COMMENTS
Technology Working Group Issues Papers

“Client Confidentiality and Lawyers’ Use of Technology” &
“Lawyers’ Use of Internet Based Client Development Tools”

ABA Standing Committee on Client Protection..................................................p.4-6

Diane Ainsworth, Adjunct Prof., Northwestern University School of Law.......... p.7-8

Wells H. Anderson, JD....................................................................................p.9

Nicole L. Black, Esq.,.....................................................................................p.10-11

Larry Bodine, Business Development Advisor, LawMarketing.com ............p.12

Carolyn Elefant, Creator, MyShingle.com....................................................p.13-44

Chi Eng, CEO & Founder NeuLexa Corp......................................................p.45-46

Jonathan I. Ezor, Asst. Professor of Law & Technology and Director, Institute for
Business, Law and Technology, Touro College Jacob D. Fuchsberg Law
Center............................................................................................................p.47-51

Gordon Firemark, JD......................................................................................p.52

Ross Fishman, CEO, Fishman Marketing, Inc..............................................p.53-55

Richard Gallagher, Gallagher Law Firm, LLC..............................................p.56

Pamela K. Gracyalny, General Counsel, Total Attorneys............................p.57-60

Kellen Hade, law school student, U.C. Berkeley........................................p.61-93

Hellerman Baretz Communications..............................................................p.94-101

Silvia Hodges, Adjunct Associate Professor, Fordham Law School..........p.102

J. Hopkins, JD...............................................................................................p.103-118

Francis Jackson, JD.....................................................................................p.119

Josh King, Vice President, Business Development & General Counsel
Avvo, Inc......................................................................................................p.120
Jack Knust, Attorney, Mediator, Collaborative Lawyer, and Counselor at Law, The Collaborative Law Group………………………………………………………….p.121

Dan Krohn, JD……………………………………………………………………………p.122

Paul Lippe, CEO Legal OnRamp ……………………………………………………….p.123-124

Law Firm Risk Management Advisory Board…………………………………….p.125-130

The Legal Cloud Computing Association…………………………………………p.131-138

Legal Marketing Association………………………………………………………….p.139-172

D.J. Marcus, JD…………………………………………………………………………..p.173

Jack Marden……………………………………………………………………………..p.174

Roger Morrison, JD…………………………………………………………………….p.175

Tom Oloffson, JD…………………………………………………………………………p.176

David Palmieri, Vice President/Managing Director Marketing and Consumer Solutions, LexisNexis…………………………………………………………………..p.177-178

Jonah M. Paransky, Vice President Law Firm Practice Management, LexisNexis………………………………………………………………………………….p.179-185

Sara Rittman, Legal Ethics Counsel, Advisory Committee of the Supreme Court of Missouri…………………………………………………………………………….p.186-187

Normarie Rodríguez-Pérez, LL.M. student…………………………………………..p.188-214

Malcolm Ruthven, JD…………………………………………………………………….p.215

Patrick Scharmer, JD…………………………………………………………………….p.216

Andy Seger, JD…………………………………………………………………………….p.217-253

Gregory Sisk, Professor of Law, University of St. Thomas School of Law (Minnesota) ………………………………………………………………………………….p.254-295

E. David Smith, JD…………………………………………………………………………p.296

Elizabeth Tarbert, Ethics Counsel, The Florida Bar………………………………….p.297

Vien Ton, CEO & General Counsel, LawNovo, Inc…………………………………p.298-302
Kenneth K. Vanko, JD.................................................................p.303-305
McLeod Verlander, JD.................................................................p.306
Richard Vetstein, JD.................................................................p.307
Rebecca Weinstein, Esq., Director of Lawyer Division,
OnlineVisibilityExperts.com..........................................................p.308-328
Randy Wilson, JD.................................................................p.329-330
Tina Jade Wong, JD.................................................................p.331-334
The Standing Committee on Client Protection (the “Committee”) has reviewed the September 20, 2010 memoranda from the Commission on Ethics 20/20’s (the “Commission”) Working Group on the Implications of New Technologies. The Committee continues to be impressed with the Commission’s thoughtful and thorough work product and is appreciative of the ongoing opportunity to comment on the Commission’s progress.

The Comments provided by the Committee are meant to address issues as they relate to the public and client interest. They are in no way meant to limit the lawyer’s access to available technologies. The Committee’s comments are provided separately for each paper and follow the order of the issues raised.

**Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology**

The Committee strongly supports the Commission providing practical guidance to lawyers regarding client confidentiality when utilizing available technologies to store client information. The Committee encourages the Commission to provide this information in the form of a white paper, website, or other medium that can be easily updated to suit changing technologies.

The Committee also encourages the Commission to consider what a lawyer’s ethical obligations are when utilizing these technologies. While there is inherent risk in any form of electronic records storage, whether it is in the “cloud” or lawyer controlled, lawyers who choose to take advantage of these technologies should exercise extraordinary diligence in protecting client information. The Committee believes that the standard should be in line with a best practices standard, and a failure to adhere to that standard that results in the exposure of confidential client information should carry disciplinary consequences.

Accordingly, the Committee encourages the Commission to develop a set of criteria that reflects a best practices standard. The Commission could then maintain a list of reputable cloud computing vendors that meet the stated criteria. While the list would not be an ABA “certification,” it would serve as a resource for lawyers who may not have the technical knowledge to accurately assess these companies, it would serve as a resource for clients who want to make sure their information is protected, and it would encourage vendors to operate at a high standard in order to compete for business.

The Committee acknowledges that a law office’s size, resources, practice areas, and clientele may affect its internal business decisions. However there should be a minimum standard of practice that lawyers within a firm must satisfy to protect client information. The Committee
recognizes that some vendors may price their services at a higher rate if it considers itself an “ABA-listed” vendor, potentially pricing out smaller firms with limited resources. In order to discourage this, the Committee recommends the Commission consider pricing when assessing vendors.

**Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools**

As the Commission correctly notes, the public relies on the Internet as a major source of information. The Committee has no doubt that the intent of most lawyers is to provide accurate information that relates to the lawyer’s area of practice with the added benefit of broadened exposure for the lawyer and the lawyer’s practice. Lawyers should be able to compete in the legal marketplace while taking advantage of opportunities offered through the Internet. However, this form of communication creates a specific set of dangers for lawyers, the public, and current and prospective clients. The Committee strongly encourages the Commission to offer guidance to lawyers regarding issues and risks associated with online client development tools.

**Social Networking Sites**

The Working Group correctly identified most issues associated with social networking sites in its Issues Paper. The Committee requests that the Commission’s guidelines include the requirement of a disclaimer that should be immediately visible when a member of the public views a lawyer’s social networking site. Additionally, any direct communication between the lawyer and a member of the public should begin with a version of the same disclaimer.

The Committee cautions, however, that disclaimers are not fool-proof and should not be viewed as an absolute protection for the lawyer or members of the public. Too often, disclaimers are written so that their message is unclear to a lay person. When the message is unclear, it is generally the member of the public who suffers. The disclaimer that is included on the front page of the lawyer’s social networking site should specifically comply with the requirements of Rules 7.1, 7.2, 7.3 and 7.4 of the ABA Model Rules of Professional Conduct, specifically the requirement in Rule 7.1 prohibiting false or misleading statements and Rule 7.4 requiring a clear statement that the site is advertising. Direct communication disclaimers should include a clear statement that the communication does not create a client-lawyer relationship and lawyers should be careful to limit the content of direct communications and refrain from asking case-specific questions so that inadvertent client-lawyer relationships are not formed.

Finally, the Committee encourages the Commission to consider an ethics opinion to address the issue of gathering information through networking sites. Some of the issues that the opinion should cover include: the difference between public and private information on a site, when disclosure is necessary (i.e. requesting someone as a “friend” without disclosure), whether disclosure is necessary when the person requesting is an employee of or contracted by the lawyer, and the level of disclosure necessary when the person is a witness and not an opposing party.

**Blogging or Discussion Forums**
The Commission’s Issues Paper addresses three different kinds of lawyer-run blogs: those that are associated with a lawyer’s website, are clearly meant to serve a marketing function, and are clearly subject to series 7 advertising rules; those that are a lawyer’s personal blog with no connection to the lawyer’s professional background that clearly do not trigger the advertising rules, and those that are set up to discuss a particular type of legal issue, but are not directly connected to a particular law firm or lawyer. The Committee agrees with the Commission that this third category is the most problematic.

The Committee encourages the Commission to develop an amendment to the comments in Rule 7.3 of the Rules of Professional Conduct to address a lawyer providing legal advice or expertise on a website or blog that is not clearly associated with the lawyer’s professional website. A lawyer may raise issues and questions when participating on these sites. However, when the lawyer seeks to provide advice based on his legal knowledge or submit information regarding the lawyer’s practice, rules governing contact with potential clients are triggered.

Lawyers should also be mindful of issues related to the multijurisdictional practice of law. For example, a lawyer licensed in one jurisdiction may provide erroneous information to an individual in another jurisdiction based on his home jurisdiction’s laws. Or a lawyer may suggest that an individual seek the advice of counsel in that individual’s jurisdiction with or without a specific recommendation. In the latter situation, the lawyer’s suggestion without a specific recommendation may have different consequences than the lawyer recommending the individual contact specific counsel.

The Committee is particularly concerned with confidentiality issues associated with JD Supra and similar websites. The Committee suggests adding a comment to Rule 1.6 of the ABA Model Rules of Professional Conduct to address the lawyer’s responsibility to maintain the client’s confidential and personally identifying information when posting documents on these sites. The Committee also believes that client consent should always be required before posting documents related to that client, whether or not they include personally identifying information.

Lawyer Websites

The Committee believes that the newly adopted ABA ethics opinion 10-457 (2010) covers most of the issues related to lawyers’ websites. However, the Committee asks that the Commission be clear that we now live in a “Google Nation,” and much of the public believes that the answer to any conceivable question, including legal questions, can easily be found online. The Committee does not assert that the public’s dependence on the Internet is in any way the responsibility of an individual lawyer to control. But, lawyers must be mindful that as this reliance increases, the need for the lawyer to provide accurate information online also increases. If a lawyer makes the decision to actively provide specific legal information online (lawyer website or lawyer controlled blog), it becomes the lawyer’s affirmative duty to provide regular updates for that information if it changes for as long as the information remains public. Accordingly, the Committee believes that an amendment to Rules 4.1 (a), 7.1, and 8.4 (c) might be appropriate.
Dear Vera,

re: ABA Proposal to regulate online marketing by attorneys: additional comments.

I had occasion to view the podcast from the "Divorce Deli" lawyer, which I have been told, forms the basis of the ABA Proposal to further regulate lawyers internet marketing. Although what the lawyer did was in bad taste, there is no basis for concluding that the lawyer violated any ethical rules and there should not be any new rules that would require that conclusion. I and other lawyers I have talked to object to the regulation of bad or good taste by the ABA or any other regulatory body.

The decision to use this method of marketing should be left to the individual and not be tampered with. There is no objective or verifiable standard that can be used to assess the good taste of ads presented by lawyers or individuals, nor, in a free society, with a Constitution such as ours, should there be.

Diane Ainsworth
Re: ABA's plan to restrict lawyer marketing on the internet.

Dear Vera:

I am a lawyer in Illinois and I am distressed and concerned about the ABA proposal to regulate online "marketing' by lawyers. The internet is a free forum and for the first time millions of people have access to a way to express their desires, wants and needs without suppression. I believe the internet is the first equal opportunity employer of all time. I think it also provides solo practitioners, small firms and lawyers of every ilk with a way to effectively market, advertise, keep in touch, promote and participate - not just their practices but who they are. Further, they can for the first time do so in a truly open and competitive environment, because of the cost-effectiveness of this medium.

I urge the ABA to refrain from attempting to market or even propose guidelines for lawyer marketing on or via the internet. We are already required in most states to keep track of our postings, and Registration Commissions of all states as well as lawyers see how inanely and unnecessarily frustrating such a task can be. There is no adequate way to keep track of the exercise of all of first amendment expressions except by complete suppression. We must stop fascism in all its forms, even if it hides under the rubric of "regulation". Moreover, we already have ample guidelines and restrictions regarding lawyer advertising provided by the ABA.

Sincerely,

Diane Ainsworth
Attorney at Law
Adjunct Prof-Northwestern University School of Law
Wells H. Anderson:

ABA Staff:

As a licensed attorney, a technology consultant to small law firms and solo practitioners, and long-time member of the American Bar Association, I urge the ABA Commission on Ethics 2020 to take into consideration the following positions and comments corresponding to the questions enumerated in the Conclusions section of Client Confidentiality and Lawyers’ Use of Technology (September 20, 2010):

1. Yes
   a. Best practices for technological security
   b. Lawyers rely on peers, CLE ethics classes, bar associations and consultants.
2. Yes
3. Yes. The Commission should propose comments to the existing rules illustrating compliance and referring to ABA online resources called for in 2, above.
4. No comment.
5. Cloud computing needs no Model Rules amendments but rather should be dealt with based on existing rules.
   a. Cloud computing presents issues that differ significantly from traditional outsourcing and should not be forced into a category where it does not fit.
   b. No obligation to negotiate terms should be imposed on lawyers; rather, lawyers should be obligated to use due diligence in investigating vendor policies, practices and reputations. These aspects are covered by existing ethical obligations and rules.
   c. As an immature industry, there are no de facto standards and terms are rarely negotiable. However, disclosure of a cloud computing vendor’s policies and practices should be expected of the vendor and insisted upon by attorneys.
6. Yes. Recommendations should take the form of practice guidance. Precautions are a constantly evolving and multiplying, so they not amenable to the MRCP amendment process.
7. No comment.

Thank you.

Wells H. Anderson, J.D., CIC
Active Practice LLC
Dear Ms. Vera,

The following are my comments regarding the ABA 20/20 Commission's paper "Lawyers' Use of Internet Based Client Development Tools."

First and foremost, I question the way in which the social media question is framed. Specifically, the use of the words “Internet-based client development tools” in the heading of the letter implies that, by virtue of having a law degree, client development is always the primary underlying motivation anytime lawyers interact online. This is not a presumption when attorneys interact with others offline. Yet, because a novel and different medium is now being used to interact, client development issues are apparently triggered by default whenever attorneys interact online.

Second, when discussing social media use by lawyers, the commission explains that “[b]ecause lawyers frequently use the websites and services for both personal and professional reasons, the legal ethics issues in this context are more complicated than they might have been for more traditional client development tools.”

This statement appears to include the assumption that prior to the advent of social media, lawyers never interacted with others offline for both personal and professional reasons. In other words, the Commission appears to be saying that lawyers engage in community activities with only a personal or professional motivation and the two underlying motivations never intersect.

In that case, does the the commission believe that golf outings with other attorneys, judges, clients or potential clients are undertaken solely for personal enjoyment, with no hope of advancing professional goals?

Likewise, volunteering one’s time as a member of a not-for-profit board is always done solely out of the goodness of a lawyer’s heart and for personal enjoyment (since the board meetings are usually oh-so-exciting). Similarly, participation in a local Rotary Club also is done solely for personal reasons, with nary a thought of professional advancement ever entering the lawyer’s mind.

I would argue that that’s simply not the case. If your career involves providing services to the public, anytime you interact with others in their community, you should have both professional and personal goals in mind. If that’s not the case, then you likely will be out of business in no time flat.

That’s not to say, of course, that every time an attorney interacts with another person — online or off — he or she does so with professional goals in mind. It simply depends on the unique nature of the specific interaction at issue. Some are personal, some are professional. Others are a combination of the two.

For that reason, I believe that the rules as they exist are perfectly sufficient to govern such conduct, and no additional oversight or interference is needed. Online interaction simply is an extension of offline interaction. It does not, by virtue of its unique format, 

Nicole L. Black:
merit a separate category requiring additional, more stringent oversight. Rather, common sense application of existing rules is all that is required.

Thank you.

Regards,

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Nicole L. Black, Esq.
Profiled as an ABA Legal Rebel

Book co-author: Social Media for Lawyers: the Next Frontier, Criminal Law in New York, and currently writing "Cloud Computing for Lawyers" (to be published by the ABA in late 2010)

Of Counsel, Fiandach & Fiandach
RE: Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools

December 6, 2010

Dear Commission on Ethics:

As a member of the Wisconsin bar for 29 years and a renewed member of the ABA, I am writing to insist that the ABA Commission on Ethics 20/20 take no action on any of the issues identified in its September 20, 2010 issues paper.

It is not necessary to burden online lawyer marketing, such as Facebook, LinkedIn, Twitter, blogs, discussion forums, JD Supra and lawyer websites with additional ethics rules. Model Rule Rule 7.1 “Communications Concerning a Lawyer's Services” already states that “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.” This is sufficient.

Rather than pursuing a lawyer for what was said in a Tweet, disciplinary authorities should better spend their time identifying and reprimanding dishonest and deceitful lawyers.

If enacted, rules outlined in the “Issues Paper” will have many deleterious effects:

- The public will suffer because there will be less information to find online about attorneys, FAQs and articles about the law, and how lawyers can help them.
- Ethics burdens on marketing will unfairly hurt solos, GPs and lawyers in small and mid-sized firms, which heavily use online marketing.
- The ABA’s proposed actions will cause a chilling effect on a lawyer’s right to commercial free speech, first established in In Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

What is needed is less regulation of online lawyer marketing. I urge the ABA not to amend the Model Rules, issue formal ethics opinions, or offer policy statements to the House of Delegates concerning lawyer’s use of the Internet to grow their practices.

Very truly yours,

Larry Bodine, Esq.
December 15, 2010

ABA Commission on Ethics 20/20

Re: Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools

Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology

To the ABA Commission on Ethics 20/20:

My name is Carolyn Elefant and I am a proud solo by choice, with a law practice in Washington D.C. where I focus on energy regulatory and emerging renewables, federal siting and eminent domain, appeals and Section 1983 matters. In December 2002, I launched MyShingle.com, is the longest running blog and on solo and small firm practice and an ABA Top 100 Blawg for four years in a row. I am also the author of Solo by Choice: How to Be the Lawyer You Always Wanted to Be (Decision Books 2008), the only comprehensive guide on starting a solo practice in the 21st century, and co-author with Nicole Black of the ABA best-seller, Social Media for Lawyers: the Next Frontier (July 2010). Through my own personal experiences as a solo as well as through writing MyShingle, participating in the ABA’s Solosez listserv and speaking at solo conferences nationwide, I believe that I have a good sense for the concerns of solo and small firm practitioners. I submit these comments on behalf of myself as well as my fellow, actively practicing solo and small firm attorneys to ensure that we have a voice in rules that will shape our future.

Due to time constraints, I am submitting one set of comments in response to the two above captioned issues papers. The first part of these comments addresses use of internet-based client development tools; the second part

1 As an Ethics Commission, I trust you will take note of my use of the term “focus” rather than its evil, ethics-violating twin, “specialize.”
addresses client confidentiality and lawyer technology. In the interest of brevity, I have attempted to keep these comments short. However, I also attach my briefing on the rules (November 4, 2010) which further amplifies my position. I appreciate the opportunity to submit these comments.

I. Lawyers Use of Internet Based Client Development Tools

A. ABA Must Balance Benefits With Non-Existent Harm of Web Based Tools

The Issues Paper begins with the erroneous assumption that lawyers use internet based tools solely for marketing. We also use the Internet, and particularly social media, to educate clients and ourselves and to interact and build relationships with other lawyers. For solo and small firm lawyers in particular, the web and social media are a godsend in that they provide access to knowledgeable colleagues to brainstorm about cases, mentors whom young solos need now more than ever in a grim economy and friendship. Because of the web, I am a far more educated, informed and engaged lawyer than I was two decades ago, which in turn means that I can deliver more effective service to my clients.

At the same time, client complaints about lawyer use of the Internet are, at least to my knowledge, essentially non-existent. Most of the complaints brought about “pay per click” advertising or other ethics matters come from competitors, not clients. Other complaints grow out of witch hunts audits conducted by various bar regulators, who apparently have nothing better to do than scan lawyer websites and Linked-In profiles to determine whether they use naughty words like “specialization” or include client testimonials full of unverifiable superlatives. It is not the role of the ABA and bar associations to serve as an arbiter for disputes between competitors or to concoct problems where none exist. Nor do the ABA and bar associations have the authority to stifle the rights of clients and colleagues to express an endorsement or provide a testimonial at a third-party website.

As the ABA moves forward with this initiative, it must balance the harm to consumers that will arise out of prohibiting, limiting or over-regulating Internet and social media tools against whatever goals the ABA hopes to accomplish.

B. Uniformity is Paramount

The ABA must engage the 50 state bar regulators and collectively adopt a uniform position on use of Internet tools. First, lack of uniformity puts solo and small firm lawyers in multi-jurisdictional practices at a disadvantage. A lawyer barred in both a permissive and restrictive state must follow the rules of the more restrictive state. So if the restrictive state prohibits testimonials, the lawyer will be at a disadvantage to competitors in the permissive state which allows them.
Second, lack of uniformity is confusing to potential clients. Increasingly, clients are engaging the Internet to find lawyers and in doing so, may stumble across lawyer websites in other jurisdictions. If these websites permit testimonials, a client in a restrictive jurisdiction might wonder why there are no lawyers in his state that allow testimonials, and might come to the conclusion that none of them are qualified because of it.

Finally, technology is moving too fast for each state to adopt a separate position on Internet use. State bars are already resource constrained, and should be devoting the resources that they do have to helping unemployed lawyers with reduced price CLE or legal research. There is simply no need to reinvent the ethics wheel 50 times, and in 50 different ways.

C. The World Is Changing Too Quickly to Pin Down With Rules

The ABA cannot issue rules governing Internet use and social media. For starters, those rules would be obsolete by the time they are adopted. Look at the ABA’s recent opinion on websites, ABA 10-457, which came out a 15 years after the first lawyer websites came online.

Second, the Internet and social media change only the media, they do not change the message. Nor do they alter our obligations as lawyers to protect client confidences, avoid deceptive practices. Lawyers inherently understand what is permissible based on what they have done in the past.

This is also why it is so important to have those who make the rules for the profession fully engaged in the technologies that they are regulating. Quite frankly, it is dismaying that only one or two of the ABA Commission members blog (and then, only as part of a group or firm blog) while only one that I can tell engages Facebook. I have been using these technologies for 15 years. I launched my website in 1996, my blogs in 2002 and 2003, and began participating in social media around 2006. Once lawyers begin to engage these technologies, the decisions about what is appropriate on Facebook or Twitter come as naturally as knowing what is appropriate when chatting with a judge at a cocktail party or passing out business cards at a PTA meeting. It becomes obvious to discern the difference between a content-rich blog that is no different from a law review article (and therefore, is not advertising) and a blog that is nothing but a shell for blatant solicitation. I implore the Commission members to engage social media and use it steadily for six months before taking any action to regulate it.

The remainder of my position related to social media and ABA regulation may be found in my power point presentation, at Slides 14-18.
I. Lawyer Use of Technology

A. ABA Must Balance Use and Have Uniformity

As with social media, technology is indispensable to solo and small firm practitioners. In particular, cloud applications are reducing the cost of starting and running law firms and more importantly, actually succeeding in convincing lawyers to use practice management tools. Any restriction on use of internet based tools must balance the harm that will come from increasing the cost of technology.

Also, as with social media, uniformity is paramount for regulation of cloud computing applications. Lack of uniformity will require solo and small firm lawyers to maintain redundant systems, and will require vendors to develop different products to satisfy different bar associations which increases development costs. In addition, getting technology “right” is a costly endeavor and no single bar has the resources to do so. The ABA and the 50 bars should pool their resources and collaborate on technology issues.

B. No Rules, Just Risk Assessment

Technologies change, so strict rules are simply not feasible. Moreover, rules will either over regulate or under regulate depending upon a lawyer’s circumstances and practice area. A solo who handles social security cases and deals with hundreds of files with social security number has higher risks in the event of breach than a solo who handles appellate matters, where all of the documents are already public in the proceeding below. Different security standards should apply.

Moreover, nothing is risk-free. Papers can be stolen from a locked building as readily as they can be hacked from a computer. Striving for perfect security will only increase costs without commensurate benefit.

