incomplete, the path that North Carolina appears to be contemplating significantly departs from the road that bar regulators in other jurisdictions have so far taken. Whether acquiescing to market trends — even ones that seem to be irresistible — is in the true best interest of legal consumers and the legal profession remains to be seen.

Thompson Hine LLP - Karen E. Rubin

II. West Virginia Bar Opinion 2015-02 "*Social Media & Attorneys*"

A. A Few Statistics on Social Media Utilization

1. Facebook: 71% of adult internet users & 58% of entire adult population
2. Twitter: 23% of adult internet users & 19% of entire adult population
3. LinkedIn: 28% of adult Internet Users & 23% of entire adult population
4. Pinterest: 28% of adult Internet Users & 22% of entire adult Population
5. Instagram: 26% of adult Internet Users & 22% of entire adult Population

B. <u>**What Does This Mean for Attorneys?**</u> –WV Opinion. [p. 13] Not Alabama but many of points expressed in this opinion are informal opinions I provide often: In short, **The Alabama Rules of Professional Conduct Apply to Social Media**

1. **1.1 [Competence]: in order to comply, attorneys should have an understanding of how social media functions and be able to advise clients about various issues that may arise as a result of their social media presence or lack thereof**

2. **8.4(c) [Misconduct]: & 7.1** [Communications Concerning Lawyer's Services] a lawyer may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Therefore, information about you and/or your firm on social media sites must not be false or misleading. Example: endorsements on LinkedIn-make sure settings require you to review endorsements before published on your page

3. **3.3 [Candor Toward Tribunal], 3.4 [Fairness to Opposing Party & Counsel], 4.1 [Truthfulness in Statements to Others], 1.6 [Confidential Information]** (see #6 below for more on 1.6)

    a. You should advise your clients of the consequences of their social media actions affect their legal matters

    b. You may advise clients to change privacy settings but may NOT instruct clients to destroy, alter, or conceal content on social media

    c. PROVIDED YOUR CONDUCT DOES NOT CONSTITUTE SPOLIATION OR IS OTHERWISE ILLEGAL, you may instruct clients to delete from their pages information that may be damaging

    d. BUT, you must also take appropriate steps to preserve information in the event it becomes discoverable or relevant

    e. You must respond to discovery requests regarding relevant content on client's social media sites

    f. You may not advise client to post false or misleading information and if you know information is false you may not present information as truthful in client's case

    g. You may connect with clients and former clients on social media but must retain records of communication with client via social media and must NOT reveal confidential information via social media-EXAMPLE: judge in Alabama received professional discipline from JIC for communications via social networking which another lawyer inadvertently published on Facebook-PRACTICAL ADVICE: don't use Facebook or other social media sites to confidentially communicate with clients unless you have the same disclaimer on all messages that your emails have.

4. **4.2 [Communication with Person Represented by Counsel]** (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

a. Special Circumstances

1) Communication between Parties
2) Attorney as Party

3) Public Officials

b. Representation of Organizations

1) Current Employees

a) Managerial responsibility?
b) Whose act or omission imputed to the organization?
c) Whose statement may constitute an admission on the part of the organization?

2) Former Employees

a. Managerial responsibility?
b. Whose act or omission imputed to the organization?
c. Whose statement may constitute an admission on the part of the organization?

3) Communications Authorized by Law

a. Formal Opinion 2003-02
b. Communication with elected or appointed governmental officials is not prohibited.

b. You may not contact person represented by counsel through social media

c. You may not use pretextual third person or agent to "friend" someone or gain access to their social media pages-violations of 4.2, 4.1, and 8.4

d. You may view and utilize information from public social media sites

5. **4.3 [Dealing with Unrepresented Person]** (a) in dealing with a person not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

a.Again, cannot use pretextual basis-must track 4.3 language

b. As long as information obtained ethically and consistent with the Alabama Rules of Professional Conduct, you may use information obtained from social media sites in client-related matters and legal disputes

c. Discovery of information on social networking sites (see below)

e. You may accept client reviews and endorse other attorneys-must be accurate (see above)

6. **1.6 [Confidentiality of Information] [p. 92]**

a.You may comment on and respond to reviews/endorsements on social media sites, etc. Obviously, cannot disclose confidential information.

1. PRACTICAL ADVICE: don't do this. The last thing you want to be known for is the lawyer who gets into internet wars with disgruntled clients. Rarely will anything good come from arguing on the internet.