C. Cloud Computing is NOT Outsourcing

The concept of cloud computing as outsourcing is almost so ridiculous as to not warrant a response. Are trust accounts outsourcing? What about my telephone service? To be sure, lawyers should be careful with client data, just as they should be careful with client funds. But just as we do not require lawyers to check the status of their bank, we should not impose similar obligations on them with respect to cloud providers.

Moreover, the proposal to require client consent to a lawyer’s choice of practice management tools is both foolhardy and completely out of step with the direction of privacy and consumer protection advocates who reject the “notice and consent” standard. The ABA would look quite foolish indeed to okay a

2 See, e.g., David Vladeck, Privacy: Where do we go from here?, Speech to the International Conference on Data Protection and Privacy Commissioners, Nov. 6, 2009, (“[The notice and consent
measure that allows clients to consent to use of a practice tool when the FTC and other consumer advocates vehemently reject this model.

D. The ABA Should Not Regulate Sensitive Data

Lawyers have a confidentiality duty, to be sure. But it is a stretch to suggest that the obligation to confidentiality justifies ABA regulation of lawyer handling of personal, sensitive data like credit card numbers, social security numbers, etc…The federal government and states have laws regarding use and disclosure of sensitive information and when a company must give notice of a data breach. Lawyers who deal with this information must be subject to federal and state law, not ABA law. To the extent that the ABA (like the AMA has done) chooses to offer best practices for dealing with sensitive information, it might do so. But the ABA should not issue rules on matters already covered by federal and state law.

E. Best Practices and Certifications

When it comes to technology, solo and small firms want flexibility and simplicity. Thus, the ABA should take a two pronged approach. First, it should issue best practices – guidelines for lawyers to follow in choosing technology for those lawyers who wish to make their own decisions. Second, the ABA should also certify certain providers that are ethically compliant and which a lawyer may use without problems. The certification would be similar to the bar’s certification of IOLTA providers.

F. Any ABA Technology Center Should Not Require Membership

The ABA sought comment on whether it should create a technology portal to support information. If the ABA chooses to do so, the portal should be open to all lawyers, not just ABA members. If the ABA is going to set standards that apply to all lawyers, it must give them access to the tools for compliance.

However, there is really no reason for the ABA to create an extensive site. The FTC has excellent resources on data, privacy and security, as well as a Chief Privacy Officer. The ABA cannot match these resources and should leverage off other available resources.

Thank you for the opportunity to comment. I have personally benefited from the web, social media and online technology. I urge the ABA to avoid restricting or limiting use so that other solo and small firm lawyers, particularly the next generation can enjoy the same benefits that I have.

[The model] may have made sense in the past where it was clear to consumers what they were consenting to, that consent was timely, and where there would be a single use or a clear use of the data. That’s not the case today. Disclosures are now as long as treatises, they are written by lawyers—trained in detail and precision, not clarity—so they even sound like treatises, and like some treatises, they are difficult to comprehend if they are read at all. It is not clear today that consent today actually reflects a conscious choice by consumers,”) available at http://ftc.gov/speeches/vladeck/091106dataprotection.pdf
Briefing on ABA Commission on Ethics 20/20:

Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools

Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology

Presented by Carolyn Elefant
Law Offices of Carolyn Elefant
Creator, MyShingle.com
November 4, 2010
ABA Ethics 20/20 Commission

Created in 2009, with intent to:

perform a thorough review of the ABA Model Rules and U.S. system of lawyer regulation in the context of advances in technology and legal practice development. Our challenge is to study these issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and into the future.

--ABA Commission on Ethics 20/20,
www.abant.org/ethics2020/home.html
Commission’s Current Focus

- **Social Media**
  - Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools

- **Cloud Computing Applications**
  - Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology

Comments due December 15, 2010
Why Ethics 20/20 Matters for Solo & Small Firm Lawyers

• Social media and cloud computing are leveling the playing field by reducing cost of marketing and practice management
• Social media helps educate clients, exchange ideas and advance the law
• Cloud LPM tools reduce practice management costs, minimize malpractice risks and improve quality of service
• Technology needed to support collaborative ventures between solo and small firms to replace big law
• Clients, from consumers to larger businesses, are demanding different ways to access legal services including online
• Quasi-legal providers like Legal Zoom have unfettered rights to advertise online, and real lawyers hobbled by regulation can’t compete

Collectively, technological advancements help realize the goal of meaningful access to justice
Concerns About the Ethics 20/20 Proposals and Process
Vendor Agend-er

Vendors can add value to Ethics 20/20 and their views must be included. But it’s lawyers and our clients whose interests are on the line.

Vendors’ interests in Ethics 20/20 proposals any financial support provided to the ABA should be disclosed in comments.
What About Clients?

No mention of increasing client access or client hunger for increased information.

No documented accounts of clients mislead online!
Those Making the Rules Aren’t Playing the Game

Informal Survey:
None of 20/20 Commission Members have their own blog

Found only 1 with a personal Facebook page

None of Twitter

Does the Commission have the understanding to regulate this area? If not, all the more reason to educate them.
Micromanagement and Overreaching

Proposals sap lawyers of any discretion and takes away confidence to judge our own conduct: chilling effect

Micromanages relations traditionally best left to lawyers and clients, BUT...

Overreaches, and ignores prevailing state and federal laws on data security
Summary of the Proposals
Use of OnLine Tools for Marketing

- Commission seeks guidance on the following:
  - Lawyers’ “mixed use” of social media (e.g. using Facebook page for friends and advertising)
  - Lawyer sponsored “chatrooms” and FB pages (e.g., Sokolove “Yaz” FB Page)
  - Testimonials at 3rd party sites
  - Regulation of blogs as advertising and specific rules on ghostblogging
  - Guidance for lawyers who upload documents to JD Supra (e.g., confidentiality issues)
  - Pay per click advertising (Google Ads and others) - is it an impermissible payment for recommendation in violation of MR 7.2?
  - Amend MR to specify that certain websites are subject to advertising rules (including ban on deceptive communication, creation of AC relation, UPL and disclosure of client identity w/out consent, and First Amendment considerations)
  - Should Commission amend rules? Make Whitepaper recommendations? Issue best practices?
We are bound by ethics rules but need to exercise discretion.

Problem with proposing additional regulation to address new media is that it has a chilling effect on ethically-inclined lawyers while doing nothing to stop those who push the line.

How do lawyers currently assess compliance?

- Cocktail party standard: Passing out business cards at a cocktail party or PTA is no different from interactions on FB.
- Social media offers more protection since users must always affirmatively “accept” and can “block” CANSPAM guards against spam.
- Discretion - most lawyers are private about disclosing/protecting client identities. If not, we lose biz. JD Supra - docs are public, so it’s a discretion call. (Anyone complain about LEXIS/Westlaw reselling briefs?)

Potter Stewart Test: I’ll know it when I see it (what if lawyers set up a fake med clinic? How is this different?)
No Recognition of New Consumer Awareness and World of Third Party Platforms

- Lawyers online are competing with quasi-legal providers and can’t be placed at substantial disadvantage
- Regulation of 3rd party platforms impedes CONSUMER’s CLIENT’s rights to comment
  - Differential state rules put lawyers at disadvantage
- Today’s consumers are internet savvy
  - They understand how to assess ratings sites
  - Not fooled by testimonials at 3rd party sites like “My lawyer was best in the world”
  - Not confused when someone lists “energy law” as LinkedIn specialty

Is the purported confusion created by lawyers who don’t know how to use these sites - or legitimately by clients?

Rules against deception will always apply, both by Model Rules and FTC Disclosures.
Need Safe Harbor for Lawyer Discretion in Social Media

• As lawyers, discretion is our middle name! We interpret law and advise clients for a living.
• Rules not appropriate for rapidly changing technology. We need room to exercise our discretion to apply ethics obligations:
  – Safe harbor for lawyers who research ethics before diving in. Get rid of the chilling effect.
  – ABA should be prohibited from accepting $s from marketers or firms with suspect practices
  – At most, suggest best practices as examples.
  – Publicize ANY client complaints about deceptive practices so that lawyers can self-correct
  – Make ethics rules available w/out copyright so that lawyers can research them

At the end of the day, it is OUR license, OUR clients. We should not have to rely on pricey outside counsel or vendor assurances. But draconian sanctions are not fair either.
Blogging

• Blogs that express opinions or provide substantive information ARE NOT advertising any more than law journal articles. To say otherwise, demeans their value.

• Distinguish from advertising blogs:
    • Educational v. promotional?
    • Canned content v. original?
    • Firm branding occupying majority of the site

• Blogs that constitute ads are subject to MR 7 prohibiting deceptive practices:
  – Ghostwriting and ghost communicating - deceptive when posted as first person. Should not be prohibited but disclosed (would you send a proxy to a cocktail party). Problem is deception - not competence (in my view).
  – Lawyers who use copyrighted content w/out attribution subject to ethics review (as with plagiarism)
Attorney Websites

- ABA Copyrighted Rule on Websites (Op. 10-457) Good summary of current practices and mores, ten years too late.
- Websites properly treated as advertising.

- Sole change needed:
  - UNIFORM rule or best practices to govern websites and other social media conversations since attorneys practice in multiple jurisdictions
  
  - UNIFORM practices should apply to all SM and online interactions. The world is no longer flat, and SM traverses jurisdictional boundaries. Provincial crazy-quilt rules must go; they impede commerce, disadvantage lawyers who practice in multiple jurisdictions and impose added transaction costs.
Pay per Click

- My own view - often costly and ineffective, does not necessarily yield desirable clients. AND Pay per click is NOT a First Amendment issue (regulates form, not content) But...
- Pay per click as Google or FB ads or Total Attorneys is not a fee for referral. It’s performance based marketing that gives lawyers of lower cost access.
- Alternative: large firms buy up ads and dominate, then trade referrals back and forth or hire contract attys to handle cases in different states.
- Pay per click may need additional disclosures but otherwise, should not be barred.
Client Confidentiality and Lawyers
Use of Technology

• Overview of potential issues re: use of technology:
  – Client confidentiality concerns related to cloud
  – Is cloud computing outsourcing?
  – Confidentiality related to “local” technology (smartphones, onsite, passwords)
  – Cyberinsurance
Client Confidentiality and Lawyers
Use of Technology

• Commission seeks guidance on these issues:
  – Overall: Should Commission have rules, best practices or Whitepaper? Should Commission set up its own Tech Site for guidance?
  – Confidentiality in cloud
    • Duties to investigate vendor re: back up, security, clarify data ownership
    • Negotiate more favorable terms if not available
    • Policies for notification of data breach
    • Standards re: encryption
    • Need to retain independent tech consultant where knowledge is not sufficient
  – Is cloud computing outsourcing?
    • Would require lawyer oversight of cloud just like oversight of independent contractors
    • This approach will require client consent to use
  – Confidentiality related to “local” technology (smartphones, onsite, passwords)
    • Policies for wifi, password protection and incryption
  – Cyberinsurance
    • What are options? To what extent are security issues covered by malpractice
Overarching Approach

• Define the baseline. Nothing is risk free.
  – Papers can be stolen in open court.
• Acknowledge the benefits of user friendly cloud tech and help transition to it rather than obfuscate.
  – Lower cost of service and more effective delivery
  – Mobility - helps on other fronts like retention of women in the profession
  – Way of the world. Clients want access!
• Evaluate risk management.
  – No need for technoverkill. High security needs more protection, public docs need less
  – For drivers’ license, SS numbers, CC numbers - ABA has no business regulating this. If we lawyers do business in commerce we need to play by the “big boy” rules
• Should not impose higher or lower burdens than required by state law unless necessary to protect client confidences or privilege
• Uniform standards are imperative!
  – 50 different state rules on access is untenable
  – Will raise cost of tech development and stifle innovation
Best practices combined with vendor certifications

Best Practices
- Encourages competition and innovation. Avoids monopoly by select vendors
- Gives lawyers discretion to choose appropriate tools for practices
- One best practice: find ways to avoid collection of sensitive data (Fed courts and PACER)!

• Vendor Certification
  - Some solos and small firms would prefer to just choose vendors from a check list (like IOLTA approved banks). Make this an option (not mandatory)

• Group bargaining power
  - Individual firm can’t get concessions from vendors. ABA and state bars should collaborate to get concessions just as GSA did for government agencies on Facebook

• Uniformity is imperative!
  - If ABA and states could pool resources, they could create a TechFund that would be useful
  - W/out uniformity, added costs for solo/small firms in multiple jurisdictions and for vendors

• RiskMatters, Not Size
  - Some solos deal with critically sensitive information. They don’t deserve exemptions from rules. High risk demands more security, irrespective of size.
  - Don’t want solos to appear “lax”
Considerations About the Cloud

Basic practices:
- SSL, Firewall, PW (even with free systems)

Does data at rest need to be encrypted?
- Recent paper shows 88% of breaches due to human error

Human error enhanced where features are interactive

Overall system security is more important than encryption at rest
Cloud as Outsourcing

• Only a lawyer!
  – Acknowledge the benefits of user friendly cloud tech and help transition to it rather than obfuscate.
  – Lower cost of service and more effective delivery
  – Mobility - helps on other fronts like retention of women in the profession
  – Way of the world. Clients want access!
• Sets dangerous precedent: do we treat phones and bank as “outsourcing?”
• Clients should not have to give consent to tech uses.
• That said, ABA can develop best practices for evaluating cloud companies, or list of certified suppliers.
Data Breaches and Management

• Certain data subject to federal and state law retention requirements
• ABA should not be regulating that! Regulation of cloud insofar
  – Acknowledge the benefits of user friendly cloud tech and help transition to it rather than obfuscate.
  – Lower cost of service and more effective delivery
  – Mobility - helps on other fronts like retention of women in the profession
  – Way of the world. Clients want access!
• Sets dangerous precedent: do we treat phones and bank as “outsourcing?”
• Clients should not have to give consent to tech uses.
• That said, ABA can develop best practices for evaluating cloud companies, or list of certified suppliers.
Recommendations for Ethics: 20/20: Online Marketing

- Rules too static for changing times, perhaps best practices
- Allow lawyers to use discretion, with safe harbor for those who act in good faith
- Lift the copyright wall on ABA and state ethics opinions to facilitate compliance
- Do not regulate hybrid lawyer uses of social media or third party platforms - encroaches on rights of clients to communicate about, and interact with lawyers
- Do not lump bonafide bloggers in the “advertising category”
- Websites are understood to be advertising, but must have uniform rules
- Pay per click is not a “fee for recommendation” but it is not First Amendment either (it’s not content!)
- ABA and bar associations should not accept sponsorship dollars from vendors with ethically suspect practices
Recommendations for Ethics
20/20: Confidentiality

- No rules since industry is in flux. Combination of “best practices” and vendor certification (like bar-certified IOLTA banks)
- Best practices must be uniform to avoid confusion, inefficiency and transaction costs for lawyers in multiple jurisdictions.
- Do NOT treat cloud computing as outsourcing - creates dangerous precedent and requires client approval of lawyer decision (is phone service outsourcing? Banking?)
- Transition from rules to risk assessment
  - What is baseline acceptability? What are benefits? What are risks.
  - Solo & small firms shouldn’t be exempt from security - depends on risk requirements
    - Allow lawyers to use discretion, with safe harbor for those who act in good faith
- Is one hundred percent encryption at all levels of interactive software necessary?
  - Studies show 88% of breaches derive from human error not lack of encryption
- ABA and bars must negotiate terms with suppliers. Individual lawyers lack bargaining power
- ABA should defer to state and federal laws on management of personal data and breach notification -
  - One best practice: discourage lawyers from storing credit cards, SS numbers, etc..
  - May be a burden but identity theft is serious - lawyers should be bound by state and federal laws, not self-created regulation
Thank You!

Get Involved! Read the Issues Papers! File Comments!

For additional information or if you would like permission to recirculate this presentation, contact Carolyn Elefant, elefant@myshingle.com, 202-297-6100 @carolynelefant

Facebook/carolynelefant
Chi Eng:

Dear ABA Commissioners:

I am an IP attorney licensed to practice in New York and New Jersey, and operate a solo practice. I was a practicing engineer with AT&T Bell Laboratories prior to becoming an attorney since 1993. I am also in the process of building a global platform (www.neulexa.com) for clients and attorneys to collaborate using the Amazon cloud computing infrastructure.

I will attempt to respond to the Commission’s questions raised in the Commission’s memo dated September 20, 2010.

1. a. While a White Paper would be a good vehicle for laying out the foundational concerns relating to the safeguarding of confidential information, any specific guidance could become outdated as technology evolves. Generally, most attorneys operate a small office and are not proficient with technology. Thus, overly burdensome requirements will stifle competition and innovation for the small business owners. Helpful guidance that applies to all attorneys is welcome but the Commission should refrain from laying down requirements that require small business owners to hire various technology consultants to run their business. Technology drives efficiencies. Inappropriate or overreaching regulations tend to increase economic inefficiencies.

We need to take a step back and look to what has been generally acceptable behavior for the handling of confidential information. For example, lawyers have used postal office and other courier services for transmitting confidential information. It is known that agents of couriers can and sometimes did breach the security of an envelope or a package and retrieved confidential information. Otherwise, one would require a fire-proof and impact-proof safe with a high quality lock to secure all letters and packages before shipment by FedEx or other carriers. Also, it is widely known that unencrypted emails have been used by attorneys without litigants claiming loss of privileged communications arising from such use.

Accordingly, confidentiality issues relating to cloud computing or any other newly developed technologies (e.g., portable hard drives) must be reviewed in light of practicality, cost, reasonableness, and generally acceptable behavior. Attorneys’ ethical obligations should not be more stringent that is required for other accepted means of data storage and transmission.

b. I determine my ethical obligations based on ethics opinions issued by my bar associations.

2. An online and updated resource is preferable, if provided with a user-friendly interface.

3. I recommend that the Commission avoid over-regulation of the legal industry and if any amendment is necessary, it should aim to set minimum standards and not tied to any specific technological embodiment. Attorneys can exercise their professional judgment and interpret general rules appropriately.
4. I personally think the Massachusetts data protection standard (201 CMR 17.00) sets a high standard. While it is good practice to exercise due care to protect confidential information and do what is common sense, it is another to require certain detailed program and management for such protection. A government should not try to run a business vicariously via laws. It is overreaching when the government assumes certain business structure and available human resources to implement the program. It should be sensitive to the needs of the type and size of business.

5. a. Cloud computing should not be interpreted as “outsourced” service any more than the leased physical space for a law firm. Breaching the security of a physical space of a law firm where paper copies of confidential documents are stored can be just as serious as the loss of data by a cloud computing vendor. But with electronic data, the attorneys can store multiple copies of the data with different vendors without incurring significant cost. One may argue that a reputable cloud computing vendor is more secure than the servers placed in a closet of a law firm. One can create a legal fiction that cloud computing is outsourced service, but for what practical purpose would one do that? We should analyze the needs of the profession and then create a legal fiction to accomplish the objectives, but not unnecessarily.

b. Lawyers should be provided with an outline of what one can be expected to negotiate. But ultimately, negotiation depends on the bargaining power of both parties. Cost is always a factor. A negotiated, customized deal will cost the attorneys, and thus clients additional expenses. Let free market prevail.

c. I think Amazon and the likes offer the best industry standards in terms of data security. They exceed the standards of an average law firm’s IT capabilities. Their service terms can be found at: [http://aws.amazon.com/serviceterms/](http://aws.amazon.com/serviceterms/)

6. As to the various precautions that lawyers should take, I believe general useful guidance is desired but rigid standards should be avoided. It’s common sense. Note that the US military, which has a highly regulated structure, has been reported to have lost sensitive military data. Thus, there is limit to any regulation when it comes to human behavior. Let’s not over-regulate here. Guidance here is good but not requirements.

7. Insurance carriers offer E&O insurance for professionals. The questionnaires will help law firms improve their procedures in order to obtain a lower premium. Again, actors in a free market can make rational decisions.

I welcome any questions you may have regarding my above comments.

Yours truly,

Chi Eng, Esq.
CEO & Founder
NeuLexa Corp.
To the ABA Commission on Ethics 20/20:

I am writing to submit my comments on your thoughtful and timely Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology. Of specific concern to me, and the focus of my comments, is the possibility that the ABA could alter its longstanding position and conclude that client communications must be encrypted to fulfill ethical obligations to preserve confidentiality. Such a recommendation, however well-meaning, could have far-reaching negative implications for attorneys and clients alike. An alternative approach of education and assistance would be a much preferable alternative.

Encryption of E-mail generally

Internet-based e-mail is generally sent “in the clear”; that is, the actual contents of the message (including any attachment) are not encrypted. While in theory, this could enable anyone with access to the data stream through which the e-mail message passes to “sniff” and therefore intercept the contents of the message, in reality, the infrastructure of the Internet, and the standards through which e-mail is transmitted, makes this extremely unlikely. First, the underlying TCP/IP (Transmission Control Protocol/Internet Protocol) methodology used by every Internet provider and software breaks every transmitted message into packets of data, which may be sent via different paths only to meet up and reconstitute themselves at the receiving end. (A rough analogy would be if someone tore up a letter, sent each piece with a different courier, and relied on the couriers to pick their own routes and meet up at the destination to reassemble the letter.)

E-mail messages differ from other types of Internet content in that they may stop along the route at various server computers, before being broken down and sent along to the next stop. While the messages are in fact complete at each of those “stops,” they generally do not stay at any intermediate location for
more than a few seconds at most, and the sheer volume of messages passing through most intermediate
e-mail servers makes it exceedingly unlikely that any administrator would read a specific message.
Beyond that, the transmission itself can be encrypted between sending and receiving machines (as is
generally true for BlackBerry phones and Web-based mail like Gmail or Outlook Web Access),
although the message itself is received in an unscrambled form.

By the same token, though, e-mail messages can be misaddressed or inappropriately forwarded, and can
therefore be available to someone other than the intended recipient. To deal with this, it is possible to
crypt the contents of a message or its attachments, so that only the party with the relevant means to
decrypt the message can read it. That way, even if a message does end up in the wrong hands, any
information contained within it remains confidential.

Encryption, though, is not a simple process, given how many different operating systems and e-mail
programs are in use. There is a standard accepted methodology for message and other encryption, called
Public Key Infrastructure (“PKI”), but its actual use is quite complicated. Under PKI, a user creates a
unique “private key,” a digital file containing one of a very large number of possible sequences of letters
and numbers, further altered by user input to make it effectively unguessable. Using that private key, the
user creates a “public key,” a smaller digital file which is related to the private key but cannot be used to
calculate the private key. The user then shares the public key with others, keeping the private key secret.

To send an encrypted e-mail message, the sender needs to have an e-mail program that can handle PKI
operations, and the public key for all recipients. After drafting and addressing the e-mail message, the
sender encrypts it using each recipient’s public key and sends it. That message can only be decrypted via
the private key associated with the public key used to scramble it. If the message is received by the
wrong party, or the right party receives it but does not have access to the correct private key, it
remains scrambled and unreadable. (Digital signatures essentially use the reverse procedure; the sender
“signs” the message using her private key, and a recipient with the sender’s public key can match the
keys and verify the identity of the sender. The ABA Section on Science and Technology Law created a
useful report on PKI and signatures in 1996; it’s available online at
http://www.abanet.org/scitech/ec/isc/dsgfree.html.)

In order for encryption to be standardized, then, all senders and recipients must create private keys, use
them to create public keys, distribute those public keys to all possible correspondents, and ensure that
everyone involved has an e-mail program that is compatible with this method on all devices and
machines on which they may read their e-mail. Otherwise, either e-mail won’t be consistently encrypted,
or it may be properly encrypted but unreadable by the recipient (or her colleagues if need be). Also,
arached e-mail for which the private key is no longer available will be unreadable. Although PKI has
been the generally accepted method for encrypting e-mail for more than 15 years (see the report above),
it is still not a standard feature of the major e-mail programs and platforms.

All of these challenges and hurdles made, and continue to make, requiring mandatory encryption of all
e-mail messages essentially unenforceable. The ABA’s 1999 ethical recommendation on e-mail and
encryption took this reality into account.
ABA Formal Opinion No. 99-413

On March 10, 1999, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 99-413, Protecting the Confidentiality of Unencrypted E-mail (available online at http://www.abanet.org/cpr/pubs/fo99-413.htm l). The opinion was necessary because, with the tremendous expansion of Internet connectivity available to both attorneys and clients, and the increased reliance on e-mail as a communications method, states were beginning to wrestle with the ethical obligations of this medium. The executive summary of that opinion provides,

A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.

This opinion, based both on the practical reality of e-mail, its unlikelihood of casual interception, and how it would be used, has been extremely influential on state bars, none of which have (to date) otherwise required encryption of client communication.

Recent Developments on E-mail and Privilege

A number of recent court cases have begun to call into question the privileged status of unencrypted attorney-client e-mails, raising some troubling possibilities. In Scott v. Beth Israel Medical Center, 847 N.Y.S.2d 436 (N.Y.Sup. 2007), the trial court ruled that the plaintiff’s e-mails to his attorney were not protected by the attorney-client privilege and could be utilized by the defendant, since the plaintiff sent them while employed by and using the corporate e-mail system of the defendant. In the court’s analysis, the hospital’s internal e-mail use policy, which warned employees that the hospital reserved the right to monitor and read internal e-mails, was sufficient to defeat the reasonable expectation of privacy required for preservation of privilege. Courts in other jurisdictions (New Jersey, California, etc.) have at least taken notice of the Scott decision, although they may not have faced the same factual situation or reached similar conclusions. Further, the New York State Bar Association’s Committee on Professional Ethics has also recently cited Scott in the context of discussing remote storage of client records (NY Eth. Op. 842, 2010 WL 3961389, September 10, 2010).

The Risk of Requiring Encryption

As the above analysis suggests, courts and ethics committees are increasingly faced with new questions about the use (and misuse) of unencrypted e-mail between attorneys and clients. Unfortunately, until and unless encryption methods become easier, less expensive to implement and generally utilized, even those attorneys who would prefer to encrypt their client communications will likely find many clients
unwilling or unable to do so. For that matter, the attorneys themselves may not have the resources or knowledge to implement encryption, or to ensure the adequate storage and availability of their own private keys and the public keys of their clients, especially on mobile devices like smartphones where PKI-encrypted e-mail programs are more difficult to find.

Nor should attorneys necessarily be encouraged to rely on the growing number of Web-based encryption services, which purport to prevent anyone but the sender and intended recipient from accessing a protected message. While these services may be technically sound, they are also out of the attorneys’ control, and should they go out of business or otherwise change how they operate, attorneys could find themselves unable to access past client communications, which would almost certainly be or lead to an ethical violation.

At this point, were the ABA’s Commission on Ethics 20/20 to reverse the 1999 opinion and affirmatively state that encryption should be ethically required, such a pronouncement would likely increase the number of courts and state bars that in turn adopted such a requirement, whether as a standard for evaluating privilege or for ethics compliance purposes. Chaos would quickly result, as attorneys found themselves uncertain whether and how to use e-mail to communicate with clients, and clients could no longer be sure that their present or even past messages to and from their counsel would remain protected under privilege. The costs of trying to comply with encryption mandates would dwarf those for other recent technological advancements such as mandatory electronic court filings, and many firms and in-house departments would be still unable to quickly or completely do so.

**Recommendation: Retain the 1999 Opinion, But Assist in Increasing Implementation of E-mail Encryption**

The factors underlying the 1999 ABA opinion are even more true today: given users’ much greater familiarity with how to properly use e-mail, the business-focused Internet access services most law firms and in-house practices utilize, and the exponentially greater volume of e-mail traffic than was present in 1999, the likelihood of a specific message being casually intercepted is that much more remote. While the number of data breach incidents is rising, those generally involve large caches of stored data, not individual messages in transit. (This memorandum does not address whether encryption should be mandated or recommended for stored information, another question raised by the Commission on Ethics 20/20, except to suggest that such encryption is much easier to implement and manage than the individual message encryption as described here.) Generally speaking, e-mail is still reasonably believed and proven to be reliably private between sender and initial recipient, justifying the continuation of the 1999 recommendation.

Nevertheless, increased use of e-mail encryption would be preferable as a means of protecting client confidences, since it would minimize the possibility of accidental disclosure through incorrect addressing or unauthorized forwarding of messages. The ABA can and should utilize its substantial educational and market power toward this goal, including though not limited to the following:

a. The creation and publication of practical guides for encryption for attorneys and their clients;

b. Offering webinars on encryption and how it can be implemented, focusing on those operating systems and devices most used by ABA members;
c. Negotiating and publicizing sizable discounts for ABA members on software (such as Symantec’s PGP) and related services (e.g. digital certificate issuance) needed to implement internal e-mail encryption by attorneys;

d. Collaborating with trade groups for other industries (e.g. medical, financial) that now or in the future will likely face similar ethical obligations regarding encrypting communications; and

e. Encouraging and supporting practice-management education by law schools that trains future attorneys on the need for and methods of encrypting client communications.

With such an approach, which respects the ongoing and significant economic and technical hurdles to universal implementation of e-mail encryption by attorneys, the ABA can do a great deal toward moving the profession into an era of enhanced protection of confidences, which will benefit practitioners and their clients alike.

I would be happy to answer any additional questions the Commission may have, or to assist in its efforts.

Jonathan I. Ezor  
Assistant Professor of Law and Technology and Director, Institute for Business, Law and Technology  
Touro College Jacob D. Fuchsberg Law Center  
225 Eastview Dr.  
Central Islip, NY 11722  
Tel: 631-761-7119  
Fax: 516-977-3001  
E-mail: jezor@tourolaw.edu
Gordon Firemark:

Natalia Vera,
Senior Research Paralegal,
Commission on Ethics 20/20
ABA Center for Professional Responsibility,
321 North Clark Street, 15th Floor,
Chicago, IL 60654-7598

Re: ABA Proposal re regulation of lawyer Internet speech

Dear Ms. Vera,

I'll keep it short and sweet.

The Internet is little more than a new medium for communication. The old rules still apply. This new medium doesn't call for new rules and regulations for how lawyers can use it. Let the market, and the existing rules framework take care of things.

Services like twitter, facebook, youtube, the Web, and email are all just ways to carry messages. What's important is that the messages are not misleading or deceptive. Those rules already apply to EVERY lawyer communication or advertisement.

Blogging, podcasting and videocasting are more like journalism than advertising. Let things stay that way. don't tell me what I can write about, and what information I can provide to my readers. The fact that some of them are prospective clients is part of the reason I blog, but that doesn't make it advertising. As long as I don't deceive or mislead, I should be free to say what I wish.

Lawyer advertising rules already exist
Lawyers already risk liability for inadvertently created client relationships

There's no need to impose new restrictions. Let the old rules and the market do their job.

If anything, the ABA should serve its members by issuing guidelines that advise state bars to stay out of this area.

Thanks for your time.

-Gordon Firemark
Ross Fishman:

Regulating Online Marketing?
Red Alert - The ABA isn’t the Enemy.
I’ve been following this issue, and candidly, I’m not clear what the "RED ALERT" hysteria is all about.

On this issue, the ABA isn't the enemy. I strongly disagree with Larry Bodine – I don’t see any evidence that the ABA "is quietly gathering support to choke off lawyer marketing on the Internet."

In fact, from my vantage as someone who has been interacting with the marketing/ethics rules nationwide on an almost-daily basis for over 20 years, I think the ABA has been gradually moving in the right direction, loosening up the rules and their application to real-world marketing.

I feel pretty qualified to opine on this issue - I'm a lawyer and marketer who's been fighting the marketing-ethics battles on behalf of law firms nationwide since 1990. I’ve included an overview of my relevant qualifications at the bottom, but briefly, I'm a lawyer and former marketing director, marketing partner, and strategy/branding consultant who's developed 75+ marketing campaigns for firms worldwide. These have included national campaigns that needed to contemplate the ethics rules of all 50 states, and countless state-specific campaigns running in marketing-phobic jurisdictions like Florida.

We shouldn’t be arguing about regulating the free-flowing internet or social media as though it's a special case that requires new rules -- that’s a red herring. The Rules don’t care whether it's TV or Twitter, Facebook or face-painting. The Supreme Court, in the Texans Against Censorship case (http://tinyurl.com/2fax7k7), held that speech can be regulated if you use it in a way that "beckons business." If you don't, it can't be regulated.

Very simply, if you paint "Hire me." across your face, then you're beckoning business. As such it is commercial speech, and the government has the responsibility to regulate it for the protection of the consumer. That wouldn’t change regardless of whether you conveyed that same "Hire me" language in a billboard, blimp, bulletin, blog, brochure, or business card. Or in a print ad, newsletter, T-shirt, TV commercial, radio spot, or direct mailer. Or via Twitter, Facebook, LinkedIn, AVVO, or JDSupra.

It's what you say. Not where you say it.

If you have no personal injury experience and you tweet or post "Hire me to handle your PI case!" you're over-reaching, and the lay consumers who might hire you would be at risk. That's commercial speech, and it's not unreasonable to have the government regulate that -- the courts are quite clear on that issue. When you tweet "I'm eating yogurt," you're not directly seeking business and so that can't be regulated as commercial speech. If you want to blog, tweet, post, comment, articulate political or legal issues or trends, or do any of the other things blawgers tend to do, the state has no authority to regulate it -- as long as it doesn't directly beckon business. Go nuts.
A friend of mine calls the Rules "technologically agnostic." That is, the Rules don’t care what the medium of the message is - it’s simply whether the specific language of the communication on its face beckons business, regardless of whether it’s a 140-character Tweet or a 5-second TV spot. And whether or not you choose to beckon business in your communications is exclusively within your control. The breadth or scope of the limitations don’t matter -- it’s what you say.

In fact, the ABA has been relatively reasonable in its recent evolution regarding the marketing of legal services. I haven’t seen anything in its recent history that leads me to believe that it’s dedicated to choking off new or evolving avenues of marketing.

Rule 7.2 clearly states that "a lawyer may advertise services through written, recorded, or electronic communication, including public media." Thanks, John Bates.

This is subject to Rule 7.1 which states that this communication may not be "false or misleading." Can’t argue with a "don’t lie" rule.

Then a "false and misleading" communication is defined very simply as one that:

1) "contains a material misrepresentation of fact or law," or
2) "omits a fact necessary to make the statement considered as a whole not materially misleading."

Again, that seems fine to me.

The ABA actually loosened the restrictions of Rule 7.1 by removing two previous definitions of "false and misleading," i.e.:

- "Likely to create an unjustified expectation about results the lawyer can achieve," which had prohibited many forms of client testimonials, and
- "Compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated." Previously, the use of almost any adjective could have subjected the attorney to discipline. Even stating that a lawyer was "good," implied that others weren’t -- and was impermissible. Marketing without adjectives or comparisons was unrealistic and therefore widely violated. Taking reality into account, the ABA removed that exemption.

All this anti-ABA hysteria is a distraction from the real problem, which is how certain marketing-phobic states, e.g. Florida, Iowa, New York, and Texas, have outside the ABA’s control, outrageously and arbitrarily extended or applied the Model Rules. Attacking the ABA gives these states just a little more confidence in undercutting those rules further, and developing even more draconian regulations.

Instead, we need to advocate aggressively toward uniform state rules nationwide, and the best hope we can have for that is through the support and adoption of the ABA Model Rules. The efforts to undermine the stature of the ABA will forever condemn law firms to seek compliance with the ever-changing rules and obligations of 50 different states. Trying to hit that moving target is unnecessarily complicated.

Of course, the ABA isn't perfect. My primary qualm with the ethics policy isn't that it is debating how or whether to apply the Rules to the internet and the evolving new
technologies. It can't expand its reach beyond "commercial speech," and has shown no interest in trying to do so. In my opinion, the real problem is that it doesn't distinguish between Corporate and Consumer practices.

The rules presume that a 60-year-old Fortune 500 insurance company General Counsel with a roster of 100 outside law firms and $20 million legal budget needs the same level of protection as an uneducated high school dropout who is hospitalized after a major car wreck. Would that we could develop a firm brochure or website so compelling that it could exert an arm-twisting level of pressure upon a savvy high-level purchaser of legal services.

I've met countless clients across the US and around the world, and have never met an executive or in-house counsel who needed to be aggressively protected against a firm brochure.

**BIOGRAPHY**

I've been intermittently active in the ABA since 1985, particularly the Law Practice Management Section, sat on the *Law Practice* magazine's editorial board, including writing two monthly marketing columns and a cover story on the history of law firm marketing. Our campaigns have won dozens of international marketing awards, including the ABA's Dignity in Advertising award, and five of the Legal Marketing Association's Best of Show honors. I was an inaugural member of the LMA's Hall of Fame, and am a Fellow of the College of Law Practice Management.

In other words, I follow this stuff pretty darn closely.

**Ross Fishman, JD**, CEO, Fishman Marketing, Inc.
Richard Gallagher:

Vera,

I read with some concern the ABA’s position that it is reviewing new ethical rules for Internet advertising. I write to you to express my concern as a small law firm lawyer.

Understand that I am not suggesting that lawyer advertising that I personally see on the Internet is appropriate or tasteful. Nor am I suggesting that lawyer advertising is protective free speech (it may be, but I am not Constitutional expert).

I am writing to tell you that there are already enough rules in place to protect the consumer. Additional rules will not protect the consumer, but will overly burden the small firm lawyer.

For example, in Louisiana, Rule 8.4 (c) prohibits “dishonesty, fraud, deceit or misrepresentation.” Wouldn’t this cover most types of improper advertising? I believe it would.

The Internet is a great leveler – it allows small firms like mine to compete with much larger firms for new business. I already compete with these large firms in the Courtroom. Small firms also form the backbone of our legal system. Anything which makes it harder for small firms to survive will only cause harm to our legal system, and also to our clients.

Richard T. Gallagher, Jr.
Gallagher Law Firm, LLC
December 15, 2010

Ms. Natalia Vera
Sr. Research Paralegal, Commission on Ethics 20/20
American Bar Association
Center for Professional Responsibility
321 North Clark
Chicago, IL 60654

RE: Comments to the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools

Dear Ms. Vera:

On behalf of Total Attorneys, I submit these comments to supplement my testimony before the Commission on October 14, 2010 regarding the Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools (the “Paper”). As did my testimony, these comments address primarily that section of the Paper entitled Paying for Online Advertising, Referrals, and Leads.

Google AdWords
The Paper recognizes Google’s AdWords program as an example of pay-per-performance pricing. Google’s AdWords is a complex system of formulas, rankings, and algorithms much of which are undisclosed to the public. Some service providers provide additional services to attorneys in addition to managing a Google AdWords account. Such services may include, as ours do, the hosting of the web site, design and maintenance of the web site, and content creation for the web site in addition to the ongoing daily work of managing Google’s bid system.1 While these additional services provide a broader scope of services than Google AdWords alone, it is not clear that one can accurately characterize them as “more sophisticated” than the complex AdWords system. Such programs are naturally more expensive than the stand alone costs of the AdWords program, which represents only one component of the advertising campaign.

“Recommendation”
The Paper raises the issue of whether pay-per-click fees constitute an impermissible payment for “recommending” the lawyer’s services under Model Rule 7.2(b). The question mirrors the

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1 We also provide a software platform license and call center services bundled with the marketing services.
structure of Rule 7.2 and in doing so reveals the flaw inherent in Rule 7.2. As currently drafted, Rule 7.2 addresses not only advertising, but also matters that do not constitute advertising and that are addressed elsewhere in the Rules. Section (b) of the Rule intertwines the concepts of “recommendation,” advertising, solicitation and running/ambulance-chasing. Additionally, by virtue of carving out specific categories in this section, the Rule appears to suggest that the concept of a “recommendation” encompasses advertising, lawyer referral services, the purchase of a law firm, and lawyer to lawyer referrals. Very little in Rule 7.2(b) pertains to advertising, with the exception of the largely unnecessary carveout allowing attorneys to pay advertising costs. The attempt to address solicitation through a third party (i.e., a “runner”) within the advertising rule creates confusion between advertising and solicitation. Such matters would be better addressed in Rule 7.3 along with other matters of solicitation.

Method of Pricing
The manner in which advertising is priced does not alone somehow transform the nature of an otherwise permissible advertisement into something else such as solicitation, fee-sharing, or a lawyer referral service. Similarly, the mere form of pricing alone cannot transform what would otherwise be accepted as advertising into an impermissible payment to a runner. That logic would unintentionally transform many advertising agencies into law firm runners.

It must be noted that all advertising, including traditional and widely-accepted forms of advertising, have some performance element to them based upon various audience measurement systems. The technology associated with the Internet simply makes possible the immediate and accurate measurement of the audience size. Television advertising is priced based upon the Nielsen ratings of viewership. Newspaper and magazine advertising is priced based on circulation statistics. The usual and reasonable fee charged by the industry for Internet advertising has naturally become a calculation based in part on the number of users who click on an ad or click and send through information showing interest in the product or service being offered by the advertiser.

Unique Characteristics of Internet Advertising
Internet advertising is built on the curiosity of users who seek out information through a search they create and execute themselves, by creating key words and typing them into a search engine such as Google. We have long accepted more invasive and intrusive forms of advertising such as the letters which appear in an individual’s mail or ads which appear on his television. By contrast, Internet advertising is often presented to a consumer as a result of a specific request for information actively initiated by the consumer in a forum that is entirely within the consumer’s control. When faced with information he finds undesirable, he can simply navigate away from it in any number of directions, or simply log off entirely, all at his option.

The courts, too, are beginning to recognize the unique characteristics of online attorney advertising. In Public Citizen, Inc., et al. v. Louisiana Attorney Disciplinary Board, et al., no. 08-4451, the U.S. District Court for the Eastern District of Louisiana stated that “This Court is persuaded that Internet advertising differs significantly from advertising in traditional media.” The Court held that the Louisiana rule which required attorneys to file copies of their advertising with the bar regulators was unconstitutional as applied to Internet advertising due to the unique considerations inherent in Internet advertising. This is the first time a federal court has
recognized that the rules which were written for traditional forms of advertising cannot be automatically or even constitutionally applied to advertising on the Internet.

**Access to Legal Services**

Online advertising by attorneys has real benefits to consumers not only through their ability to actively search for attorneys using their own tailored parameters, but also through overall increased access to legal services for the general public. Consumers in need of legal services, most particularly in rural and underserved areas, gain broader access to legal professionals through the use of the Internet to close the geographical gap between them and licensed attorneys in their state. Additionally, the Internet’s performance-based pricing allows smaller law firms and sole practitioners to make their information available to potentially the same degree that much larger law firms with greater resources are presented to consumers, thus allowing meaningful competition. This greatly increases the range of attorneys presented to the searching consumer and may in some instances present a consumer with a more affordable option than would otherwise have been apparent.

**Negative Impact on Multijurisdictional Advertising**

Technological progress is resulting in an ever-evolving increase in the forms of communication otherwise available to attorneys. The many variations in the ethics rules, however, render certain forms of commercial free speech impossible and unavailable to attorneys. Short of a protracted and financially burdensome federal court fight – one which most licensed attorneys lack the resources to wage – the risk remains that at least in some state jurisdictions the free speech rights of attorneys are being chilled.

The variations among the state rules governing attorney advertising have actual negative impact on attorneys’ ability to advertise. A multijurisdictional law firm, for example, cannot simply advertise whether through web sites, radio or television without ensuring compliance with a range of restrictions that at best is cumbersome, but that at worst renders the advertisement or its media quite impossible. The same is true of the solo practitioner who desires to participate in a group lawyer advertising model comprised of attorneys in various jurisdictions. For example, neither of these groups of attorneys may currently produce a single standard 30-second radio advertisement that satisfies the rules of all state jurisdictions and circulate that advertisement to various radio stations throughout the country. This is because of the handful of states which currently have rules requiring all advertisements, regardless of form, to include lengthy state-specific disclaimers which if all read for a single national ad would require air time greater than sixty seconds, not including any time for the actual advertisement.

**Negative Impact Resulting from Ambiguity in Rule 7.2**

We are in a unique position to attest to the actual negative impact of the current ambiguity in Rule 7.2. In 2009, a nationwide grievance was filed alleging that our group lawyer advertising model constituted a prohibited lawyer referral service and that the attorneys who paid for our services were improperly sharing fees despite the fact that our fees bear no connection to whether a consumer retains the attorney. Approximately 500 attorneys across the country who use our services were named in the request for inquiry. Much of the analysis and inquiry conducted by local disciplinary counsel has centered on the concepts of “recommendation” in
their version of Rule 7.2(b). The issues of “running” and solicitation have also been woven throughout the inquiry.

To date, over $1.2 million in defense costs have been incurred defending our attorney customers and while no state has made any findings of wrongdoing, the impact on our customers has been significant. At least one named attorney was in the course of running for a judicial position and nearly had his candidacy sidetracked by the allegations. Many attorneys worry about the impact the grievance may have on their malpractice premiums.

We have seen a wide range of interpretation by disciplinary counsel of the state rules virtually identical to Model Rule 7.2, demonstrating the lack of clarity and guidance that this Rule presents. Leaving this matter to the interpretation of local disciplinary counsel risks contradictory, and possibly unconstitutional, interpretations. A thoughtful and reasoned redrafting of Rule 7.2 would provide much-needed guidance to attorneys, disciplinary counsel and rule-making bodies throughout the country.

Attorneys look to the ABA to provide guidance on important aspects of the responsible and ethical practice of law. Disciplinary agencies and state rule-making bodies, too, although not strictly bound by a revised Model Rule, would have the benefit of the ABA’s reasoned and thoughtful guidance.

For the reasons set forth herein, we support and encourage a fundamental amendment of Rule 7.2 to more meaningfully address advertising only and to provide a workable framework for the ongoing advances in technology. We urge the removal or redrafting of Rule 7.2(b) to remove the confusing references to “recommendation”.

Thank you for considering our input. We are happy to assist the Commission and/or Working Group in any way necessary.

Respectfully submitted,

Pamela K. Gracyalny
General Counsel

PKG:
Kellen Hade:

Ms. Vera,

Attached is an analysis under the First Amendment of social networking regulation of lawyers. This paper was originally prepared for a professional responsibility course in law school, but since it discusses several issues proposed by the Committee's September Call for Comment, I thought I would send it along.

Thanks so much for your time. Happy holidays.

Best,
Kellen Andrew Hade
U.C. Berkeley, School of Law '11
Not All Lawyers Are Antisocial!
Analyzing Limitations on Attorneys’ Use of Social Networking under the First Amendment

Kellen Andrew Hade†

Within just a few years, social networking tools like Facebook, LinkedIn, and Twitter went from teenager-focused novelties to ubiquitous services boasting hundreds of millions of users. These virtual communities give people the ability to interact, teach, learn, and connect with each other on a global scale. But unfortunately, many state bar regulators have enacted or are contemplating reactionary limitations on lawyers’ use of social media. Such regulations unnecessarily chill the adoption of this new technology and deprive both attorneys and clients of its benefit. On examination, however, many of these restrictions are vulnerable to challenge. Unlike traditional advertising, which receives limited constitutional protection, social networking cannot readily be categorized as commercial speech. Without the deferential authority on which bar regulators have relied in the past, social networking restrictions will be subject to heightened scrutiny, promising lawyers a wider degree of autonomy when using these tools. Of course, social networking should not be a place where ethical behavior goes to die. But the First Amendment will ensure that regulators find balance between protecting legitimate client concerns and allowing lawyers to thrive in an increasingly digital world.

INTRODUCTION ................................................................................................................................................. 2
I. SOCIAL NETWORKING IN THE LEGAL PROFESSION .................................................................................. 5
   A. “This Isn’t a Direct Marketing Tool; This is Human Connection.” ...................................................... 5
   B. State Regulators “Unfriend” Social Networking ................................................................................ 9
II. SOCIAL NETWORKING AND THE COMMERCIAL SPEECH DOCTRINE .............................................. 13
III. FIRST AMENDMENT CONCERNS REGARDING SOCIAL MEDIA RESTRICTIONS ........................... 18
   A. Regulations Prohibiting or Restricting Client Testimonials .............................................................. 18
   B. Regulations Requiring Profiles Be Inaccessible to Public ................................................................. 22
   C. Restrictions on Establishing Connections with Attorneys/Judges .................................................. 25
   D. Vague or Ambiguous Social Networking Regulations ...................................................................... 28
IV. SOCIAL NETWORKING’S PLACE IN AN ETHICAL PROFESSION ......................................................... 29
CONCLUSION ......................................................................................................................................................... 31

† J.D. Candidate, 2011, University of California, Berkeley, School of Law. In keeping with the theme of this paper, the author can be found at http://www.linkedin.com/in/kellenhade.
INTRODUCTION

Recent development in legal ethics might lead one to conclude that human interaction has no place in the profession. Judges in Florida cannot have friends.\(^1\) Lawyers in Indiana are nervous about recommending to others the work of their colleagues.\(^2\) And clients in South Carolina should be careful when complimenting counsel after a job well done.\(^3\) Although these rules would be patently absurd if applied in the “real world,” they are unfortunately all too much a reality when it comes to lawyers’ use of platforms like Facebook, LinkedIn, and Twitter.