2. THAT SAID, Hunter v. Virginia, 744 S.E.2d 611 (Va. 2013)-Virginia Supreme Court overturned a decision rendered by a Virginia State Bar Disciplinary Panel which ordered Richmond attorney Horace Hunter receive a public admonition for discussing **PUBLIC** information without client's consent and the blog not having the proper disclaimers. The investigation revealed multiple clients believed the posts contained embarrassing information. The Virginia Supreme Court upheld the disclaimer violations but reversed the Panel's imposition of discipline related to violations of Rule 1.6 because the information was protected by the First Amendment. [copy of case located at p. 97]

3. Did the Virginia Supreme Court get it wrong? In my opinion, yes. There is no discussion of the Annotations for Rule 1.6 in this opinion. Specifically, the annotation for "*Previously Disclosed or Publicly Available Information.*" **RULE 1.6 CONTAINS NO EXCEPTION PERMMITTING DISCLOSURE OF INFORMATIONPREVIOUSLY DISCLOSED OR PUBLICLY AVAILABLE.** There is a long string cite

to cases standing for this proposition. [p. 111] However, the United States Supreme Court denied cert.

4. In re Skinner, 740 S.E.2d 171 (Ga. 2013) [p. 113] First, it's worth noting that Hunter was released on February 28, 2013. Skinner was released on March 18, 2013. Different facts from Hunter in that Skinner admitted in a conditional guilty plea she revealed confidential information in response to a negative review of her work product on "consumer websites." The Supreme Court of Georgia rejected the imposition of a "Review Panel Reprimand" which is "the mildest form of public discipline." The Georgia Supreme Court specifically noted disbarment was maximum penalty for a violation of Rule 1.6. Was Skinner disbarred? After being remanded, the special master recommended a public reprimand. All Justices of the Supreme Court of Georgia concurred in its May 19, 2014 opinion affirming the public reprimand. [Side note: had this matter been handled in Alabama, it is my opinion Skinner would have received a suspension of at least 91 days in spite of her mitigating factors. Would it be affirmed by the Alabama Supreme Court? No idea.]

b. **PRACTICE POINTER**: ALWAYS get written consent from clients to disclose any information related to the representation.

7. **3.6 [Trial Publicity], 3.5 [Impartiality & Decorum of the Tribunal], & 8.2 [Judicial & Legal Officials**

a.3.6: your social media sites are obviously subject to this rule. Thus, do not make extrajudicial statements on these sites if you know or reasonably should know it will have a substantial likelihood of prejudicing an adjudicative proceeding

1. 6 factors determining the above (*Alabama Rules of Court* at 1013 [p 116]

2. Exceptions: (Id.)

b. 3.5 [You shall not (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding; (c) after conclusion of trial communicate or attempt to communicate with jury or alternate juror without first applying for and receiving an order from the Court to this effect and provide notice to all parties; and (d) engage in conduct intended to disrupt a tribunal

1. Not surprisingly at this point in the materials/sad excuse for a presentation, THIS RULE APPLIES TO SOCIAL MEDIA. Shocker, right?

2. You may connect with judges via social networking sites provided the purpose is not to influence the judge in performing her/his official duties

   a. PRACTICE/PRACTICAL POINTER/COMMON SENSE: Generally, I don't recommend friending or connecting with members of the judiciary if you do not have a true prior friendship. If said judge wants to connect with you via social media, let them be the person who sends the connect/friend request

   b. For those of you perusing my Facebook friends list/LinkedIn/Instagram pages, yes I am friends with judges as I'm sure are many of you. Two are my former employers and I followed my own rule in (a). Another I was friends with before he was elected judge. [Stream of consciousness side note: I see one of my friends who was in my leadership forum class has either de-friended me or shut down his Facebook account; I really hope it's the latter]

c.**8.2**: (a) You shall not make statements you know to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate to any of the above; (b) lawyer who is candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.-THESE RULES APPLY TO SOCIAL MEDIA. **Seems like a no brainer, right?** Apparently, not. I have at least one ongoing investigation involving possible violations of this rule via social media. **PRACTICE POINTER**: I strongly advise against feeding information that is potentially violative of this rule to a non-lawyer "blogger" who definitely does not have a journalism degree and also clearly has no concept of libel.

8. **RULES 7.1-7.6 APPLY TO SOCIAL MEDIA**

   a. Advertising is any communication regarding the legal services you provide made to persons with whom you do not have a prior personal or professional relationship

   b. Social media sites require the Rule 7.2(e) disclaimer or, if applicable, the extended testimonial disclaimer found in Disciplinary Commission Opinion 2003-01 entitled "Various Advertising Issues Addressed" (see the answer to question #10)

   c. Social media sites are subject to the Rule 7.2(b) filing requirement

   d. Unlike the Florida Bar which charges $150 per advertisement for mandatory review, I will happily review your advertisement (including social media) for compliance with the Rules of Professional Conduct at no charge (much like OGC's opinion service described in ASB President Lee Copeland's latest video message disseminated via multiple forms of social media, advertising review is included as a service that comes with your occupational or special license). In my response, I will either advise you how to bring your advertisement into compliance or I will respond, "[t]he attached advertisement appears to comply with [insert applicable 7 series rule here]…."