Colloquially termed social networking services or social media, this technology is quickly becoming entrenched within popular culture. Friends, parents, celebrities, and even 84-year old monarchs\(^4\) are avid users of social networking. It is used to broadcast everything from the philosophical to the mundane, and businesses are finding that establishing a social media presence is a must in today’s digital marketplace. Not surprisingly, these tools are finding their way into the legal profession too, and for good reason. Social networking has the ability to revolutionize the way lawyers interact with one another and share information with the public. The Journal of the American Bar Association even compiles a list of the “Top 100” law-focused Twitter users.\(^5\)

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\(^1\) Florida Judicial Ethics Advisory Comm., Op. No. 2009-20 (Nov. 17, 2009) (opining that judges adding attorneys appearing before them as “friends” on social network websites violates the judicial ethics code) [hereinafter 2009 Florida Opinion].


\(^3\) South Carolina Ethics Advisory Comm. Op. 09-10 (2009) (requiring that client statements posted on social networking websites conform to the ethical code) [hereinafter 2009 South Carolina Opinion].


\(^5\) Blawg 100, Tweeters Who Write Legal Blogs in the ABA Journal’s 2010 Blawg 100, http://twitter.com/#!/ABAJournal/blawg100 (last visited Nov. 29, 2010).
Nevertheless, many state regulators believe that social networking lawyers “represent a dangerous trend that needs oversight.”

They in turn are stifling the potential of this technology by promulgating new rules or with ill-suited interpretations of existing ones. Ostensibly under the guise of protecting professionalism, some state bars have taken a staunchly conservative approach designed to limit the reach of social networking in the profession. Some others have failed to address the issue at all, leaving lawyers to guess what might trigger future discipline. The cumulative result is a patchwork of inconsistent and ambiguous state regulations that impede wider adoption of social networking tools.

In September, 2010, the American Bar Association’s (ABA) Commission on Ethics announced it will consider how to properly regulate lawyers’ use of social media, what it dubs “Internet-based client development tools.” Although the ABA’s involvement might finally advance a comprehensive scheme to regulate social networking, the Commission is not working in a sandbox. Regulation of lawyers’ use of social networking must still be judged against the First Amendment.

State bar associations traditionally rely on the unambiguously commercial nature of advertising to place limits on lawyers’ speech. This is the approach regulators take with static law firm webpages, treating them as advertisements.

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7 Am. Bar Assoc., Comm’n on Ethics 20/20, *For Comment: Issue Papers Concerning Lawyers’ Use of Internet Based Client Development Tools* 1, Sept. 10, 2010, available at http://www.abanet.org/ethics2020/pdfs/clientdevelopment_issuespaper.pdf [hereinafter Am. Bar. Assoc., *Call for Comment*]. Even the name the ABA assigns social media—“Internet-based client development tools”—alludes to the potential value these services have within the profession.

8 Id. at 2-3 (recognizing that “First Amendment issues [are] at stake” when regulating social networking tools).

9 See, e.g., Ala. Ethics Op. 1996-07 (1996) (finding that any information made available to the public about a lawyer or a lawyer's services on the Internet, whether through a "web page, bulletin board or unsolicited
 protections for commercial speech allow ethics rules limiting such things as, for example, client testimonials and other statements that risk misleading the public. But social media differs in several important respects from conventional print or television ads, and even other websites. These distinctions will render information on Facebook, LinkedIn, and Twitter non-commercial speech, and as such, restrictions on their use will be more highly scrutinized than those on advertising. Social networking will thus enjoy more flexibility within professional conduct regulations and will allow the technology to reach its potential within legal practice.

Part I of this paper outlines the social media environment today and explains the advantages of these services and the ways in which their use can benefit the legal community. Part II offers an analysis of social media under Supreme Court precedent distinguishing between commercial and non-commercial speech. Next, Part III applies the First Amendment to a variety of restrictions bar associations either have placed on lawyers’ use of social networking or rules they may adopt in the future. It concludes that state bars will have limited power to regulate the social networking habits of its members. Finally Part IV attempts to balance the practical realities of social networking’s ubiquity with the legitimate need to promote legal professionalism. It suggests that although some rules concerning social media may be constitutional, new ethics rules are not altogether needed. Rather, current canons can be interpreted with an eye towards the future, and

email,” is regulated by the rules on advertising and solicitation); N.C. Bar Ass’n Ethics Comm. RPC 239 (1996) (holding that attorneys may advertise on the Internet if the advertisements comply with the state’s Rules of Professional Conduct); Ill. State Bar Assoc. Ethics Op. 96-10 (1997); Utah Ethics Op. 97-10 (1997) (holding that attorneys may operate and maintain a web site as long as it complies with state rules regarding advertising and solicitation); Ky. State Bar Ass’n, Op. E-403 (1998) (holding that state rules regarding advertising apply to Internet advertising); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998) (finding that an attorney may operate and advertise a practice over the Internet, as long as attorney complies with applicable rules of professional conduct); State Bar of N.D. Ethics Comm. Op. 1999-02 (1999) (“Attorney advertising or solicitation on a web page is governed by the same rules which generally apply to attorney advertising or solicitation by more traditional methods.”).
with continuing education, they can embrace social networking tools’ use in the practice of law.

I. SOCIAL NETWORKING IN THE LEGAL PROFESSION

A. “This Isn’t a Direct Marketing Tool; This is Human Connection.”

Social networking use has been dubbed a “global phenomenon.”\(^{10}\) Indeed, perhaps the most compelling reason for lawyers to adopt the technology (and likewise for ethics rules to properly embrace it) is that potential clients have already done so. Two-thirds of the world’s population now participates in at least one social networking service.\(^{11}\) Six of the twenty most visited websites in the United States are social media platforms.\(^{12}\) It is a snowballing cultural movement, and not one reserved just for teenagers and college students. The use of social networking among users age 50 and older doubled over the last year.\(^{13}\) This key demographic—comprised of business owners, in-house counsel, and the retiring generation—contains those individuals most likely to consume legal services in the near term. And to reach this population, lawyers can turn to a variety of social networking platforms. The three most relevant of these are Facebook, LinkedIn, and Twitter.\(^{14}\)

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12 Alexia, Top 100 Sites in the United States, available at http://www.alexa.com/topsites/countries/US (last accessed Oct. 30, 2010). The websites are: Facebook (2\(^{nd}\)), Twitter (7\(^{th}\)), Blogger (9\(^{th}\)), LinkedIn (14\(^{th}\)), MySpace (19\(^{th}\)), WordPress (20\(^{th}\)).
14 These services can be found at www.facebook.com, www.linkedin.com, and www.twitter.com, respectively. Blogging websites, though outside the scope of this paper, are also popular platforms.
Facebook is the most popular social networking website in the world, boasting more than 500 million members.\(^{15}\) Anyone with an e-mail address may join Facebook’s community, where they can establish a free personal profile. These profiles display basic information (like name, occupation, interests, etc.) and pictures, and allow users to add other individuals as “friends.” The latter feature is probably Facebook’s best-known contribution to the social networking world.\(^{16}\) “Friending” another user links together profiles and permits either user to see the activity of the other. It also results in a searchable list of individuals with whom a user has a connection or relationship. This list is typically visible to other users, even those who are not “friends.” Facebook pages also contain a “wall” where the user and his friends can post updates, share links to other websites, and publish messages. These communications, too, are generally available publicly by default.\(^{17}\)

What Facebook is to the casual social networking cohort, LinkedIn aims to be for the 70 million lawyers, doctors, and corporate warriors that have established an on-line presence with the service.\(^{18}\) LinkedIn essentially allows users to create an interactive,


\(^{17}\) Facebook, like other social networking platforms, permits users to exercise a fair amount of control over the relative privacy of their information. These efforts include settings to restrict or prohibit access to certain information. Facebook’s privacy policy is not without criticism, however. See Jessica E. Vascellaro, Facebook Grapples with Privacy Issues, WALL ST. JOURNAL, May 19, 2010, available at http://online.wsj.com/article/SB10001424052748704912004575252723109845974.html.

web-based resume. Clicking on any of the member’s information—educational background, work history, awards and honors—will instantly display a list of others with similar credentials. Of particular interest to lawyers, the platform deploys several other features aimed at building professional networks. Like Facebook, LinkedIn members can add friends (called “connections”) and can “recommend” the professional services of another by offering short testimonials.19 These recommendations are displayed on the member’s profile and are badges of honor among users of the service. LinkedIn also benefits from a vast degree of public visibility, a characteristic making it attractive to professionals marketing their services. To wit, a person’s LinkedIn profile will often be among the first few pages resulting from a Google search of their name.

Twitter is the web’s fastest-growing social network,20 a fact that has not escaped lawyers. “[L]egal professionals are flocking to Twitter as a chance to socialize, promote and network.”21 Twitter is fundamentally different from Facebook and LinkedIn. Instead of building around profile pages, the user experience is focused on “tweets”—short messages (no more than 140 characters long) that are pushed to the Internet in real-time. Tweets are broadcasted to the “world” by default, meaning that anyone, even those without a Twitter account, may view a user’s messages.22 Tweets are even searchable using popular Internet search engines. Twitter users employ the platform to express their views on everything from politics, to popular culture; and from advertising their

19 Cool & Young, supra note 11, at 36.
22 Twitter’s internal privacy settings allow users to restrict access to their account. However, this feature naturally degrades the service’s self-publicizing appeal, and for this reason the majority of users do not change the default setting.
professional services, to what they ate for lunch. Twitter provides users their own landing page, which aggregates their tweets and the tweets of other users they choose to follow. 23

Many practicing lawyers have adopted social networking technology already. Over three-quarters of attorneys report using a social networking service. 24 And for good reason: social networking offers attorneys a variety of benefits. For example, it gives lawyers a valuable, yet “virtually cost-free podium” from which to speak. 25 They can “comment on legal news, law firm issues, and [their] experiences in court.” 26 Attorneys can make contacts quickly, exchange information, and collaborate across jurisdictional boundaries. Moreover, using social networking to comment on the law requires that practitioners keep current with new developments. The nature of social networking platforms also forces attorneys to write effectively and with brevity, skills that carry over into real world practice. 27

And, although only one of its benefits, social networking is also a powerful business development tool, attracting both clients and attorney referrals. Some regard it as the

23 “Following” a user on Twitter is similar to adding them as a friend on Facebook or a connection on LinkedIn. One notable difference is that the followed-user is not required to accept the request.


26 Erb, supra note 21, at 35.

digital equivalent of a “giant cocktail party.”

Like its real world counterpart, social media provides a valuable way to interact within the community and build a network. For this reason social networking platforms are quickly replacing alumni contacts as an important source of referrals. And there lies the real significance of social networking. “This isn’t a direct marketing tool; this is human connection.” Rather than replace traditional forms of interaction, on-line tools augment face-to-face relationships and extract more value from them. Social networking need not simply coexist with the legal profession. It instead can be a valuable resource for both lawyers and the public. Unfortunately, some bar associations seem to disagree.

B. State Regulators “Unfriend” Social Networking

Considering the conservatism of the legal profession, it is perhaps no surprise that state bars have greeted the emergence of social networking technology with skepticism. Social networking burst into the public consciousness only within the past few years. Since then the technology has already far outpaced the slow, bureaucratic rate at which ethics rules are adapted. “Existing ethics guidelines generally do not focus on technology issues, and state bar associations have been slow to fill in the gaps with opinions and best practice guides.” And when they have addressed the issue, states have responded with a bizarre and inconsistent patchwork of regulations.

28 Erb, supra note 21, at 37.
29 Leader Networks, supra note 24, at 7.
30 Rob Key, chief executive officer of Converseon, a social marketing firm.
31 See Karen Sloan, Kentucky Bar Proposes Regulation of Attorneys’ Social Media, NAT’L LAW J., Nov. 17, 2010, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202474978093 (Bar associations’ instinctive “reaction is to regulate every change that comes along.”).
32 Steven C. Bennett, Ethics of Lawyer Social Networking, 73 ALB. L. REV. 113, 114 (2009).
Take, for instance, Florida’s Judicial Ethics Advisory Committee. In 2009, it issued an opinion concluding that judges are prohibited from adding as friends on social networking websites any lawyers that appear in front of them. The committee rationalized its decision by noting that such a gesture “convey[s] the impression that [the lawyers] are in a special position to influence the judge.” This conclusion misses the mark. “Although the term ‘friend’ is used in a social networking context, it merely means a person is a contact, not necessarily someone you would let crash on your couch overnight or a friend in the traditional pre-internet sense.” Florida’s restriction, if analogized to a real world blanket prohibition on lawyer-judge interaction, is absurd and demonstrates a fundamental misunderstanding that many regulators have about social networking.

South Carolina takes a more measured approach to regulating lawyer social networking; however, its treatment still ignores important, user-driven features of the technology. Although the state tentatively allows clients to post content on lawyer’s profiles, if their comments can be construed to be an endorsement of the lawyer’s work or skill, the message is required to adhere to South Carolina ethics rules. The opinion also contains language suggesting that a lawyer might even be responsible for monitoring the client’s social networking page to ensure any comments about the lawyer are within

33 2009 Florida Opinion, supra note 1 (the committee relies on FLA. CODE OF JUDICIAL CONDUCT CANON 2B: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”).
34 Id.
36 2009 South Carolina Opinion, supra note 3.
ethical guidelines.\textsuperscript{37} Although perhaps noble in purpose, enforcing this opinion in practice proves difficult. Suppose after a court victory an elated client posts on his own Facebook wall that “Claire is the best lawyer in town!” This is considered an endorsement under the state’s ethics rules.\textsuperscript{38} South Carolina thus requires that the lawyer, who may not even be alerted that the message exists, first must find the message and then try to convince the client to remove or edit it so it does not “create unjustified expectations” about the lawyer’s skills. If the client refuses, the lawyer’s continued representation may imply adoption of the comment and subject her to discipline.\textsuperscript{39}

A handful of other states have also issued rules or ethics opinions about social networking. Texas requires that attorneys block the public from accessing their profiles, otherwise physical copies of the page must be filed with the bar.\textsuperscript{40} This too is an impractical approach. It forces lawyers to choose between forgoing the benefits of a public social networking page and attempting to keep current with the bar copies of dynamically changing content.\textsuperscript{41} Kentucky is considering adopting a similar rule.\textsuperscript{42} And problematic is that numerous jurisdictions have not formally addressed social networking

\textsuperscript{37}\textit{Id.}, citing South Carolina Ethics Advisory Comm. Op. 99-09 (1999). Unbeknownst to his lawyers, a client created a webpage about on-going litigation which described the case and asked other victims to contact the lawyer if they wished to be included. Determining that the webpage was an attempt by the client to advertise for the lawyers (even though it was not commissioned by them), the opinion concluded that “if the attorneys do not approve of this method of advertising, they should promptly inform the client of this and demand that the web page be changed.”

\textsuperscript{38} See id. (an endorsement is “a general recommendation or statement of approval of the lawyer”).

\textsuperscript{39} See South Carolina Ethics Advisory Comm. Op. 99-09, \textit{supra} note 37. If the client who created the unauthorized “advertisement” for the lawyers refused to remove it, failing to withdraw from the case would be considered an endorsement of the page by the lawyers. \textit{Id.}

\textsuperscript{40} Texas State Bar Advertising Committee Interpretive Comment No. 17(A)-(I) (2010) [hereinafter \textit{2010 Texas Opinion}].

\textsuperscript{41} See Benham, \textit{supra} note 25, (noting that new Texas rule “leaves the attorney in the tenuous position of submitting every post related to her practice to the [bar’s] Advertising Review Committee or making judgment calls at the risk of a possible ethical sanction.”).

\textsuperscript{42} \textit{Proposed Amendment, Deletion, and Addition to the Regulations of the Attorneys’ Advertising Comm’n, BENCH & BAR (Ky. Bar Assoc.)}, Sept. 2010, at 45 [hereinafter \textit{Proposed Kentucky Rule}].
at all, chilling its use by lawyers who fear of future discipline. For example, a law firm in Indiana, concerned about an ambiguity in the state’s ethics code, is forbidding its employees from using LinkedIn’s recommendation feature.\textsuperscript{43} Indiana has yet to issue a formal clarification of its rule as applied to social networking.

Quite simply there is very little consensus among authorities about the regulation of social networking. The resulting patchwork of schemes hinders greater adoption of the technology and deprives both lawyers and clients of its benefits. For instance, inconsistent state rules allow bar regulators to exert power outside their borders. Lawyers with multijurisdictional practices are forced to adhere to the most restrictive state’s rules because social networking, unlike print or television media, cannot be readily contained within political boundaries.\textsuperscript{44} Likewise, the use of social networking in states with ambiguous guidelines or those with none at all will be chilled as lawyers will not want to risk discipline from an ad hoc review in the future. The ABA’s Commission on Ethics has an opportunity to review this mess of state regulations and present a uniform alternative. But before it can do so, it must consider a variety of constitutional and policy questions. The first, and perhaps most important of which, is determining whether social networking is more properly considered commercial or non-commercial speech. The level of First Amendment protection afforded to the technology and the permissible scope of its regulation depend on the answer.

\textsuperscript{43} See Dayton, supra note 2. The firm feels compelled by the language of IND. R. PROF’L CONDUCT R. 7.2(d) (providing, in relevant part, that “A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which: … (3) contains a testimonial about or endorsement of a lawyer[.]”). No analogous language is found in the ABA’s model rule. See MODEL RULES OF PROF’L CONDUCT R. 7.1, et seq.

\textsuperscript{44} For example, lawyers can target certain newspapers or television markets with ads that predictably adhere to the ethical rules of that particular state. While it is true that law firm websites pose similar problems as social networking in this respect, the former are more securely categorized as commercial speech and their regulations are more uniform (discussed infra).
II. SOCIAL NETWORKING AND THE COMMERCIAL SPEECH DOCTRINE

Bar authorities often find the most obvious way to regulate social networking is to treat it as advertising.\textsuperscript{45} Doing so gives regulators a fair amount of flexibility and power. Indeed, not long ago lawyers were entirely prohibited from publicizing their services. The idea of advertising as protected “commercial” speech developed only in the last half of the 20th century. Prior to this, many bar associations enforced restrictions barring attorneys from engaging in advertising, ostensibly out of concern for protecting the integrity of the practice of law.\textsuperscript{46} Advertising was thought to “tarnish the dignified public image of the profession.”\textsuperscript{47} But in time the Supreme Court rejected this rationale and in the process moved advertising under the umbrella of First Amendment protection—the commercial speech doctrine. “Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.”\textsuperscript{48} Wholesale bans on attorney advertising finally crumbled in tow.\textsuperscript{49}

\textsuperscript{45} See 2010 Texas Opinion, supra note 40 ("Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements."); see also Am. Bar. Assoc., Call for Comment, supra note 7, at 3 (asking for comment on “whether [announcements posted on social networking platforms] are subject to the usual ethical restrictions on lawyer advertising and solicitation”).

\textsuperscript{46} Vestiges of this old mindset can still be found today. See, e.g., IND. R. PROF’L CONDUCT R. 7.2(b) (providing that lawyers can advertise only in a “dignified manner”); N.Y. R. PROF’L CONDUCT R. 7.1(g)(1) (prohibiting the use of Internet pop-up ads by attorneys).


\textsuperscript{49} See, e.g., Bates, supra note 47.
Commercial speech, however, does not enjoy limitless First Amendment protection. It may be subjected to reasonable regulation that serves a legitimate public interest.\(^{50}\) Courts consistently hold that commercial speech that is false, misleading, or deceptive fits within this permissible scope of regulation.\(^{51}\) These decisions underlie the limits in place on attorney advertising today. For example, the ABA’s Model Rules prohibit lawyers from making “false or misleading communication” about the lawyer’s services, language that closely tracks the contours of the constitutional doctrine.\(^{52}\) Limits on commercial speech protection also validate restrictions of attorney referral services and publishing client testimonials, among other things.\(^{53}\) Thus, if social networking is categorized as commercial speech, its regulation could be expansive and difficult to challenge. Indeed, Texas’ rule assumes—without analysis—that public profile pages are advertisements and therefore subject to strict restrictions.\(^{54}\)

Commercial speech is characterized by an “expression related solely to the economic interests of the speaker and its audience.”\(^{55}\) Its labeling is an exercise of “commonsense.”\(^{56}\) But while commercial speech is easy to identify in traditional advertisements, social networking cannot be so readily branded. Lawyers take advantage of social media for a myriad of reasons: learning, teaching, networking, and

\(^{50}\) Bigelow v. Virginia, 421 U.S. 809, 826 (1975).


\(^{52}\) MODEL R. PROF’L CONDUCT R. 7.1.

\(^{53}\) See id., cmt. 7 (providing that attorney referral services cannot be “false or misleading”); see, e.g., Utah State Bar Ethics Advisory Comm., Op. No. 09-01 (2009) (discussing limits on commercial speech restrictions for advertising and concluding that client testimonials are prohibited to the extent they are “false or misleading”).

\(^{54}\) 2010 Texas Opinion, supra note 40 (“Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements.”).


collaborating. These uses, at best, bear only an indirect relation to the lawyer’s economic interests. For example, a lawyer who posts commentary about a recent court opinion might hope that it will increase his exposure among the community, eventually leading to an uptick in business. However, that content has significant educational value that is wholly unrelated to the lawyer’s economic interest. Likewise, an attorney may utilize LinkedIn’s recommendation feature to reinforce a personal friendship just as much as to build a referral base. This type of content does more than merely “propose a commercial transaction.”

Thus, to the extent the social networking page does more than merely offer the lawyer’s services for a fee, it is not commercial speech.

Bar associations might nevertheless try to justify regulating social networking as advertising by treating each lawyer’s page not as a single unified expression, but rather as the sum of separate component parts. This approach would allow isolation of certain portions of the page as commercial speech, subject to stricter rules, and others as non-commercial, having more protection. For instance, regulators might determine that an attorney’s Facebook update promoting a seminar she is presenting—without regard to her profile’s other content—is sufficiently related to her economic interests to subject it to the commercial speech standard. Notwithstanding the vagueness of a regulation that would apply only to some of a lawyer’s social networking page, the Supreme Court has refused to deconstruct expressions in this way. When commercial speech is “inextricably intertwined” with fully-protected non-commercial speech, it is proper to apply more rigid

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58 Of course, an explicit solicitation published on an attorney’s social networking profile (“Reasonable doubt for a reasonable fee, call me!”) involves a different analysis. Because publishing this type of explicit self-promotion is not the traditional way social networking tools are used by lawyers, the following analysis will assume this type of content is absent.
59 See Part III.D discussion, infra at pp. 28-29.
First Amendment protection to the speech as a whole. 60 “[A]pplying one test to one phrase and another test to another phrase . . . would be both artificial and impractical.” 61 Therefore even arguably commercial messages will lose their commercial character if they are aggregated with fully-protected speech on an attorney’s social networking platform. 62

Thus, it will be difficult for bar associations to define user-generated content, like that created by social networkers, as commercial speech. The closest example of a government’s attempt to do so is the Federal Trade Commission’s (FTC) recent amendments to its Endorsement and Testimonial Guides. 63 In 2009 the FTC, for the first time, extended these consumer-protection rules to bloggers in an effort to regulate speech about companies or products with which the blogger has a “material connection.” 64 The new rules restrict bloggers’ speech and require attachment of a disclaimer informing readers about this connection. A failure to do so can “subject [bloggers] to liability for


61 Id.

62 Id.; but see Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (holding that “Tupperware parties” in university dorms were not sufficiently intertwined with educational lessons to render ban of solicitation in dorms unconstitutional). Although Fox purports to limit the Riley doctrine somewhat, it is fair to regard aggregated messages on a social networking site substantially more intertwined than the “educational” messages presented at a Tupperware party. The Fox Court determined that the university’s ban did not deprive the commercial speakers of a forum—it could be sold outside the dorms. Separating the components of social networking, however, would require the lawyer to find an alternate forum for his commercial speech, thus depriving him of the broadcasting power of the Internet. Additionally, the commercial-nature of selling housewares is much less ambiguous than is that of a lawyer’s use of social networking, as discussed supra.


64 Id. at 53,142 (codified at 16 C.F.R. § 255.5 (2010)). The evil the FTC fears is a product review or “endorsement” written by a blogger that has received—directly or indirectly—compensation for his review. Remuneration might be as explicit as a cash payment, or as innocuous as providing a demo product that the blogger returns after she is finished.
false or unsubstantiated statements.”\(^{65}\) Implicit in these amendments is the FTC’s determination that a user-generated blog can constitute commercial speech,\(^ {66}\) a marked departure from the view that such typically exists only within traditional advertisements.\(^ {67}\)

Serious doubt exists about the validity of these wildly unpopular rules,\(^ {68}\) but even if they survive constitutional challenge, a lawyer’s use of social networking cannot fairly be compared to a blogger’s payola. The economic motivation behind a lawyer tweeting about the upcoming seminar, for example, is far less clear than that of a blogger getting paid to review a product. Although some financial benefit may eventually befall the lawyer from increased public exposure (indeed, that is one of the goals of using social networking), its value is indirect and difficult to quantify. It certainly cannot be said that the tweet is an “expression related solely to the economic interests” of the lawyer. A blogger’s product endorsement is also unlikely to contain the amount of fully-protected speech—political viewpoints, social commentary, artistic expressions—that is usually present on social networking websites.

Without the commercial speech label, the deferential treatment towards bar association regulations is stripped away, and these restrictions will be subject to increased

\(^{65}\) Id. at 53,139 (codified at 16 C.F.R. § 255.1(d) (2010)).

\(^{66}\) The FTC’s “false or unsubstantiated statements” language follows the limits on restrictions of commercial speech. See Va. St. Bd. of Pharm., supra note 48, at 771 (holding that states may regulate commercial speech which is false, deceptive, or misleading).

\(^{67}\) Of course, a blog could easily take on the characteristics of traditional advertising were it maintained by or under the control of employees of the company that produces the product. But this circumstance is not the FTC’s focus.

judicial inquiry. Because social networking limitations are limits on the forum, not the content, of speech, their regulation will be judged under the familiar standard of intermediate scrutiny framework.\textsuperscript{69} They will survive the ire of the First Amendment only if they advance important government interests that are unrelated to the suppression of speech, and they are no greater in scope than necessary to further the state’s objective.\textsuperscript{70} With this framework in mind, several potential forms of social networking regulations are analyzed below.

### III. First Amendment Concerns Regarding Social Media Restrictions

To date, regulators have proposed or adopted a number of social media limitations for lawyers, which can be roughly grouped into four categories: (1) regulations prohibiting or restricting the availability of client testimonials; (2) regulations that limit the amount of information a lawyer can make publically available; (3) limitations on who a lawyer may add as a connection; and (4) other regulations that may be vague or overbroad.

#### A. Regulations Prohibiting or Restricting Client Testimonials

Client testimonials published on social networking services are unique in that they are both incredibly valuable and yet might also be one of the technology’s features bar regulators fear most. Prohibitions on client endorsements have always been a central part of restrictions on attorney advertising out of the fear that their content may unduly influence vulnerable clients into unrealistic expectations about a lawyer’s skills. Although there is a risk that a particularly deceptive testimonial may lure an unwitting

\textsuperscript{69} See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (providing that restrictions on forum of speech, without aim to suppress the content of message, subject to intermediate scrutiny); see also James B. Lake, Speaking Legally and Freely: Lawyer Web Sites, and the First Amendment, 58 S.C. L. REV. 871, 875 (2007) (explaining that the fact that a message is communicated via the Internet does not label the speech’s content).

client, peer recommendations play an important role in our decisions whether to consume nearly every product or service. The Internet and more specifically social networks can give the public ready access to information about lawyers and allow them to make informed choices before contracting for legal services.

Like South Carolina, regulators might be tempted to restrict, to varying degrees, the availability or content of client testimonials posted on a lawyer’s social networking page. But such restrictions are ripe for challenge under the First Amendment. As a threshold matter, a testimonial posted to a social networking site is actually the client’s speech, not the lawyer’s. Unlike traditional advertising where an attorney retains final authority over the content of the message, a social networking profile is merely a passive conduit through which third-party content is displayed. Clients can, on their own initiative, navigate to a lawyer’s profile, compose a testimonial, and publish it, all without any affirmative action by the lawyer herself. 71

This distinction has two important implications. First, it serves to reinforce the non-commercial nature of testimonials in social networking because the speaker (the client) has no economic incentive to post his endorsement, absent direct compensation from the lawyer. 72 This confirms that the content deserves a higher degree of constitutional protection. Second, state bars’ regulating authority extends over attorneys only; the public is not bound by their decrees. Any broader statute restricting the public’s ability to

71 This is true of both Facebook (via a user’s wall) and Twitter (by directing a tweet at a user), depending on the user’s security settings. By contrast, LinkedIn requires that members approve recommendations before they are publically displayed. However, 47 U.S.C. § 230, discussed infra, makes this difference irrelevant.

72 Of course, if the lawyer solicited and paid for a recommendation, the testimonial would be commercial speech and would be subject to the traditional prohibitions on false or misleading content.
publish recommendations of lawyers would be a content-based speech regulation and would surely fail.\textsuperscript{73}

Regulating authorities may try to circumvent the problematic issue of the speaker’s identity by nevertheless attributing all content displayed on a lawyer’s page to the lawyer, regardless of its author, under a theory that the lawyer has the ability to edit and delete content on his social network. However, federal law likely will preempt any such effort. Section 230 of the Communications Decency Act protects users of “interactive computer services,” like social media platforms, from liability for the content of another.\textsuperscript{74} The statute provides that users “shall [not] be treated as the publisher or speaker of any information provided by [a third-party].”\textsuperscript{75} Section 230 is most commonly used to immunize internet services and their users against liability for a third-party’s defamatory or otherwise unlawful speech. For example, Yahoo! successfully invoked the statute to avoid tort liability for displaying indecent depictions of a woman, content her former boyfriend uploaded to the service.\textsuperscript{76} But the statute is not by its terms limited to this context.

Notably, Section 230 expressly preempts inconsistent state laws that subject immunized parties to liability.\textsuperscript{77} Because most states treat disciplinary proceedings as

\textsuperscript{73} See, \textit{e.g.}, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”).

\textsuperscript{74} \textit{See generally} 47 U.S.C. § 230 (2010). An interactive computer service “means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” \textit{Id.} § 230(f)(2).

\textsuperscript{75} \textit{Id.} § 230(c)(1).

\textsuperscript{76} Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009), \textit{as amended} (Sept. 28, 2009).

\textsuperscript{77} 47 U.S.C. § 230(e)(3).
forms of civil liability, the statute prohibits state bars from sanctioning lawyers by considering a client’s speech the lawyer’s own. Section 230 additionally includes protection from liability for “publishing” third-party content, which includes reviewing, editing, and deciding whether to publish content or to withdraw it from publication. Thus, the statute also preempts state regulations that prohibit lawyers from “accepting” testimonials on sites, like LinkedIn, that require users to approve third-party content before it is publically posted. Section 230 likewise preempts requirements like South Carolina’s that burden attorneys with policing client comments to ensure conformance to the ethics canons.

Given the technical realities of testimonials in the social networking context, bar associations will be limited in their ability to impose restrictions. To the extent lawyers use the services merely as static advertisements and personally republish client testimonials themselves, the testimonials might be subject to reasonable regulation precluding false or deceptive content. Of course, if the lawyer solicited and paid for a recommendation, the testimonial would be commercial speech and would be subject to the traditional commercial speech restrictions. A closer question presents when the lawyer solicits, but does not compensate for, a testimonial. But in any case, lawyers will enjoy far more flexibility in displaying client endorsements on social networking profiles.

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78 Although not in the context of 47 U.S.C. § 230, many state courts describe disciplinary proceedings as civil in nature. See, e.g., In re Chastain, 532 S.E.2d 264, 267 (S.C. 2000); Matter of Discipline of Babilis, 951 P.2d 207, 214 (Utah 1997); Matter of Rabideau, 306 N.W.2d 1, 6-7 (Wis. 1981); State ex rel. Nebraska State Bar Ass’n v. Richards, 84 N.W.2d 136, 141 (Neb. 1957); contra Mississippi State Bar v. Young, 509 So.2d 210, 212 (Miss. 1987) (disciplinary actions are quasi-criminal proceedings because the lawyer enjoys due process rights).


80 Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1170-71 (9th Cir. 2008).
than regulators have previously allowed in advertising. This can only benefit the public by increasing the transparency of the profession.\textsuperscript{81}

\textbf{B. Regulations Requiring Profiles Be Inaccessible to Public}

Some jurisdictions might believe that a clean line to draw would be to require that lawyers erect a wall between their social networks and the public. What will be termed “lockdown restrictions” here, these regulations exclude the public by requiring that lawyers use privacy settings to limit access to their pages to “friends” or “connections”—those users who have an established social networking relationship with the lawyer. Lockdown restrictions remove a lawyer’s tweets, for example, from the publically searchable database and severely limit the effectiveness of social networks as information centers.

Challenges to these limitations can be brought under several theories. Perhaps not surprisingly, lockdown restrictions are new only to the digital realm. State bars in the past attempted to limit the audience of traditional advertisements. For instance, an old Missouri statute prescribed that printed announcement cards could be sent by lawyers only to other lawyers, their clients, former clients, personal friends, and relatives.\textsuperscript{82} Absent from this list of acceptable recipients, of course, is the public at large, much like lockdown restrictions in the social networking environment. Missouri argued that it was ill-equipped to monitor the content of advertisements sent to a broad audience. However, the Supreme Court rejected that reasoning and struck down the statute. Difficulties in

\textsuperscript{81} Publicly available information about lawyers is “helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered.” \textit{Bates, supra} note 47, at 358.

\textsuperscript{82} In re R.M.J., 456 U.S. 191, 196 (1982).
enforcement, the court held, cannot relieve the government from its duty to ensure regulations are no greater in scope than necessary to further its objective.\textsuperscript{83}

Lockdown restrictions also reflect a sense of arrogance. Implicit in these regulations is the belief that the public lacks the ability to protect itself from deception. The First Amendment frowns on this “highly paternalistic approach” to speech regulation.\textsuperscript{84} A necessary corollary to speech protections are protections to ensure speakers will have an audience. The law is “especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”\textsuperscript{85} Rather than give clients the opportunity to absorb and weigh for themselves information about lawyers gleaned from social networks, lockdown restrictions represent threshold judgments about the educational value of the content and aim to keep it away from the public’s eyes. They serve to interrupt the free-flow of information to consumers that the First Amendment protects, especially in a non-commercial context.

Regulators might seek to avoid constitutional ire by forgoing a complete ban on public social networks in favor of providing an alternative regulatory framework for lawyers who choose to not to lockdown their content. Texas, for instance, permits lawyers’ profiles to be “generally available to the public,” but mandates that the lawyer first file a copy of the page with the Advertising Review Committee for approval.\textsuperscript{86} Texas’s rule is ironic considering the Bar itself, like many others, has a public Facebook

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\item \textsuperscript{83} Id. at 200.
\item \textsuperscript{84} Va. State Bd. of Pharm., supra note 48, at 771.
\item \textsuperscript{85} 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996) (finding state’s ban on price advertising for alcoholic beverages unconstitutional).
\item \textsuperscript{86} 2010 Texas Opinion, supra note 40 (providing that social networking pages are advertisements subject to the professional rules); TEX. DISCIP. R. PROF’L CONDUCT R. 7.07 (describing process of submitting advertisements to state bar for approval).
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But there are several problems with its approach. First, requiring that a lawyer’s social media page receive the bar’s blessing as appropriate under its advertising guidelines ignores the non-commercial nature of the technology. The bar presumably would look for potentially false or deceptive content, evaluation criteria that are inapplicable outside the commercial speech doctrine. And absent the advertising rules, Texas does not articulate the “narrow, objective, and definite standards” for reviewing social networking pages that the First Amendment requires to avoid arbitrary censorship.

Second, these types of filing alternatives are impractical. Their enforcement would be an administrative nightmare for regulators. Unlike print advertising or static law firm websites, social networking profiles are dynamic, breathing pages that can (and regularly do) update every few hours. The Texas rule does not express how often lawyers are required to update their filings with the bar. Should it be every month; every week; every day? And as the state requires that a fee accompany any submission for review, directing lawyers to submit an update too frequently may impermissibly chill social networking use because “financial burden[s] operate as disincentives to speak.”

In sum,

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87 Facebook.com, State Bar of Texas, http://www.facebook.com/statebaroftexas (last visited Nov. 30, 2010). The following state bars also currently have a Facebook presence: Alabama, California, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Utah, Washington, and Wisconsin.

88 See supra discussion, at pp. 13-18 (and accompanying notes).

89 See TEX. DISCIPLINARY R. PROF’L CONDUCT R. 7.02 (providing that communications about a lawyer’s services—advertisements—cannot be “false or misleading” about the qualifications or the services of the lawyer or firm).


91 TEX. DISCIPLINARY R. PROF’L CONDUCT R. 7.07(b)(4).

these types of alternatives provided for those who decline to block public access to their profile will not save the lockdown regulations from constitutional scrutiny.

Not only do lockdown restrictions raise concerns about validity, but they are also bad policy. Lawyers should “be encouraged to use [the Internet] to discuss legal developments with other lawyers, clients, and the public.” Clients have a right “as consumers and citizens to know about the activities of the legal profession,” and lockdown provisions deprive lawyers and the public from using the incredible platform social networking provides to accomplish this objective. Open social networks also help to dismantle the wall between lawyers and laymen and demonstrates that lawyers indeed have a “human side.” This in turn helps attorneys to build relationships with the people in their communities. Lockdown restrictions run counter to these ambitions.

C. Restrictions on Establishing Connections with Attorneys/Judges

Even in a profession known for its conservative nature, Florida’s ban on social network relationships between judges and lawyers rule raised eyebrows. Ethics professor Stephen Gillers called the committee’s assessment of the dangers social media presents “hypersensitive,” and noted that people do not suddenly “drop out of society when they become judges.” Florida’s rule probably best illustrates misconceptions harbored by the uninitiated about social networking. Underlying these types of regulations is the mistaken belief that a user will add as friends only those people with whom he socializes

93 Lake, supra note 69, at 877.
94 Bates, supra note 47, at 358.
95 Brown, supra note 27, at 2.
96 See Cool & Young, supra note 11, at 36 (social networking sites “help community members learn more about you and begin to feel they know you personally.”).
on a frequent basis. But the reality is that the meaning of “friends,” “connections,” or “followers” takes a very different connotation in the social networking world. “Friendships” in a social network are probably better understood as simple links between people, either on personal or professional level, or even as mere acquaintances. Nevertheless, these misconceptions remain, and they lead to regulations like Florida’s.

Although Florida’s rule is aimed at judges, it has an incidental affect on attorneys, and it is not too far a stretch to conclude that a similar regulation might be extended to lawyers directly. Whether a restriction on social networking relationships is styled as a limitation on association or one on speech, authorities seeking to impose it will need to show that it advances a substantial government interest. If this first prong of the intermediate scrutiny analysis fails, so too does the regulation. This is an area where regulators must articulate the distinctive evils posed by social networking use. It is well settled that any prohibition on lawyer-judge interactions in the physical world would be unlawful. So to sustain this type of regulation, there must be something inherently unique and dangerous about virtual communication that is not found in reality.

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99 For example, regulators might point to Model R. Prof’l Conduct R. 8.4(f), which proscribes an attorney from “knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”

100 An argument might be made that social networking relationships implicate the right of expressive association under the First Amendment. See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (finding “implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”). However, the few courts addressing the issue seem not yet ready to accept social networking websites, by themselves, as a protectable forum for association. See, e.g., Spanierman v. Hughes, 576 F. Supp. 2d 292, 314 (D. Conn. 2008) (stating that court “unsure as to whether MySpace can properly be considered an ‘organization’” for an expressive association analysis). Regardless, it seems clear that displays of social networking friendships or connections are nevertheless forms of speech.

101 The analyses for determining the validity of content-neutral restrictions on association and speech are the same. Compare Cent. Hudson, supra note 51, at 561 (speech), with Roberts, supra note 100, at 623 (association).
The hallmark governmental interest grounding most ethics rules is still concern for the integrity of the profession. Honorable lawyers and judges serve “to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies.” Although this rationale is insufficient to uphold real-world bans on interaction, it is probably sufficient to justify some on-line regulations against lawyers. Commentators have noted several features of social networking use that may allow bootstrapping the integrity rationale to social networking and justify stricter regulation. In particular, authorities might be concerned about the permanence, searchability, replicability, and transformability of social media. If a lawyer and judge meet for a drink, the encounter can be witnessed only by a limited audience for a fixed period of time. But social networking platforms memorialize these types of interactions and allow anyone with internet access to scrutinize them.

Given the sensitivity of courts to the public’s perception of the profession, these unique features of social networking probably provide enough of a “substantial interest” needed to constitutionally regulate relationships between lawyers and judges. The same is true of social networking contact between lawyers and jurors. However, the rationale does not extend to bans on virtual relationships with other lawyers or clients, individuals with whom the public would expect lawyers to interact in the real world. But even if these regulations pass First Amendment scrutiny, regulators should be sure to consider the realities of social networking “friendships” before passing such restrictions.

103 Vinson, supra note 35, at 13.
104 See Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (“The Bar has substantial interest . . . in preventing the erosion of confidence in the profession . . .”).
D. Vague or Ambiguous Social Networking Regulations

Like Florida’s rule, other regulations on social networking might also flow from regulators’ lack of understanding about how the technology works or how it is utilized in practice. Because regulators may not know how to formulate the end results they wish to achieve, the result may be broad, sweeping restrictions meant to address certain discrete fears about social networking. Such regulations risk offending due process by being impermissibly vague. Vagueness becomes unconstitutional when the language of the regulation does not give its target fair notice of its prohibitions or an opportunity to conform conduct to fall outside the prohibition.105

For example, a state might promulgate a rule prohibiting lawyers from “using social networking in such a way as to degrade the integrity of the profession.” The rule has obvious policy allure: protecting the public’s confidence in the judicial system, a valid regulatory end. But it is not clear from the rule’s terms exactly what conduct it forecloses. Regulations such as these reflect regulators who likely were not comfortable enough with the technology to be able to detail what specific behaviors would degrade the profession’s integrity—so they resorted to this broad decree. However, because the language does not afford lawyers with “a reasonable opportunity to know what is prohibited,” the regulation would succumb to judicial challenge.106 To avoid against this, regulators should seek the opinions of those who actively use social networking, and perhaps invite cross-generational representatives to their deliberations.

In addition to affirmatively passing a vague restriction, bar associations should be concerned with passing no social networking-specific regulations at all. The idea that no

106 Id. at 108.
express rule is actually itself an impermissible regulation admittedly seems a paradox. But lawyers already operate in a highly-regulated environment, and there are several standing ethics rules that could be construed as ambiguous as to their applicability in the social networking world. Suddenly applying these rules to use of social media could implicate the due process concerns the vagueness doctrine embodies. “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked,” a result that is not constitutionally permissible. 107 Operations of this principle is found in Indiana’s ambiguous prohibitions on lawyer testimonials, which are forcing at least one law firm to preemptively bar its attorneys from using LinkedIn. 108 If regulators do not address social networking in some way—leaving the rules indefinite—lawyers might conclude that the risk of discipline from social networking use does not justify adopting the technology. The First Amendment guards against laws chilling protected speech in this way.

IV. SOCIAL NETWORKING’S PLACE IN AN ETHICAL PROFESSION

All this is not to argue that social networking is an untamable jungle. “Membership in the bar is a privilege burdened with conditions,” and states may of course place reasonable restrictions on attorney conduct. 109 The Constitution will never give lawyers a license to speak at will. No amount of First Amendment thumping will protect a lawyer who reveals a client’s confidential or privileged information, 110 or exonerate one who

108 Dayton, supra note 2.
110 See MODEL R. PROF’L CONDUCT R. 1.6. Each jurisdiction in the United States has codified a lawyer’s duty of confidentiality with the same or substantially similar language as presented in Rule 1.6.
deliberately lies in court.\textsuperscript{111} It is doubtful that anyone seriously advocates that states adopt a completely hands-off approach to regulating social networking use by lawyers. But instead of that aimed largely at extinguishment, a balanced scheme should be used to mitigate against abuses and ensure that the technology’s benefits can be properly utilized.

Finding that balance will require that states consider both constitutional and policy questions. One important objective should be to avoid over-regulation.\textsuperscript{112} Lost in the reactionary approaches some states have adopted towards social networking is that existing ethics rules still apply, regardless of whether social media is commercial in nature.\textsuperscript{113} Therefore, the best method of regulation is to clarify these rules and reinforce their general applicability to social networking. Language might be added to the preambles emphasizing that the foundational ethical principles—such as professionalism, diligence, confidentiality, and honesty—continue to apply to social networking use.\textsuperscript{114} Comments to the rules also can be amended to ensure social networking is explicitly mentioned.\textsuperscript{115} Clarifying the rules in this way can protect against a vagueness challenge as applied to social networking.

Educational initiatives can serve to increase awareness about social networking’s potential pitfalls without smothering the technology. To be sure, there are risks associated with its use. Social networking’s culture of openness, for example, can be at

\textsuperscript{111} \textit{Model R. Prof’l Conduct R.} 3.3.
\textsuperscript{112} See Lake, \textit{supra} note 93, at 880 (arguing that an attorney’s traditional website “ought not be subject to the painstaking regulation that some states apply to lawyer newspaper and television advertising”).
\textsuperscript{113} See generally Bennett, \textit{supra} note 32 (discussing application of current ABA rules to social networking).
\textsuperscript{114} Angela O’Brien, Comment, \textit{Are Attorneys and Judges One Tweet Away From Facing A Disciplinary Committee?}, 11 \textit{L. Pub. Int. L.} 511, 532 (2010).
\textsuperscript{115} Id. O’Brien suggests adding: “It is a lawyer’s duty to remember that the same Rules of Professional Conduct apply even as new modes of communication are developed (including online advances such as blogs and social networking sites).”
tension with a lawyer’s duty of confidentiality. Bringing these risks to the profession’s consciousness can be an effective way to regulate social networking without scores of additional rules. Even lawyers who have no interest in personally using the technology should be familiar enough with it to be able to spot potential ethical conflicts within their organizations. Efforts should begin in law school ethics courses and continue throughout the lawyer’s career. On a more local level, law firms should maintain internal social networking guidelines and make them prominent features of their training programs. All of these efforts have the added benefit of teaching lawyers how to use technology, skills that, in a profession where deals are now consummated electronically and motions e-filed, are becoming an increasingly critical component to legal practice.

CONCLUSION

If users of social networking tools constituted their own country, it would rank among the most populous in the world. That is a jurisdiction with which lawyers certainly should be familiar. Social networking has a variety of benefits that lawyers can utilize to improve their practice and understanding of the law. These tools also give clients the ability to access information about the profession that was previously difficult to obtain. For all these reasons, any regulations placed on its use by lawyers should be reasonable and serve to usher social networking into the legal profession.

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117 Margaret DiBianca, Complex Ethical Issues of Social Media, THE BENCHER, Nov. 2010 (cautioning that all lawyers should be familiar with social media because of the problems that may arise if others in their firm, like marketing assistants, use social networking services on their behalf).

118 See Vinson, supra note 35, at 42-44 (advocating for a comprehensive continuing legal education effort).
The First Amendment may ensure that regulators do so. Because social networking cannot be labeled as commercial speech, regulations burdening its use will be subject to a higher level of scrutiny than traditional advertisements enjoy. As a result, prohibitions on client testimonials will likely falter, as will rules requiring lawyers to keep their profiles private. Assuredly not all regulations will fail. But the most prudent choice for the ABA, as it considers a model regulatory scheme, might be to stick with the current rules. If existing regulations can be clarified to ensure that social networking use is brought within their purview, the technology can fully realize its beneficial role within an ethical profession.
December 15, 2010

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street, 15th Floor
Chicago, IL 60654-7598

Re: Ethics Issues Arising from Lawyers’ Use of Internet-based Client-Development Tools

Dear Ms. Vera:

I would like to thank the ABA Commission on Ethics 20/20 and its Working Group on the Implications of New Technologies for the opportunity to submit this comment in response to the Working Group’s Issues Paper Concerning Lawyers’ Use of Internet-Based Client-Development Tools (“Issues Paper”).