III. BRIEF CASELAW DISCUSSION OF SOCIAL MEDIA/ETHICS (copies of all opinions included at conclusion of materials)

A. ALABAMA CASES

1. Culp v. State of Alabama, (No. CR-13-1039), ___ So. 3d ___ (Ala. Crim. App. 2013) [p. 37] -Proper authentication of emails for evidentiary purposes; Rule 901(b)(4), Ala.R.Evid, "evidence can be authenticated by "[d]istinctive characteristics and the like including appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The Court of Criminal Appeals applied this standard and held the circuit court did not abuse its discretion in admitting them into evidence. **PRACTICE NOTE**: authentication for "electronic means of communication" discussed in this opinion and, as noted by Judge Burke, an exhaustive discussion of proper authentication of electronic communications is found in State v. Thompson, 777 N.W. 2d

617, 624 (N.D. 2010) (copy attached at conclusion of materials). My admittedly limited research did not reveal any different analyses for proper authentication of social media.

2. Ex parte Wright, 166 So.3d 618 (Ala. 2014). [p. 44] Here, the Alabama Supreme Court granted two petitions for mandamus and issued the writs in a matter where the circuit court issued a protective order and a subsequent order mandating immediate compliance with said protective order. In these orders, plaintiff's counsel was barred and enjoined from making extrajudicial references to the circumstances surrounding a lawsuit filed against A-1 Exterminating. Plaintiff's counsel was further ordered to remove any mention of the matter from its website, Facebook page, LinkedIn, any social media, and web related search engines. Lastly, the plaintiffs and counsel were ordered to refrain from referencing the case outside of court. The Court provided a detailed analysis of Rule 3.6, Ala. R. Prof. C., as well as a detailed analysis of caselaw regarding similar fact circumstances and the First Amendment. The Court concluded that the trial court's orders were overbroad and that any subsequent protective order should be narrowly tailored so that it utilizes the least restrictive means necessary to protect A-1's right to a fair trial.

3. W.G.M. v. State of Alabama, 140 So.3d 491 (Ala. Crim. App. 2013). [p. 56] Appellant alleged juror misconduct for, amongst other reasons, failure of a juror to disclose Facebook friendship with State's witness and the prosecutor. The Court held that because no questions about social networking were asked in voir dire, there was no evidence the juror willfully provided false information. More interesting was the Court's fairly extensive analysis that being friends on Facebook with someone does not, per se, establish a close relationship from which bias or partiality on the part of the juror may be reasonably presumed. Like multiple other jurisdictions, W.G.M. excerpts analysis on juror bias due to Facebook friendships from McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013) [p. 69], in reaching its conclusion. The holding in W.G.M. appears to be the same on this issue in other jurisdictions cited.

4. Clore v. Clore, 135 So.2d 264 (Ala. Civ. App. 2013) [p. 63] divorce action where wife alleged a new trial was warranted as well as recusal of the trial judge due to the Facebook friendship of the judge and the parties' adult daughter. The Court held that the existence of the Facebook friendship was discoverable by the wife well before the trial and failed to rise to the level of retroactively undoing the work of the trial court.

5. Grimes v. Saban, 173 So.3d 919 (Ala. 2014) [not included] I think must everyone has heard of this case. There is no real precedential value with regard to social media and/or ethics but the a significant portion of the

facts upon which the lawsuit are based involve a Facebook post leading, at least in part, to fisticuffs.

6. My research revealed very few, if any, additional Alabama cases with a holding involving social media and/or ethics.

B. A few noteworthy treatises & cases outside Alabama

1. *Pretrial Involving Facebook, Myspace, LinkedIn, Twitter, & Other Social Networking Tools*, 121 AMJUR POF 3d 1 (not in the OGC's Westlaw plan not could I find in google scholar so not available in these materials...SORRY)

2. Richter, Jeffrey Brian, "Discovery of Social Network Data in Litigation" *Law School Student Scholarship.* Paper 554 (no, this does not remotely look like a Bluebook cite but the front page of the document provides the above as the recommended citation) [long so I have a copy available for review if you so desire]

3. 119 results on google scholar ranging from voir dire, ethics, prosecution, evidence gathering, etc.

4. Baidoo v. Blood-Dzraku, 48 Misc. 3d 309 (Supreme Court, New York County, 2015). [p. 78] Service by Facebook private message where all other methods of service failed, comports with all constitutional standards of due process. Interestingly, the Court specified the plaintiff's lawyer would log into the plaintiff's Facebook account, identify who he was, include a web address of the summons or an image thereof, this process was to be repeated once a week for three consecutive weeks or until defendant acknowledged receipt. Additionally, the Court further ordered plaintiff's counsel to call and text message the defendant to advise the summons was sent via Facebook private message.

5. Allied Concrete Company v. Lester, 736 S.E.2d 699 (Va. 2013). [p. 82] This opinion provides a detailed analysis of spoliation of Facebook evidence which resulted in an adverse jury instruction stating, *inter alia*, the plaintiff was asked in discovery to provide information from his Facebook account but in violation of the Court's order he intentionally and improperly deleted photographs you [the jury] should presume the deleted photographs were harmful to his case. The Court read this instruction to the jury once while the plaintiff was testifying and again before closing arguments.

6. Crispin v. Christian Audigier, Inc., et al., 717 F.Supp.2d 965 (C.D. Cal. 2010) [long so single copy available if needed] Here, Crispin sued Audigier and multiple other defendants for multiple torts including but not

limited to breach of contract and copyright infringement. The federal magistrate issued an order rejecting Crispin's motion to quash subpoenas issued by the defendants to Facebook, Myspace, and two internet vendors because, *inter alia*, the Stored Communications Act ("SCA") did not apply because it reached only electronic communication service ("ECS") providers and third-party businesses were not defined as ECS providers in the statute. Although it does not necessarily involve ethics, I included this case in the materials because it appears to be the most cited case in the country (506 times per Westlaw including 60 cases) interpreting the SCA which anyone litigating issues involving discovery of social media sites will need to, at least at a basic level, understand. In an incredibly detailed analysis of both the SCA and quashing of subpoenas under the SCA, the Court vacated the magistrate judge's order in part holding that the subpoenas seeking private messaging information were inherently private and not readily accessible to the public. The district court remanded the issue involving Facebook wall posts and Myspace comments so the magistrate judge could develop a more full record with regards to the privacy settings which would definitively settle that issue.

I. The Office of General Counsel of the Alabama State Bar

A. Who we are:

General Counsel
Douglas McElvy - douglas.mcelvy@alabar.org

Assistant General Counsel
Jeremy McIntire - jeremy.mcintire@alabar.org CSF
Mark Moody - mark.moody@alabar.org Advertising, UPL
Tripp Vickers - tripp.vickers@alabar.org – Represents Bar when sued (usually federal court)

B. What we do:

- Continuing Legal Education
- Ethics Opinions
- Disciplinary Process
- Reinstatement Proceedings – Rule 28, Ala. R. Disc. P.
- Disability Proceedings – Rule 27, Ala. R. Disc. P.
- Character and Fitness Appeals
- Represent Bar in Litigation
- Reviews Attorney Advertising

C. Ethics Opinions

1. Formal Opinions

Rule 18, Alabama Rules of Disciplinary Procedure

"Rule 18 Conduct Not Subject to Disciplinary Action

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives therefrom a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action."

2. Informal Opinions

1. What can we do?

   We'll give you informal opinions regarding your own prospective conduct.

2. What can't we do?

a. Comment on the conduct of another lawyer
b. Comment on your past conduct
c. Answer hypothetical questions
d. Give legal advice
e. Apparently, I cannot properly utilize the outline format in Word. My apologies. You will see below.

3. **Write** -Alabama State Bar, P.O. Box 671
Montgomery, Alabama 36101-0671

4. **Call** – 334-269-1515 or 800-354-6154

5. **Do-it-yourself** – www.alabar.org/ogc/

D. Disciplinary Process

1. Duties and Functions of the General Counsel

Rule 6 [The General Counsel], Ala. R. Disc. P.

(a) Duties and Functions. The General Counsel for the Alabama State Bar shall exercise and perform all of the duties, functions, and powers conferred upon him or her by these Rules, including, but not limited to:

(1) Performing all prosecutorial functions, consisting of screening all information relating to alleged lawyer misconduct or incapacity that comes to his or her attention to determine whether the alleged misconduct is within the jurisdiction of the Disciplinary Commission and the Disciplinary Board;

(2) Investigating all allegations which, if true, would constitute grounds for discipline or transfer to disability inactive status;

(3) Recommending disposition based upon the facts revealed by the investigation;

(4) Prosecuting matters at all stages; and

(5) Any other duty or responsibility conferred upon him or her by the Executive Committee of the Board of Commissioners of the Alabama State Bar.

(b) Staff. The General Counsel, with the approval of the Executive Committee of the Board of Commissioners of the Alabama State Bar, shall appoint and supervise the members of his or her staff. References to the General Counsel shall be deemed to include the assistants to the General Counsel of the Alabama State Bar.