I. Introduction

As the co-founder of Hellerman Baretz Communications (“HBC”), a public relations firm that assists the marketing efforts of a diverse group of law firms including some of the nation’s largest, I am familiar with how today’s attorneys are using—and in some cases, consciously refraining from using—Internet-based client-development tools. HBC has long recognized the tremendous potential of the Internet to connect lawyers with the public, including prospective clients, and has accordingly developed substantial expertise in this area. Among other relevant work, our agency has conceived and created numerous law firm blogs, conducted private coaching with attorneys on the appropriate use of social and professional networking sites, and consulted for a networking site mentioned in the Issues Paper, JD Supra, in connection with its release of a product available on LinkedIn, the popular professional networking site.

I offer my perspective based on my firm’s extensive experience with the Internet-based activities discussed in the Issues Paper, how they operate in practice, and our familiarity with current attitudes among attorneys towards the use of Internet-based client development tools.

Below, HBC offers three overarching principles that should guide the ABA’s approach to the regulation of lawyers’ online activity: (1) the ABA should neither prohibit nor discourage the use of Internet-based tools for client development; (2) the substance of attorney communications, not the method of communication, should remain the focus of ethics regulation; and (3) guidance from the ABA is nonetheless needed to provide certainty to lawyers who would like to responsibly participate in online networking.

This letter first explains the reasoning and import of the general principles above, and then responds to selected questions posed in the Issues Paper.
II. General Principles to Guide the ABA Approach to Lawyers’ Use of Internet-Based Client Development Tools.

In 1998, Congress faced a legislative issue that required it to balance all the social utilities of Internet Service Providers (ISPs)—those who make the Internet available, and widely searchable, to the general population—against the rights of copyright holders. Some copyright holders wanted to hold ISP responsible for instances of copyright infringement that were made accessible through their services, but which the ISPs played no role in creating. Congress wisely chose a course that allowed ISPs to continue providing the incalculable benefits of Internet availability to the general population, while also clarifying that they would be subject to liability if they did not adhere to certain “safe harbor” requirements.

Here, the ABA faces a similar situation: one in which it is balancing the social good provided by Internet communications against the potential for abuse. But the ABA’s task is, thankfully, easier than Congress’s in passing the Digital Millennium Copyright Act, as nearly all of the tools to prevent such abuse are already at its disposal and embodied in its Model Rules of Professional Conduct.

As the below explains, lawyer activity on the Internet serves a great benefit to the public, and at very little cost. The ABA’s Model Rules, which prevent unprofessional conduct, are already fully applicable to lawyers’ online activity, eliminating the need for the passage of complicated or costly additional Rules. The most fruitful role that the ABA can provide with respect to lawyers’ Internet-based client development activity is to clarify, through Comments to its existing Model Rules, that both their permissions and prohibitions apply with full force with respect to online communications.

A. The ABA Should Neither Prohibit Nor Discourage the Use of Internet-Based Tools for Client Development.

Any ABA action that effectively prohibits or discourages lawyers from using Internet-based tools for client development would work a disservice to the vast majority of attorneys who wish to do so responsibly, and, more importantly, the general public. Over the last two decades, the Internet has revolutionized the way people search for information—including the way they search for legal representation. As of 2009, 65% of those in need of an attorney begin their search for representation online. If the ABA were to limit the availability of information about lawyers to the public on online channels, such action would eliminate (or severely curtail the effectiveness of) what has become a vital resource to those seeking representation.

Online searching is not merely a popular method through which to identify a legal representative: it is a uniquely informative one. The lack of space constraints and printing costs on the Internet allow law firm web sites, for example, to provide a wealth of data that could not be made available practically through any printed product. The depth of information on such sites—which typically include biographies of all firm attorneys and detailed information about the firm’s practice areas—gives those considering legal representation from them far more complete information than can be made available through legal directories or any other existing product. Furthermore, frequently updated online content such as blog posts, articles shared through JD Supra, and informative “status updates” on networks such as LinkedIn and Facebook, give prospective clients a rich and evolving body of material upon which to assess an attorney or firm’s suitability for hiring.

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Finally, any action that prohibits or discourages the use of Internet-based client development tools would conflict with the precedent the ABA wisely set in responding to the introduction of similarly revolutionary technologies. A Comment to ABA Model Rule of Professional Conduct (“Model Rules”) 7.2, addressing the introduction of television and electronic mail, states:

> Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television 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. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.

The same considerations that led to the adoption of this Comment should govern the ABA’s approach to any contemplated regulation of lawyers’ online presence.

**B. The Substance of Attorney Communications, Not the Method of Communication, Should Remain the Focus of Ethics Regulations.**

The creation of additional rules or addendums specific to content appearing on websites and/or social and professional networking accounts would mark an unnecessary and impractical departure from the existing approach of the ABA’s Model Rules.

Internet-specific rules are unnecessary because the substance of communications, rather than the method of those communications, are the focus of the Model Rules. As such, the current rules already address communications transmitted over the Internet. Rule 7.1, for instance, prohibits “false or misleading communication[s]” without regard to the method through which the prohibited communication is made. Similarly, Rule 7.3(c) regulates solicitations made by “written, recorded, or electronic communication[s],” which encompasses any made via the Internet. Given that the ABA’s Model Rules apply without regard to the method of communication (or, where any methods of communication are specified, as in Rule 7.3(c), in broad terms that account for Internet-based activity), the existing rules can be applied without modification any hypothetical situation arising online.

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2 Nicole Black, the co-author of an ABA book on social media use, *Social Media for Lawyers: The Next Frontier* (ABA Law Practice Management Section, 2010), put the matter simply: “Ethical rules apply online and off line. . . . The rules don’t change just because you’re using a different medium to communicate.” Rebecca Berfanger, “Social Media Presents Fine Line,” *The Indiana Lawyer* (Aug. 18, 2010).

3 In addition to Rule 7.3(c), Rule 7.3(a) is the other Model Rule that applies only to a subset of communication methods, but in terms that clearly account for Internet technology. Rule 7.3(a) prohibits certain solicitations motivated primarily by pecuniary gain via “in-person, live telephone, or real-time electronic contact.” There is no ambiguity that “real-time electronic contact” includes the “live chat” capability of certain social networking sites, such as Facebook.
[The application of the Model Rules to specific questions in Part III, infra, demonstrates just how adequate they are for issues arising online. Footnote: The only possible exception to this statement is the question regarding “friend” requests to Judges, discussed in Part III.A.3.]

The novelty of websites, blogs, and social and professional networks—which have only recently come into being—may tempt a belief that they merit dedicated regulations. But it is worth recalling, as noted above, that television and email were once novel technologies as well, and before them the pager, telephone, and telegraph. The ABA has not found it necessary to draft revisions to the Model Rules with the introduction of each of these new communication technologies because the rules appropriately focus on what attorneys say through those channels, not which channel is being used.

In addition to being unnecessary, the exercise of drafting new regulations to address Internet-based client-development tools would be impractical. Over 200 major social networking sites are now in existence.4 Regardless of whether that number increases or decreases, it is a virtual certainty that the features of today’s robust networking platforms will change and proliferate over time. Attempting to address the universe of Internet platforms with specific Model Rules (or addendums to existing rules) will sentence the ABA to a futile, time consuming, and never-ending mission to amend the rules’ language to keep pace with the networks’ ever-changing natures.

C. Guidance from the ABA Is Nonetheless Necessary to Provide Certainty to Lawyers Who Would Like to Responsibly Use Internet-Based Client-Development Tools.

While social and professional networking use among lawyers is growing rapidly,5 our encounters with dozens of attorneys, as well as anecdotal evidence from other social media specialists6, has confirmed time and again that lawyers are reluctant to engage in social media due in large part to uncertainty regarding whether, and to what extent, their participation is permitted by state bar rules. This uncertainty benefits no one. Worse, it hampers those who have stayed away from social networks in an abundance of caution and puts them at an unfair disadvantage relative to those who are participating.

The ABA could benefit the profession with guidance that provides clarification for all, and it can do so without unnecessary amendments to its Model Rules. As noted in response to specific Issue Paper questions addressed below, HBC recommends that the ABA provide this clarifying guidance in the form of Comments to existing rules. The Comments will not only clear the way for lawyers who wish to act responsibly, but they can also clarify the existing rules’ application to the online behavior of those who do not do so.

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III. Responses to Selected Questions

A. Online Social and Professional Networking Services

1. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer’s participation in professional and social networking sites, given that such activities often have both a personal and advertising purpose? (See Part II.A above.)

No special rules are required merely because online activity, such as participation in social and professional networking sites, can have both professional and personal elements. Every day, lawyers participate in activities that cannot be categorized as either purely professional or purely social. For many, participation in civic organizations; attendance at community functions, industry conventions, and networking events; donations of time to charitable causes; and endless other activities have both a professional and personal component.

The Model Rules do not make special provision for attorney communications in any of the above situations, and for good reason. The Model Rules, indeed, apply wherever an attorney is communicating with another party, regardless of whether than environment has a social component in addition to a professional one. Rule 7.3(a)’s prohibition on solicitations, for instance, applies just as firmly to an attorney’s conversations on the golf course as it does to a phone call from the office.

The focus, as always, should be on the substance of the specific communication in question, and whether or not it violates any existing rule. Such an approach not only is consistent with the logic of the Model Rules, but it avoids the negative consequences attendant to taking another course—for instance, considering all statements made over a social network to be attorney advertising. Applying Article 7.2(c)’s notice provisions to all attorney statements made over a social or professional network would have the effect of: (i) discouraging lawyers from using social media altogether; (ii) diminishing the public esteem of the legal profession, given that advertising notices would be applied to communications that patently would not fit any reasonable definition of “advertising”; and (iii) diminishing the effectiveness of advertising notices where warranted, as the public would soon become immune to their impact.

2. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers’ use of networking sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 7.2 (See Part II.A.1), 1.18 (See Part II.A.2), 8.4(f) (See Part II.A.3), 4.2, or 4.3 (See Part II.A.4), or the Comments to those Model Rules in order to explain when communications or other activities on networking sites might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission propose?

Model Rule 7.2: For all the reasons stated above, HBC recommends that the ABA adopt a comment to Rule 7.2 (Advertising), clarifying both that: (i) a lawyers’ mere presence on a social or professional networking site does not amount to attorney advertising; and (ii) that communications that do amount to advertising, when made over a social or professional networking site, will be subject to all the restrictions of Article 7.

Model Rule 1.18: While lawyers may not be able to provide disclaimers prior to communication from a prospective client on social or professional networks to the same as they can in the case of contact initiated through a website, this circumstance does not call for an amendment to Model Rule 1.18. The current Comment to the Model Rule states:
Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

For all the reasons stated above, to ensure that a lawyer’s fear of an inadvertent lawyer-client relationship alone will not prevent him or her from participating in social or professional networking, HBC recommends that the ABA adopt a Comment to Model Rule 1.18 to clarify that a lawyer’s mere presence on a social or professional network alone does not give rise to any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship with any specific individual.

Model Rule 8.4(f): While HBC does not believe that sending a “friend” request to a judge could be considered “assistance” in judicial conduct that violates rules of judicial conduct, it recognizes that this is one situation that the existing Model Rules do not cover. HBC takes no position on whether sending a “friend” request to a judge should be allowed or prohibited.

Model Rules 4.2 and 4.3: For all the reasons stated above, HBC recommends that the ABA does not amend the language of these rules, but rather clarifies through a Comment that when interacting online, lawyers and their representatives are fully subject to the limitations on dealing with third parties, both represented and unrepresented, and that a “friend” request or other action that gives an attorney or his or her representative access to a third party’s profile, will be considered a communication.

B. Blogging and Discussion Forums

1. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer’s participation in blogs, given that such activities often have both an advertising and non-advertising function?

As with participation in social and professional networking sites (see II.A.1., supra), the fact that a blog may have an advertising and non-advertising function should not require the creation of a new rule. The focus should remain on whether the communication in question—in this case, an individual blog post—amounts to advertising, and, if so, whether it has adhered to the requirements of Article 7.

For the reasons given above, HBC recommends that the ABA provide clarity through a “safe harbor” Comment provision stating that if a conspicuous, general notice on the blog adheres to the advertising restrictions, all blog content shall be deemed in compliance with Article 7.

2. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers’ use of blogging? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

Model Rules 1.18 and 7.2: For all the reasons stated above, HBC recommends that the ABA adopt a Comment clarifying that all Model Rules, including 1.18 and 7.2, apply to content on blogs to the same extent as they would if the blog content were distributed via print or other means.
4. When a lawyer uploads documents to websites, such as JD Supra, are those materials and the surrounding information regarding those materials governed by the Article 7 Rules? Should the Commission offer a policy statement or white paper that sets out certain guidelines regarding lawyers’ use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.6, 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

The publication of articles and other writings is an age-old client development tool used by attorneys. The relevant analysis should focus not on the identity of the distributor (e.g., JD Supra, Harvard Law Review, or the New York State Bar Journal), but rather on the content of the communication. Written materials uploaded to JD Supra or other professional or social networking sites should not, merely because they have been uploaded to the Internet, trigger any particular existing Model Rules, or call for the creation of new rules specific to JD Supra or any other particular social or professional networking site.

For all the reasons stated above, HBC recommends that the ABA adopt a Comment clarifying that all Model Rules, including 1.6, 1.18 and 7.2, apply to material uploaded to JD Supra and similar sites to the same extent as they would if the material were distributed via other means.

D. Lawyer Websites

1. Should the Commission recommend amendments to Comment 2 of Model Rule 7.2 to clarify which types of websites are, in fact, subject to the restrictions contained in the Article 7 Rules of the Model Rules of Professional Conduct? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites? (See Part II.D.1)

The existence of a law firm website, in and of itself, should not be considered advertising that therefore triggers the restrictions of Model Rule 7.1. or other limitations in Article 7. As the Issue Paper recognizes, it is quite possible for a website to exist without including advertising content, or serving an advertising purpose. A further factor suggesting that websites should not be understood as advertising without more is the fact that they are not “pushed out” to an audience, as content generally understood to be advertising typically is. Instead, visitors locate law firm websites and choose to visit them.

As accordance with its other responses, HBC recommends that the ABA only consider websites to be subject to the restrictions of Article 7 if it meets a definition of “advertising” as generally understood in the culture. The ABA could provide clarification on this question through a Comment that details a list of characteristics that will be considered in classifying a website as advertising.

3. An ABA Formal Opinion addresses issues arising from websites that contain information about the law. Should the Commission offer additional guidance in this area, such as amendments to Model Rules 4.1(a) (prohibiting false statements of material facts or law to third parties), 7.1 (prohibiting a material misrepresentation of law in advertisements), 8.4(c) (prohibiting misrepresentations), or the Comments to those rules? In addition or as an alternative, should the Commission offer any other form of guidance on this issue? (See Part II.D.3)

There is nothing about the publication of written material online that makes it more difficult to discern whether Model Rules 4.1(a), 7.1, or 8.4(c) have been violated with respect to a given writing. As such, and in accordance with its other responses, HBC recommends that the ABA apply those rules to online content in the same manner as it would to printed writings. If the ABA felt it necessary, HBC would recommends
that the ABA adopt a Comment clarifying that all Model Rules, including 4.1(a), 7.1, and 8.4(c), apply to material published online to the same extent that they do to printed materials.

IV. Conclusion

HBC appreciates the effort that the Working Group has dedicated to this important effort. I hope that our perspective is helpful to you in clearing a path for lawyers to use Internet-based tools for client development in a responsible manner, benefitting both the profession and the public.
Silvia Hodges:

Dear Ms. Vera,

Below please find my comment on the Issue Paper of the Commission on Ethics 20/20.

Best wishes,
Silvia Hodges

Comment regarding the ABA’s stance on lawyer’s social media usage:

I urge the ABA’s Commission on Ethics 20/20 to reconsider its proposed review of lawyers’ social media usage. Historically, ethics rules have been adopted to provide protections to attorneys’ clients as consumers of legal services. The existing informational asymmetry between clients, as buyers, and attorneys, as legal service providers, requires regulatory protection, especially for the infrequent consumer of such services. Peer-quality control provides guidelines for attorneys and governs their professional conduct through detailed rules, and serves as a basis for evaluating client complaints. However, given the philosophy of the professional, ethical codes are seldom a response to external pressures but typically an expression of strong self-governance. That said, the profession already has a well-developed set of ethical rules. This does not mean that the need for new ethical rules will not arise, especially given the rapidly changing technological, economic and regulatory environment but the traditional information asymmetry has been largely addressed. Extensive legal information and education is available at low or no cost on the Internet. As a result, buyers of legal services today are better informed and more sophisticated as consumers. This is particularly true in the context of business-to-business legal services, with ever more former private practice attorneys purchasing legal services as in-house legal counsel. It is essential that the business of law be allowed to evolve to meet the requirements of the global market place and to facilitate the ongoing modernization of the profession. Where is the mischief in the use of social media and, on what basis does the ABA believe that its ethical guidance is needed? Surely the market is capable of determining the extent to which social media can or should be used by attorneys in business development.

Dr. Silvia Hodges
Adjunct Associate Professor
Fordham Law School
www.silviahodges.com
Digital Marketing for Lawyers

Requested Comments submitted to the American Bar Association

J.Hopkins/D.Sales

12/9/2010
We commend the American Bar Association for evaluating the possible regulation of Web-based marketing by lawyers.

Our firm was fortunate to be able to give a single person the responsibility for managing our digital marketing. He has experience in legal liability risk management, lawyer regulation and digital marketing. As a result, we have been confronting issues under the ABA’s consideration for some time.

We believe it is important to first consider the environment in which lawyers find themselves and the public’s attitude toward lawyer advertising and marketing. Traditionally, state bar associations have approached studies gauging the public’s opinions concerning “lawyer advertising” or “attorney advertising.” We think this has created a flawed data set to be used in considering the most mutually effective regulation of lawyers. The fact is the public holds very mixed feelings about “advertising” of any kind.

When it comes to “lawyer advertising,” we believe it is necessary to consider both the public’s attitude toward all advertising and the public’s view of the legal profession. The ABA’s own studies demonstrate that the public harbors some concerning attitudes toward lawyers: that they are greedy, manipulative, and corrupt (Public Perceptions of Lawyers Consumer Research Findings, 2002). In one ABA study, lawyer advertising itself was not as objectionable to the public as the way in which the advertising was done. This suggests that educating lawyers about the best practices for methods and styles of marketing would not only improve the quality of lawyer advertising, but also help the bar’s image with the public.

Many studies have documented the public’s general feeling for advertising (Krugman, 1994; O’Guinn, 1998; Mittal, 1994; Pollay & Mittal, 1993). A 1998 study attempted to use a larger sampling group and balance age characteristics in reaching a conclusion that the public may actually not be as negative toward advertising as was once thought (Public Attitudes Toward Advertising, Shavitt, 1998):

*The present study provides a current picture of the general public’s attitudes toward and confidence in advertising. The survey focuses primarily on personalized attitudes – how people feel advertising affects them personally. The results indicate that the public holds a moderately favorable view of advertising on a number of dimensions: Americans tend to enjoy the advertisements they see, and they tend to find advertising generally informative and useful in guiding their own decision making. And although they report that they do not generally trust advertising, they tend to feel more confidence in advertising claims when focused on their actual purchase decisions. Finally, they do not generally support increased government regulation of advertising.*
There is no reason to believe that lawyer advertising is not subject to the same type of reaction and consideration by the public. It is, in fact, reasonable to believe that the public uses lawyer advertising to inform its decision-making about the consumption of legal services.

Advertising is perhaps an unfriendly reality, but a reality all the same. With the advent of the internet and the web, regional borders have been blurred or obliterated. No longer is marketing received by Florida residents solely from Florida lawyers and the same can be said in every other jurisdiction. When applying meaningful regulation to lawyer web marketing this issue must be acknowledged and unnecessary restraint of lawyers’ ability to market their services must be avoided.

General Recommendations

We must begin to educate the public about the good that the legal profession does and we must, on a state level, do more to police lawyers by properly enforcing already existing regulations. The answer, however, is not to pass unnecessarily restraining regulations in an area of marketing that, if handled properly, could actually do more to promote our profession and provide valuable resources to consumers.

We recommend the following:

1. Maintain Rule 7.1: 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.

2. Promote good marketing practices.

3. Promote good advertising practices.

4. Require that all information contained on a website be reviewed and approved by a lawyer.

5. Clearly set forth disclaimers that include: the information on the website is not intended to take the place of formal legal advice of a lawyer; the information is not intended to apply to any specific jurisdiction; and that legal information can vary in applicability from one jurisdiction to another.

6. Clearly set forth the physical location of the law firm’s office(s) and the geographic area(s) in which the firm regularly practices.

7. Case results should include a sufficient explanation of the facts involved in the case to permit a consumer to understand the case. All pages containing case results should include a disclaimer indicating that no results reached in cases are indicative of what may
be reached in any other case and that all cases are unique in their fact patterns and applicable law.

8. Client testimonials should be set forth in their entirety as written by the client or not at all. No testimonial should be written by the lawyer or the firm on behalf of the client. Photographs of clients should be strongly discouraged.

9. Video contained on any lawyer website should be either video that has received the approval of the state bar association advertising rules or video that is clearly intended to provide information in connection with a given subject. Dramatic recreations, scenes, actors, and similar theatrical additions have no place in lawyer website videos.

10. Lawyers and law firms must maintain exclusive control over the final production of video whether published to the law firm’s website or another website. Lawyers should not release control over the finished, published video, except in the instance of video directly controlled by news media organizations.

11. Lawyers should be prohibited from utilizing others, such as ghost writers, in the creation of content to be published anywhere on the web, unless the lawyer has reviewed and approved the content prior to publishing of this material.

The State of Digital Marketing

Lawyers and law firms should be encouraged to provide information on websites that will educate and benefit consumers. Website ranking and popularity is substantially influenced by quality content and valuable resources. The typical TV, radio, newspaper or yellow page advertising copy and other conventional advertising methods do not lend themselves to successful web marketing efforts. Search engines long ago engineered out the ability to be influenced by keyword flooding and text repetition. Quality, authoritative content is what wins on the web.

The web provides an outstanding opportunity to promote the knowledge of lawyers, the willingness to assist and educate consumers, and the ability to effectively communicate worthwhile information.

In order to fairly evaluate a change to the rules relating to websites and digital marketing, the ABA should take into account a number of different factors, including:

- An understanding of web-based information, marketing and advertising as it compares to conventional marketing and advertising.
- How consumers use and filter web-based information and the impact that web-based information has on consumers.
• Reconciling the basis for a distinction being drawn between a call to a firm for exempted "information upon request" and "requesting" information through a search engine that uniquely requires stringent regulation.
• Information relating to search engines, search engine algorithms, and search technology, as they relate to the relevance and results of consumer information "requests" through a search engine.

**Web-based Marketing vs. Conventional Marketing**

Lawyers tend to have starkly different ideas of marketing and advertising. Marketing is much more than advertising. Marketing involves developing a brand, creating and maintaining an image, creating and building relationships, and providing information that is of use to the target consumer. The nature of a website lends itself more effectively to marketing tools than to advertising forums.

Advertising is an exercise in persuasion to purchase. Advertising has traditionally been limited to very specific mediums—TV, radio, and print—where viewers had only limited control over viewing the message. Advertising is only intended to suggest reasons to motivate action in the consumer, usually to purchase a product or service. The very mediums typically used for advertising dictate that the message must be extremely limited and focused. Advertising does not educate consumers and has only a superficial effect in branding a law firm. Lawyers have special marketing problems that are unique from most other service providers. Lawyers do not produce a product in the classic sense and customers generally only seek them out because they have a legal need. Advertising (as used here) has very limited, if any, effectiveness in building individual, personal branding for lawyers. Rather, advertising is like a televised yellow pages ad with moving characters or images. To successfully brand a law firm in the current environment requires much more information than can be provided in a thirty-second TV commercial, a radio spot or a print advertisement. More importantly, the traditional venues for advertising do not provide consumers any information of real substance or value with which they can make intelligent and reasoned decisions in selecting a lawyer.

Websites afford an opportunity for lawyers to provide consumers with valuable and complete information about legal topics, lawyers, and the firm itself. One could argue that by not more carefully crafting rules specific to the unique medium of the internet, the associations will fail to embrace an excellent opportunity to encourage, if not require, lawyers to include valuable consumer information on websites, rather than approaching regulation as broad restriction or control of information.

Web-based marketing is also one of the very few areas in which lawyers and law firms are placed on near equal footing with each other. On the web, a sole practitioner can afford to provide enough information and do so in a way that allows him or her to compete equally with
larger firms who have greater resources. Few small firms have TV and other advertising budgets
to compete with, but on the Web, it is still an affordable medium for competition.

Search Engine Considerations

Too little attention has been paid to the way in which search engines operate. Many people
apparently believe that people routinely stumble onto lawyer websites while surfing the web.
While this may occur periodically, it is not the rule for those who are accessing these websites.
The search companies have their own proprietary and closely guarded search algorithms.
Google, for example, is a pioneer in search algorithms and other search
engines have quickly acted to adjust their algorithms to catch up with
Google’s precision and know how. Yet all the search engines have a
single goal: to provide search results that match as closely as possible
to what the consumer seems to be searching to find.

Do Google searches sometimes yield irrelevant results? Of course.
This is often the result of user input. A corollary exists in more
traditional media, like the yellow pages. You cannot find “lawyers” in
the yellow pages; you are directed to consult “attorneys.” Yet even in
the “attorneys” section of the yellow pages, a potential client finds little
information of real value.

For example, the consumer finds: “Let Our Experience Work for You”;
“Serious Lawyers for Serious Accidents”; “No Fees or Costs If No
Recovery”; and “A Passion for Justice”.

A consumer could call several firms only to discover that only three claim to handle medical
malpractice. If the consumer calls the three firms and requests information, the information the
consumer will have available to them is controlled entirely by the firm itself. Most state bars do
not regulate this information upon request, beyond the “truthfulness” standard.

Typically, state bars assert no control beyond truthfulness (Rule 7.1) in the information provided
to a consumer by a law firm during a simple telephone call. It seems clear that there is little or
no difference from the web content that is visible, reviewable and accountable to anyone from a
firm’s website.

A search in Google is fairly comparable to “accessing” the yellow pages: evaluating and
retrieving the relevant data from the yellow pages; contacting a "site" (the telephone call to the
lawyer); and retrieving information and data (the information selected by and provided by the
attorney).

A search engine is not difficult to translate to a human's search through yellow pages. Perhaps
the largest difference is that the consumer is provided with a much larger collection of returned
data for them to review and a far richer amount of content for them to evaluate in determining the best possible selections. In addition, the user is provided with the same or better information than they would otherwise have received in response to their search in the yellow pages or their phone calls to law firms.

In fact, most search results for lawyers will return results for more lawyer referral services than individual lawyers. This is an area that most bar associations have claimed to have no jurisdiction over and do not choose to regulate. If lawyer web content is too rigidly regulated, lawyer referral services may be the primary source of consumer information in the legal service area.

The Florida Experience

The Florida Supreme Court and the Florida Bar purported to try and protect consumers from information such as testimonials and past case results. The Florida Bar and Supreme Court proposed what has become known as a "veil" or "gate", which would block prohibited content until a user affirmed that he or she is requesting that specific type of information.

In practice, the proposed requirement would have resulted in a web page like this:

The user would be required to affirm his or her desire in four discrete areas or be redirected back to the site landing page (first page of the site). This would be the process if the user is coming
directly from the search engine query as well as if the user consciously clicks on, for example, the "case results" link on the website landing page.

This type of veil has the appearance on the web of a "pop-up ad." Several studies document the unpopularity of such features. Experienced web browsers bypass pop-ups in routine web navigation with simple commands. This type of pop-up, however, could not be defeated by a user.

**The Federal Trade Commission’s View on Regulation**

The Federal Trade Commission has consistently spoken out against the strict regulation of attorney marketing and advertising. In 2002, for example, the FTC responded to an inquiry by the Supreme Court of Alabama as follows:

Debate about attorney advertising involves important policy concerns, such as preventing statements that would mislead lay people and thereby undermine public trust in lawyers and the legal system. The Commission staff's view, expressed in the comment to the ABA, is that it is best for consumers if concerns about misleading advertising are addressed by adopting restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices. By contrast, imposing overly broad restrictions that prevent the communication of truthful and nondeceptive information is likely to inhibit competition and to frustrate informed consumer choice. In addition, as discussed in the 1994 comment, research has indicated that overly broad restrictions on truthful advertising may adversely affect prices paid by consumers, especially for relatively routine legal services.

In sum, the Commission staff believes that, while deceptive and unfair advertising by lawyers should be prohibited, restrictions on advertising that are specifically tailored to prevent unfair or deceptive acts or practices provide the optimal protection for consumers. Consumers benefit from robust competition among attorneys and from important price and quality information that advertising can provide. Rules that unnecessarily restrict that competition or the transmission of truthful and nondeceptive information are likely to harm consumers in the state of Alabama.

In 1994, the FTC offered this guidance to the ABA:

Some degree of regulation of lawyer advertising may well be necessary to ensure against deception, especially with respect to aspects of legal services about which the consuming public is not well informed. But some rules addressed to particular risks of deception may be too broad; by preventing the communication of truthful and nondeceptive information that consumers may find useful in choosing a
lawyer, they may inhibit competition and informed consumer choice. Another
center, that undignified advertising undermines respect for the legal profession
and institutions of justice, has led some jurisdictions to impose severe constraints
on advertising, style and content. These restraints, which may also inhibit
competition and consumer choice, may be stricter than necessary to promote the
values at stake. Consumers appear to be more discriminating than the
profession has believed, for surveys generally show consumers responding
positively to advertising that would be considered "dignified" and also to some
advertising methods that the most restrictive rules prohibit. Preventing truthful,
nondeceptive communications that many consumers apparently do not find
offensive and may even find useful could impose costs that should be considered
carefully.

In 2007, the FTC addressed the Florida Bar's proposed rule changes discussed, in part, above.
Among other things, the FTC said:

- The Proposed Rule . . . unnecessarily restricts truthful and non-misleading
  advertising, [and] may result in higher prices paid for legal services and less
  consumer choice.

- The Proposed Rule would prohibit comparative claims that have not been
  objectively verified from appearing in any forms of computer-accessed
  communications and prohibit descriptive statements from appearing on computer-
  accessed communications other than websites.

- The Proposed Rules would prohibit reporting past success on homepages and
  electronic solicitations. . . . Such communications may be truthful and non-
  misleading and can help consumers in assessing the caliber or personal style of a
  lawyer or law firm.

- The Proposed Rule would prohibit attorneys from using any testimonials on their
  homepages and electronic solicitations. As explained in the FTC’s Endorsement
  Guides, a consumer testimonial is likely to be deceptive if the experience
  described is not the consumer’s actual experience or is not representative of what
  consumers generally experience.

- Rules that unnecessarily restrict the dissemination of truthful and non-misleading
  information are likely to limit competition and harm consumers of legal services
  in Florida.

- The FTC raised the issue of the Proposed Rule’s constitutionality.
Constitutional Issues

First amendment protections must be carefully weighed in the context of any ultimate regulations or recommendations by any association. The ABA’s recommendations carry substantial influence with state associations and Supreme Courts, and we hope that careful consideration in this area will be made.

Specific Comments Re: the ABA September 30, 2010 Request for Comment

We will take the issues raised in the ABA’s memorandum in the order set forth and provide comments as appropriate. In nearly every area of online presence, we believe that associations, including the ABA, can best invest resources in the education of lawyers for both effective and appropriate online presence.

Online Social and Professional Networking Services

The ABA appears to treat social and professional networking sites as though they are similar; in our view they are not.

LinkedIn is a business professional site with its own set of structured controls associated with it. Contact between members of LinkedIn is controlled and, in most instances, prohibited without a showing of a prior relationship with the people whom you wish to connect with. The site provides “groups” to which users can belong, but only after applying to the group and being approved. Advertising is offered on LinkedIn, but that advertising should be sufficiently regulated by existing advertising rules.

Facebook is a new frontier. It is a purely social site with a very “personal” slant to it. Facebook also offers advertising opportunities, but they should also already be covered under existing advertising rules.

Facebook, because of its very interactive nature, provides perhaps the most potential problems for lawyers. One way to regulate this is to require that lawyers maintain a business site for the
firm and relegate all “practice matters” to that site, leaving their personal site for posting of personal matters. This, however, does not really deal with things like a client’s ability to “like” the lawyer or post to the lawyer’s “wall.” This is an area in which the good faith effort of the lawyer, combined with Rule 7.1, may be the very best regulation to be used. For example, lawyers should be encouraged to avoid the appearance of a client relationship by prohibiting postings to their law firm Facebook “wall” without approval. This would allow the lawyer a higher degree of control in content.

Twitter is also a new frontier and, so far, nothing like it really exists successfully elsewhere. It is limited to messages of 140 characters, so it might be argued that any message is “dangerously” short and cryptic; this is not a comfortable limitation for most lawyers. That said, if Twitter is used properly by lawyers, it can be a useful and powerful marketing tool for maintaining contact with clients; this is particularly useful in maintaining public contact with groups of clients. It is also a useful tool for providing information to clients and prospective clients in terms of information about safety, legal rights, and legal news.

For all of these sites, the potential for crossing the line between personal and professional communications exists; the potential for inadvertent lawyer-client perceptions exists; and the potential for inadvertent contact exists.

Videos

In a footnote, the association discusses videos, such as those uploaded to services like YouTube. This area is filled with as many or even more potential problems as any other area of the web. We assume the association is not trying to regulate personal videos, beyond Rule 7.1, and we see that as appropriate.

Lawyers should be given guidance that videos published on the web and subject to regulation are likely to fall into two general categories: TV advertisements, and videos containing information about areas of the lawyer’s practice and providing information of substance.

Many lawyers (including our firm) load TV advertising to both their website and to sites such as YouTube. Those TV Ads, however, have been produced in accordance with state bar rules and have been properly approved by the state bar association. As a result, using this type of video should not present a problem. The ABA might consider providing guidance to lawyers about producing videos that are in the nature of a TV ad, but not approved by the applicable bar association. In our opinion, those videos should be disallowed.

The last type of video would be a video that is more in the form of a seminar than an advertisement, even though the contact information for the firm is included in the video. This type of video should be permitted with guidance and education. This is the very type of information lawyers should be producing and providing to consumers and it is the type of information that can help to build consumer confidence in the legal profession.
Lawyers “Friending” Judges

This practice should be discouraged. If there is the potential that a lawyer may appear before the judge, the practice should be prohibited. If it occurs and the lawyer must appear in that judge’s court, appropriate disclosures should be required to be made.

Gathering Information through Networking Websites

Rule 7.1 should govern lawyers’ actions in this area. No investigator or lawyer should attempt to gather any information by using a false basis or a deceptive method to accomplish it.

Blogging

This is truly an area in which “if it looks like a rose and it smells like a rose, it is probably a rose.”

Certainly there are blogs written and controlled by lawyers and law firms that are substantially in the nature of pieces of advertising. You know them when you see them. Blogs that serve as nothing more than bald pandering to the greatness of a lawyer or law firm are unlikely to have long existences on the Web. Alternatively, they will not be seen as authorities and will be ignored by search engines.

Blogs become popular largely because they contain valuable information for a group of users. A blog that panders to the ego or vanity of a lawyer or law firm is likely to “die on the vine.”

If one reads some of the blogs published by lawyers, it seems clear that education and guidance are needed. However, blogs are an area ripe with free speech issues and strong controls over blogs are unlikely to accomplish the ABA’s goal—consumer protection. Instead it is more likely to result in a loss of valuable information for consumers.

As an example, some lawyers publish blog articles that are largely an article simply quoting facts accumulated from a newspaper. Lawyers should be cautioned about plagiarism in these instances.

The real dangers are blog articles involving injury or death tragedies. In these cases, some lawyers have concluded that including the names of people injured or killed in the auto accident will somehow help their “rankings.” The truth is that including this information is of little value; including this information demonstrates poor taste and provides the impression of “ambulance chasing”; and including the information is likely to motivate injured victims to avoid rather than contact an attorney who publishes an article such as this. Lawyers should be cautioned against posting these types of articles, if not for ethical reasons, then because they work against good marketing practices.
Discussion Forums, Message Boards, Groups

This is an area that could be very dangerous for lawyers. The potential exists for creating an attorney-client relationship, at least from the perspective of the “client.” In addition, it provides an area in which lawyers might offer incorrect advice simply because the lawyer is not getting all the facts of a given situation.

This type of contact also provides a forum in which lawyers might be tempted to use the discussion group as a form of advertising for clients. If, for example, a lawyer starts a discussion group about a new drug recall and that lawyer is handling cases involving the recalled drug, a lawyer could unwittingly cross over into the area of solicitation.

Most of the problems with discussion groups should be handled through Rule 7.1, education, and the use of carefully posted disclaimers within the discussion forum.

Posting of articles, white papers and similar materials to sites such as JD Supra and similar sites should be no different than a lawyer publishing an article in any magazine. Perhaps the danger is that no editor exists to assist the lawyer and to refuse publication of a lawyer’s article. If the article is clearly in the nature of an educational article or is intended to provide valuable information, should it be discouraged or should the lawyer’s ability to publish it hindered? The existing rules should provide sufficient regulation, but this is also an area for valuable education and training.

Paying for On-Line Advertising, Referrals and Leads

Before trying to regulate the area of pay-per-click campaigns, such as those found on Google, Bing and Yahoo the nature of these “ads should be carefully reviewed in order to establish what they are and what they are not.” Google pay-per-click ads are limited to no more than 130 characters, broken down as follows:

- Headline: 25 characters
- Description: 70 characters (35 characters per line)
- Display URL: 35 characters

The need to get immediately to the point of whatever the ad is about is essential to success, but it also tends to eliminate the puff and glitter that often gets lawyers afool of the rules. These ads, however, do not lend themselves to the typical ad approval process required by most associations for conventional advertising.

In addition, the real point of pay-per-click ads is to motivate a user to click on it and be delivered to a website that presumably lends itself to the type of information the user is requesting to find. This is clearly an area in which Rule 7.1 should govern conduct.
“Referrals” and Leads

We see this area as starkly different from pay-per-click campaigns for a number of reasons. The lawyer who pays for the pay-per-click campaign had the opportunity and obligation to review and approve the ad. The users who click on the ad are being directed to content produced or approved by the lawyer. Contact of the lawyer is generally directly from the user to the lawyer whether by telephone, email, or similar contact. The point is that the entire process is controllable by the ultimately responsible lawyer.

Lead generation is typically a situation in which the ultimate lawyer is provided with contact information or a user is referred over to the lawyer’s site. The problem with this type of contact is that the responsible lawyer seldom has any active participation or approval over the methods used to generate the lead information or to motivate the user to contact the lawyer. As a result, the “responsible lawyer” is not in a practical position to control something over which he or she is ultimately held responsible.

We recommend the prohibiting of lead generation in which the sole means of causing a contact between the “responsible lawyer” and a user is not within the responsible lawyer’s control or supervision. Certainly, if the responsible lawyer is fully informed and has control in the lead generation process, the lawyer should be permitted to engage in it, but is clearly charged with ultimate responsibility.

Lawyer Websites

We do not believe that any additional regulation is needed in connection with lawyer and law firm websites, beyond the rules currently drafted, including Rule 7.1 and 7.2.

This is another area in which educational assistance might do more good than any regulation would.

One of the founders of Google described the “perfect search engine” as one that “understands exactly what you mean and gives you back exactly what you want.” Google and the other search engines are about as close as possible to this result, as they are likely to get without dramatic developments in search code technology. Google looks for the following important factors in determining site popularity and, thus, where a law firm site might rank in search results:

- Relevance. This relies heavily on what pages link to the site. So, lawyers should be encouraged to develop valuable informational partnerships with other valuable websites (Martindale-Hubbell, LinkedIn, Law.com, Lexis, etc).
- Comprehensiveness. Is the website valuable and does it contain important, relevant information based upon the type of site it is?
- Freshness. Does the site provide new and fresh content that is relevant, comprehensive and informative to users?
Speed. Is the site programmed in a way that promotes page loading and search access?

We feel confident saying that educational and consumer-oriented content drives site relevancy. It also promotes a law firm’s site better than any of the very questionable techniques promoted on the web. In addition, this approach fulfills what we believe to be a lawyer’s obligation in providing information: it should be informative about the lawyer or law firm, but it should also be of value and usefulness to consumers.

Lawyer Website Disclosures/Disclaimers

We believe that lawyers and law firms could benefit from education in this area. In fact, when our law firm originally put together our several different disclaimers and user messages, no guidance existed at the time for what those should include. We compiled disclaimers largely based upon what we thought was fair to the consumer and what we believed was in our own best interests to avoid confusion on the part of consumers. This is our current disclaimer:

Please read the following important information regarding this website.

The reader should not consider this information to be an invitation for an attorney-client relationship and should always seek the advice of competent counsel in the reader's state. Searcy Denney Scarola Barnhart & Shipley does not wish to represent anyone viewing this website in a state where this website fails to comply with all laws and ethical rules of the state.

The owner of this website freely grants permission to anyone wishing to link to this website without representation; the owner will gladly remove any link from this website upon request from the linked entity; this website is not sponsored or associated with any particular linked entity unless so stated in truth by that entity; and the existence of any particular link is simply intended to imply potential interest to the reader.

Ask questions and be fully informed before you choose an attorney.

The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you full written information about the qualifications and experience of members of the Searcy Denney Scarola Barnhart & Shipley firm.

The accounts of recent trials, verdicts and settlements contained in this website and our newsletters are intended to illustrate the experience of the firm in a variety of litigation areas. Each case is unique, and the results in one case do not necessarily indicate the quality or value of another case.
Summary

Improving the image of the profession is something that each lawyer, each day, should be working toward. It is also something that can be effectively accomplished on the web. Providing useful information to consumers is possibly some of the most effective marketing on the web and is regularly recommended by quality web (digital) marketers. Why? Web users want information; they want good and useful information; and they want a free flow of information.

Generally speaking, the web is a new area for lawyers and the best methods for its use in marketing for lawyers are not well understood. Lawyers need complete, clear, and useful education and guidance, much more than they need more regulation. More importantly, we believe exclusionary regulation will do more to deny the consumer of valuable information than it will to protect the consumer from dangers against which the Model Rules are designed to guard. Certainly, current regulations relating to advertising and marketing should be sufficient to regulate lawyers in the digital world as they are in the physical world.
Francis Jackson:

Dear Madam--I am sending this message to weigh in on the issue of yet more regulation of lawyer advertising. I frankly thought the Bates decision had gotten us past this stage. Short of fraud or misrepresentation there is no valid reason to limit lawyer advertising, whether on television, the internet, yellow pages or any other medium. Please make sure that everyone at the ABA remembers that we still have the First Amendment.

Thank you
Francis Jackson
Jackson & MacNichol
Josh King:

Avvo Comments on September 20, 2010 Issues Paper re Client Development Tools

Most states look to the ABA for guidance when it comes to attorney advertising issues. One critical issue the ABA should consider is the history of state overreaching when it comes to regulation in this area. Numerous states, including in recent years New York and Florida, have enacted attorney advertising regulation with no consideration for the First Amendment limitations on the state’s ability to regulate. Such overreach has a significant chilling effect on attorney speech, and drives higher cost – and less transparency – for buyers of legal services.

Attorney advertising regulation must meet the requirements of *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, regulation of commercial speech must be supported by a showing that such regulation 1) directly advances a substantial government interest and 2) is carefully calculated to impose the minimum possible burden on speech. State attorney regulators have an affirmative burden to do this work, to operate from empiricism rather than instinct. Unfortunately, there is scant evidence that this has ever been done by those regulating or enforcing regulations in this area.

State regulation of attorney advertising has been driven by economic protectionalism and an exuberance of over-regulation rather than evidence of consumer harm. Consider New York, which just lost for the third time in federal court when the Supreme Court declined to review a lower court’s finding that many of New York’s recently-imposed rules are unconstitutional. Think of Florida, where the eight largest law firms in the state have petitioned the Florida Supreme Court to rethink its onerous new policy on attorney websites – a policy based on not a single study, finding or other evidence of consumer harm. Finally there’s New Jersey, which agonized, to the nth degree, over the question of whether attorneys could advertise their “Super Lawyer” designation: again, with no basis in evidence that such advertising was actually deceptive, damaging or otherwise confusing to consumers.

Whatever direction the ABA chooses to give the states as a result of this proceeding, it would do a great service if it were to remind the states – in no uncertain terms – of the constitutional confines within which they are permitted to regulate.

With respect to the specifics of the issues the Commission is addressing, we would simply observe that these appear to be only theoretical concerns. We are unaware of any studies – or even anecdotes – of consumer harm or confusion resulting from any of the matters under consideration. Taking into account the potential for harm may be appropriate when providing high-level guidance, but the ABA should be very cautious of the message it sends to the states when it enacts Model Rules or specific guidelines in the absence of proven harm. On this note, the ABA could look to the example of the AMA, which recently enacted social media guidelines notable for their brevity, lack of specific dictates, and respect for the professionalism of AMA members.

Josh King
Vice President, Business Development & General Counsel
Avvo, Inc.
Jack Knust:

As the world changes, so must the profession. I used to have a secretary who typed on a manual typewriter and we were required to charge fees based on a fee schedule or else we were acting unethically. Let the world progress and let the profession adapt to it. The profession serves people and people expect use of the latest technology to service their needs. Any Regulation must be sensible in these areas:

• Online social networking (Facebook, LinkedIn & Twitter)
• Blogging
• Facebook and LinkedIn profiles
• Gathering information through networking Web sites
• Discussion forums
• JD Supra document uploads
• Lawyer Web sites
• Use of case histories on law firm Web sites

Jac E. Knust
Attorney, Mediator, Collaborative Lawyer, and Counsellor at Law
The Collaborative Law Group
Dan Krohn:

In my opinion the ABA should stay clear of promulgating new rules for online social networks, blogs, etc. at this time. Things are changing too fast in that world for quality rulemaking. And the existing ethical rules are sufficient to handle any real impropriety.
Comments submitted to Legal 20/20

Paul Lippe

CEO, Legal OnRamp

I’m sure you’re getting lots of comments, so I’ll try to be succinct and avoid likely areas of redundancy. Let me suggest a theme of (i) enabling technology-catalyzed changes that enhance the profession, and (ii) being specific, focusing on what’s real in this arena, and not wasting a lot of energy on non-empirical hypotheticals.

1. Only deal with real issues. Much of lawyers’ discussion around “social media” has an air of unreality about it. We have been running Legal OnRamp for 3+ years with over 10,000 members, and have never had a problem of unauthorized practice of law, inadvertently entering into an attorney-client relationship, misleading advertising, etc. While one can construct hypotheticals in which these behaviors occur (just as one can hypothesize that lawyers need instructions on not sticking a fork into an electric socket, yet somehow we manage to do fine without such instructions), these are common sense tools and folks are sensible and cautious, so there’s little evidence of bad things happening.

2. Bias to innovation. Social Media (or Web 2.0, or what we would prefer, “Collaboration”) is an evolutionary new model of communication that is displacing email in the same way that email displaced what preceded it. Social Media is neither intrinsically good nor bad, it just is. For the reasons discussed in 3 and 4 below, these tools have the potential (and in many cases already, the demonstrated ability) to improve the quality and reduce the cost of legal work. As such, the ABA should be dominantly concerned with ways that new capabilities can enhance the profession. Mark Zuckerberg of Facebook was just named Time Magazine’s Man of the Year and said “over the next five years, most industries are going to be rethought to be social and around people.” Law is inherently a social profession, and fostering social innovation is in everyone’s interests.

3. Differentiate lawyer-only systems. Much of the committee’s concerns address possible confusion when lawyers interact with non-lawyers through social media. But a large part of the legal marketplace is focused on the represented enterprise, where in-house lawyers manage the client-side work. When dealing with a represented enterprise, the likelihood of confusion and other problems are quite low, and the benefits of sharing information are quite high. Sharing knowledge in a lawyer-only system is inherently beneficial to the profession; it’s hard to imagine any scenario in which factually-correct information should be restricted.

4. Support confidential collaboration spaces. Our primary focus at Legal OnRamp is to create company-specific or company-law firm paired collaborative spaces, using these Web 2.0 services. We believe these systems can improve quality and efficiency, and do a better job of protecting client confidentiality and attorney-client privilege through partitioned access to information. At a time when US companies are facing ever greater challenges of global
competition, fostering innovation in legal service delivery and having lawyers who can help clients innovate will be vital to US global competitiveness, and therefore also to the success of the legal profession. We believe there are huge gains to be had in value to clients through these types of systems, and it is incumbent on the ABA to foster innovation, not impede it. Having spent 20+ years in the worlds of semiconductor, software and Internet, it is painfully obvious to me and others in those realms that law is seriously lagging in its approach to quality, process, metrics, value and the use of new tools. Collaborative systems have the potential to materially advance the value of legal work. Most of the use of social media in law will be collaborative systems among folks who already have defined working relationships, not marketing systems for folks without relationships.

5. **Be serious about the differences with email.** We all lived through the adoption of email by knowledge workers generally and lawyers in particular, and so we all recall that every fear-based objection now being raised about social media was also raised about email. Yet despite these concerns, email is now pervasively used by lawyers without seriously addressing the real problems that exist with confidentiality, security, attorney-client privilege and the proliferation of information. Being skeptical about new modalities while ignoring the problems inherent in existing modalities is not an intellectually serious position, so the committee should in every case ask whether the potential issues it identifies around social media might in fact is just as much of a problem with email.

6. **Be self aware.** In a market economy, the ABA and lawyers are free to try to advance their own economic interest. But to the extent that the committee’s actions are those of a Trade Association, trying to block emerging forms of service and price competition, as opposed to a Professional Association, trying to foster the interests of society through the profession, it ought to be forthright. In today’s world of cynicism and irony, most non-lawyers will readily ascribe Trade Association behaviors to what the ABA may genuinely believe to be Professional Association initiatives, with the result of undermining the credibility of the profession and ultimately the rule of law.
I. Introduction

Technology has evolved rapidly over the past decade. The face-to-face meeting has been replaced with the video conference call. The friendly phone call has been replaced with the terse email. Technology has increased the pace at which we work, and it has created unprecedented opportunities and risks. Confidentiality was simply easier before: lock sensitive papers in the desk, make sure the file room was secured, and everything remained where it was.

With the ubiquitous movement of everything to electronic format – from filings to electronic communications – there is no single desk to be locked, no file room that contains sensitive information filed away in red wells marked with red dots. In parallel, government regulatory agencies recognized that law firms were handling regulated information, as well, so they added law firms to their scope of monitoring.

This sea change has left lawyers exposed and under fire, as federal and state regulations, client requirements, and the courts vie to determine “effective confidentiality measures.” We propose a solution that provides predictability and flexibility: a combination of Practice Management Guidelines and minor amendments to the Model Rules.

II. Brief Overview of the Confidentiality Landscape

Confidentiality used to be a straightforward affair, governed by Model Rule 1.6: “[a] lawyer shall not reveal information relating to the representation of a client...” A client could simply trust that their sensitive information was in their counsel’s safekeeping. The rule hasn’t changed, but the world around it has, including client expectations.

a. External Factors Affecting Confidentiality
As law firms have grown to multiple jurisdictions, representing a broad array of industries, they have become exposed to regulations typically not imposed upon law firms. Firms had grown to expect increased confidentiality requirements for non-public material information for publicly traded companies or even limiting information access to US Nationals for clients subject to International Traffic in Arms Regulations (typically Department of Defense contractors). This year brought the concept of personal privacy to the forefront: Personal Health Information and Personally Identifiable Information. Health and Human Services extended HIPAA with the HITECH Act to enforce confidentiality compliance on companies.
that worked with health care organizations. Massachusetts adopted data breach laws to force any company that stored particulars about its citizens to be accountable for handling this information in a prescribed manner. Law firms suddenly had a whole new set of clients that required special confidentiality management.

In the courts, judges were responding to the recently revised Model Rule 1.10, and firms were disqualified due to inadequate information security controls. At the same time, firms that had timely and comprehensive policies, procedures, and technology were able to successfully fend off disqualification motions.

Finally, clients have moved beyond simple trust and now ask to confirm that specific information security controls are in place. In the absence of a uniform confidentiality mandate in the legal industry, clients require that their law firms comply with their industry- or jurisdiction-specific regulations. Audits have become more common by highly regulated clients, as the penalties for noncompliance have become serious and more regularly imposed.

b. Guidance for Sensible Self-Regulation

Canada and the United Kingdom grapple with similar challenges with the additional challenge of meeting the requirements of the EU Data Privacy Directive.1 Canada is currently revising its approach to Conflicts of Interest to codify the use of confidentiality tools to properly screen specific lawyers from specific client information. The CBA Task Force on Conflicts of Interest found:

Sophisticated confidentiality screen software can now restrict access to electronic documents to those who are permitted access pursuant to established confidentiality screens. Confidentiality screen software can be linked with time-entry software to ensure that only those who are authorized to participate in a matter can docket time to the matter.

With the advent of these computerized monitoring and security systems comes much more assurance that client confidentiality has been protected and that information has not been improperly accessed. The list of factors which can be considered in assessing the adequacy of screens should be expressly expanded to permit the evidence of those responsible for the monitoring and security of law firm information technology, systems, and networks that no breach of security or unauthorized access has in fact occurred.2

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1 Although Canada is not a part of the European Union, it has elected to comply with the EU Data Privacy Directive to enhance its global commercial competitiveness. PIPEDA (Personal Information Protection and Electronic Documents Act) is the legislation that brings Canada into compliance.

The CBA did not recommend specific technologies to enforce confidentiality but provided proposed amended language to Canada’s Model Rules that would provide more flexibility with the phrase

the adequacy and timing of the measures taken to ensure that no disclosure of the former client’s confidential information to the partner or associate having carriage of the new matter will occur.\(^3\)

The Task Force recommendation acts as a proposal for new wording, while providing non-binding practice management guidance. Furthermore, they refer to the Law Society of Upper Canada’s Practice Management Guidelines published February 2010.\(^4\) These Guidelines recommend

Lawyers using electronic means of communications shall ensure that they comply with the legal requirements of confidentiality or privilege. [Rule 2.03 of the Rules of Professional Conduct]

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer should

- develop and maintain an awareness of how to minimize the risks of disclosure, discovery or interception of such communications
- use reasonably appropriate technical means to minimize such risks
- when the information is extraordinarily sensitive, use and advise clients to use encryption software to assist in maintaining solicitor and client communications
- develop and maintain law office management practices that offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.\(^5\)

These are non-binding guidelines that essentially act as “good practices.”

The Solicitors Regulation Authority (“SRA”) in the UK has recently adopted outcomes-focused regulation as a means to move away from prescriptive solutions and work instead on holistic approaches. They have recognized the disparate needs of different types of law firms and intend on providing special attention to larger firms and firms with higher-risk practices. Nonetheless, they have provided confidentiality guidance to their lawyers, as well. SRA’s Rule 4: Confidentiality and Disclosure includes two sections dedicated to confidentiality. Sections 4.04 Exception to duty not to put confidentiality at risk by acting – with clients’ consent and 4.05 Exception to duty not to put confidentiality at risk by acting – without clients’ consent provide guidance for the conditions when confidentiality would be

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\(^4\) [http://rc.lsuc.on.ca/jsp/pmg/technology.jsp#s52](http://rc.lsuc.on.ca/jsp/pmg/technology.jsp#s52)
\(^5\) Ibid.
required. More interesting are the accompanying practice notes which describe explicit measures for protecting confidentiality, such as

that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;

and

that the firm implements a system for the opening of post, receipt of faxes and distribution of e-mail which will ensure that confidential information is not disclosed to anyone outside the restricted group.

The Rules also spell out circumstances where firms would not be subject to these requirements, based upon size and structure of the firm.\(^6\)

Similar to Canada, the UK has delegated its firm language to the notes and guidance and not incorporated it directly in the rules.

In summary, confidentiality requirements come from many quarters. Client-driven “outside counsel guidelines” impose their industry standards on law firms. Regulatory bodies that have not typically overseen law firms bring the next set of restrictions, in the form of state or federal legislation. The associations tasked with representing lawyers – ABA, CBA, FLSC (Federation of Law Societies of Canada), SRA – provide the ethical standard and the most severe consequence: disbarment.

III. **Recommendation**

The challenge is to describe the response mechanisms and standards that are appropriate to and reasonably attainable by all firms working within the influence of the ABA and other law societies – large firms spanning multiple continents to solo practitioners. We assume the following:

a. Information management (storage, search and security) technology will continue to change and improve. Mandating a specific technical solution to information storage or security is unwise and ultimately unhelpful.

b. Confidentiality responses must be appropriate to firms of varying sizes (i.e. requirements, investment and overhead associated with controls should be appropriate based on firm structure, size, and risk composition).

c. Given increasing confidentiality regimes (professional rules, client mandates, external regulations) firms should strive to employ the most effective protections available and suitable to their specific profiles.

d. Inadvertent disclosure continues to grow as a significant risk, as KM systems in law firms enable greater sharing of information. Automatic electronic enforcement is not exclusively aimed at restricting “bad” operators, but protecting the firm against benign and inadvertent access.

e. With the considerable breadth and scope involved in managing confidentiality, law firms are leveraging a limited pool of resources against a comprehensive and dynamic set of information.

f. By codifying general principles, the ABA can provide guidance for the rules governing lawyers and for courts so that firms are not left to grappling individually with emerging issues, assessing current professional standards, and other evolving trends.

In order to meet the requirements posed by clients, external regulators, and the self-regulating efforts of the ABA, the Rules should pose a four-part test:

1. Are your attorneys and staff notified in a timely manner when confidentiality policy is established and confidential information restrictions have been put in place? Has the firm confirmed this awareness and is it able to document this fact?

Information requiring special confidentiality protections, or information describing confidential matters, should not be made generally available internally. Involved attorneys and staff should understand their ethical and professional obligations to protect sensitive information.

2. Are your attorneys and staff effectively and systematically restricted from accessing confidential and sensitive information, electronic or otherwise for which access has been restricted?
   a. Processes should be commensurate with reasonable practices adopted by peers of similar size and composition. In environments where electronic information is generally available, screening measures should include automatic electronic enforcement. Sources of sensitive information often include client work product, time entry narratives, records, file shares, litigation support systems, intranets, extranets, and, most importantly, client communications.
   b. Timely maintenance of matter team membership is important to ensure special confidentiality is respected at a team level and authorized attorneys and staff are able to access and utilize essential resources. Throughout the lifecycle of a matter, new laterals join the firm and new clients are taken on. The requirement to maintain accurate controls over time is paramount and a likely source of an inadvertent or deliberate breach.

3. Are policies, procedures, and technology in place to prove that communications and enforcement are actually occurring and being kept up to date?

Regulators and clients are asking for detailed reports that show whether attorneys and staff accessed sensitive information or were able to access the information, whether they viewed the information or not.

4. Does the firm have a process to review compliance and to ensure that its policies and practices are aligned with current peer and industry standards?
We believe that it is unwise to mandate specific information storage and enforcement standards in an environment where change is constant. The best approach is to update and enhance the Model Rules to set out principles and to provide practice guidance and principles that can be used by various jurisdictions and applied by firms and lawyers.

With new comments to Model Rule 1.6 Confidentiality of Information to include the supporting descriptive sections 1 through 3, the ABA would provide a defensible standard of practice, consistent with recent changes to 1.10:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(1) All unauthorized lawyers and staff are timely screened from sensitive information. Authorized lawyers and staff are notified of and affirmatively acknowledge their duties of confidentiality.

(2) Confidential screens for sensitive information are systematic and comprehensive, not dependent on memory or word-of-mouth or ad hoc processes;

(3) Certifications of compliance with these Rules and with the confidentiality screening procedures are provided to the client or regulator, at reasonable intervals upon the client’s or regulator’s written request, to rebut any presumptions of shared confidences.

Practice Management Guidelines (“PMG”) should provide more specific practice guidance for implementing these controls. PMG should be posted online with the ability for lawyers to set up automatic email notifications if the documents change.

IV. Conclusion
Confidentiality management requirements will continue to be imposed on the legal profession from a number of different sources. The mandate of the ABA should be to create a confidentiality management approach that is practical and achievable for its lawyers and sufficient for external regulators and highly regulated clients. A supplement to the comments accompanying Rule 1.6 and the provision of Practice Management Guidelines would provide the correct amount of guidance that balances client care and law firm expense.
December 15, 2010

Natalia Vera  
ABA Center for Professional Responsibility  
321 North Clark Street  
15th Floor  
Chicago, IL  60654-7598

RE: For Comment: Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology

To whom it may concern,

Thank-you for considering the comments and feedback of the legal technology community as part of your commission’s assessment of cloud computing as it relates to client confidentiality.

We are the Legal Cloud Computing Association (LCCA), a consortium of leading cloud computing providers. The founding membership of the LCCA includes Clio (Themis Solutions Inc.), DirectLaw, Inc., Rocket Matter LLC, and Total Attorneys, LLC. The LCCA’s charter is to:

• provide a unified and consistent voice for vendors in the legal cloud computing market;
• collaborate and cooperate with Bar Associations and other policy-forming bodies in efforts to form policies and guidelines relating to the use of cloud computing in law practices;
• to define standards and best practices; and
• to provide educational resources to attorneys and the broader legal community on cloud computing and the technical, legal and ethical issues relating to cloud computing.

The LCCA includes in its membership leading experts on cloud computing, data security, privacy and ethics. Our goal is to build a close working relationship with the Commission, and to play a key role in helping build and shape standards, best practices, and education resources for the legal cloud computing market.

The LCCA supports the committee’s efforts to provide clarity to its membership on the ethical implications of technologies available via the internet, and appreciates the opportunity to be a part of this important discussion. We firmly believe that many cloud-based solutions are uniquely able to provide a secure, confidential, convenient, and cost-effective method for law firms of any size to manage and store client data, and hope our comments will prove valuable in helping to establish the technical standards that constitute reasonable care when employing Cloud-based solutions.

In this letter we suggest the following for the committee’s consideration:

1. Desired form of the Committee’s Recommendations
2. Minimal Set of Technology Standards for Cloud Computing Providers
3. Model Terms of Service for Cloud Computing Providers
4. Is Cloud Computing Outsourcing?
5. Cloud Computing Security vis-à-vis E-mail Security
1. Desired Form of the Commission’s Recommendations

The LCCA’s desired form for the Commission’s recommendations would be the creation of an online educational resource for attorneys. This website would be a continually evolving and up-to-date resource providing:

- Overviews of fundamental concepts and terminology relating to cloud computing
- Best practice guidelines
- Articles highlighting recent developments in cloud computing
- Links to relevant ABA and state bar-level ethics opinions and best practice guidelines

We strongly discourage the Committee from contemplating a change to the Model Rules of Professional Conduct as part of its efforts. In their current form, the Rules of Professional Conduct provide a clear, technology-neutral description of an attorney’s obligations to maintaining client confidentiality. In many ways, the discussion of security, privacy, ethics and client confidentiality in the era of cloud computing echoes the debate we saw in the 1990s of the same issues as they relate to e-mail. Much of the e-mail security and privacy discussion centered on the obligations outlined by Comment 17 of Rule 1.6 in the ABA Model Rules of Professional Conduct (Client-Lawyer Relationship, Confidentiality of Information):

“When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy.”

For attorneys to make informed decisions on what “reasonable precautions” entail, and what technologies afford a “reasonable expectation of privacy”, we believe attorneys need to have access to resources that educate with an aim of leaving attorneys in a position to make informed technology decisions.

2. Minimal Set of Technology Standards for Cloud Computing Providers

Here we propose a minimal set of standards by which any cloud computing solution used by any size or type of law firm can be evaluated. These minimal standards collectively form a baseline for the secure storage and transmission of confidential client data across a variety of professional industries that employ cloud computing technology. These minimal set of standards could be incorporated into any recommendations the Commission chooses to make with respect to best practices and cloud computing.

Rule 1.6 of the Rules of Professional Conduct detail the lawyer’s duty to protect and preserve the confidences of a client and to ensure any third parties entrusted with confidential data take reasonable measures to minimize the risk that confidential information might be disclosed. The
measures outlined below provide a foundation of security that ensure a lawyer utilizing cloud computing is compliant with Rule 1.6.

**Secure Data Centers**

One of the most important layers of security for cloud computing providers is the physical security of the data centers that store client data. The following measures help ensure physical access to confidential data is restricted to those with authorized access:

- 24-7 Security monitoring at Data Centers where servers are located
- Access to physical machines is limited only to team responsible for servers
- Machines accessible only through security checkpoints and restricted access areas
- Compliance with relevant standards, such as AICPA SAS 70 Type II\(^1\), PCI\(^2\) or HIPAA\(^3\)

**Network Security**

In addition to being secured against physical compromise, data centers must be adequately protected against network-based threats. The following measures help ensure only approved protocols and connections can be used to access confidential data:

- Perimeter firewalls block unauthorized connections and protocols
- Regular third-party audits of perimeter firewall security

**Software Security**

Ensuring a data center’s software is up-to-date helps protect against known security holes. The following measures help ensure a data center’s software is up-to-date:

- Regular, independent audits of software security
- Security patches and software updates applied within 30 days of being published

**Data Transmission Security**

The previous safeguards help ensure data is securely stored at the data center, but the data must somehow be securely transmitted to the end-user over a public network such as the Internet. Secure Sockets Layer (SSL) encryption is a proven technology used by the military, banks, online merchants, and Fortune 500 companies to securely transmit confidential information over the Internet. The following measures help ensure communications between the cloud computing provider and the end-user remain confidential:

- Browser-based transmission of sensitive data must use Secure Sockets Layer (SSL)

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\(^1\) [http://searchcio.techtarget.com/sDefinition/0,sid182_gci1095696,00.html](http://searchcio.techtarget.com/sDefinition/0,sid182_gci1095696,00.html)

\(^2\) [https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml](https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml)

\(^3\) [http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html](http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html)
Backups and Redundancy

Cloud computing providers are looked to not only provide outsourced hosting of data, but to implement appropriate procedures to ensure all data is backed up and appropriate redundant failovers are in place. The following measures help ensure a cloud computing provider is taking appropriate steps to back up and safeguard their client’s data:

- Multiple intra-day backups
- At least one geographically redundant (i.e. stored at a geographically distinct location from primary backups)
- Data center must be served by multiple Internet providers and power grids
- Service Level Agreement specifying minimum guarantee of uptime and remuneration policy if guarantee not met.
- Data center must have at least one week’s worth of backup capacity

Confidentiality and Privacy

Cloud computing providers should provide assurances through a Terms of Service or Privacy Policy that all data stored with the provider will be kept confidential, and not used for any purposes other than serving the end user their data:

- Guarantees that no personally identifiable information will be released to third parties unless required by law
- Guarantees that account data will only be accessed with specific authorization of the account-holder to resolve a customer issue
- Privacy policy clearly states all data stored with cloud provider is sole property of the customer
- Include appropriate confidentiality assurances (described further in recommendation #3 “Model Terms of Service for Cloud Computing Providers”)

Data Portability

As with all software systems, users of cloud computing providers should be free to export their data for the purposes of migrating to an alternate cloud computing provider, a desktop software product, or to retain separate on-premise backups of data stored with the cloud provider. Storing an on-premise backup of data stored with a cloud computing provider also provides strong protection against scenarios such as the cloud computing provider going out of business or becoming unavailable for any reason:

- All mission-critical, active customer data (at a minimum contact information, matter data, billable time entries, expense entries, and calendar events) will be made available for download, on demand, in a non-proprietary open format such as CSV

Taken as a whole, these security measures represent a level of data protections that all but the largest of firms would find cost-prohibitive to implement, but can be made available to small- and mid-sized firms due to the economies of scale the cloud computing model affords.

The measures above provide a baseline of security and privacy guarantees that allow lawyers to store confidential client data in “the cloud” in good conscience, and in accordance with our understanding of Rule 1.6 of the Rules of Professional Conduct.
3. Model Terms of Service for Cloud Computing Providers

One of the questions suggested for consideration by the Commission is if lawyers have an obligation to negotiate specific terms of service with their cloud computing provider.

Needless to say, having to negotiate a separate set of terms and conditions with each lawyer would be an inefficient use of time and come at a huge economic cost to both cloud computing providers and end-users. Negotiating, approving, tracking, and servicing a customer base that consisted of different baseline service Terms for different customers would be, as a practical matter, virtually impossible. Cloud computing is not special in this regard. The uniform nature of terms in high-transaction volume services is unique to neither cloud computing nor web services in general; rather, such terms are a routine, recurring part of normal "offline" business. (For example, lawyers are not required to negotiate unique, individualized or personalized Terms with their cellular phone provider, internet access provider, overnight delivery service, or physical document storage facility, or traditional desktop software).

That said, given the unique and elevated ethical obligations of attorneys, we do believe that attorneys should verify that Provider Terms contain a clear, concise, "plain English" description of their policies with respect to certain key matters. In addition, Terms should be made reasonably available for review at no charge prior to, during, and after a subscription period.

One solution to explore is the development of a set of standardized Terms that are responsive to the needs and interests of law firms. If a cloud computing vendor or hosting provider is aware of a set of standardized Terms that are legal industry specific and adopts such terms as part of a commitment to “best practices”, the process of law firm review and decision-making about the acceptability of a particular cloud computing vendor can be greatly simplified. Such standardization may also have an impact on the willingness of the law firm’s malpractice carrier to extend coverage to the online delivery of legal services and other law activities that are conducted in the cloud.

Standardized Terms and Conditions that should be incorporated into agreements between cloud computing vendors and law firms should address the following issues:

(a) **Data Ownership.** Data uploaded by a law firm to a licensed account (such as contact records, documents, or calendar entries) should remain the property of that law firm. Providers should not claim any ownership rights in such data whatsoever (by express or implied lien, operation of law, or otherwise); provided, however, such data may be subject to rules with respect to accessibility and/or deletion.

(b) **Data Accessibility.** Policies with respect to accessibility and availability of data both during and after an active subscription period (including the available methods of export or retrieval) should be detailed in the Terms. Terms should disclose what type of data export methods may be available, policies with respect to scheduling retrieval (if applicable) and additional cost associated with retrieval, if any.

(c) **Data Backup and Storage.** Providers should give a general description of their data backup and storage practices (such as general frequency and timing) and additional costs applicable (if any), but may exercise reasonable discretion as to the level of detail disclosed so as not to impair security.
(d) **Security, Confidentiality and Privacy.** Providers should disclose their general security practices with respect to matters such as system access (e.g. who has access to data, and under what circumstances) and data encryption, including whether personnel, contractors, and third-party business partners (if applicable) are subject to confidentiality obligations, but may exercise reasonable discretion as to the level of detail disclosed so as not to impair security. In addition, Providers should indicate their compliance with any applicable federal and state laws governing data privacy, and their policy for handling subpoenas or similar official requests to produce, disclose, or otherwise grant third-party access to an account. Providers should also disclose whether they use an offsite hosting company and, if so, whether: (i) servers are located in the United States (servers located outside the United States may be subject to different laws); and (ii) the company abides by security and privacy terms at least as protective as Provider.

4. **Is Cloud Computing Outsourceing?**

The Commission proposes a new Comment 3 to Rule 5.3, **Responsibilities Regarding Nonlawyer Assistants**, which seeks to make to clear that the rule applies not only to the supervision of legal assistants and lawyers, but to any “nonlawyer service providers outside the lawyer’s or law firm’s office.” A literal reading of the language suggests that such non-legal, nonlawyer service providers such as the firm’s accounting firm or bookkeeping firm, FedEx and other courier and delivery companies, web site hosting providers, web-based mail list management companies such as ConstantContact, hosted email providers such as Google, Yahoo, hosted Microsoft Exchange Servers, and SaaS (software-as-service) vendors, such as Salesforce.com, Intuit, and SaaS legal application and practice management providers, are all within the definition of “nonlawyer service providers.” However, none of these non-legal, nonlawyer service providers are involved in the direct delivery of legal services, as attorneys and legal assistants are.

While we understand the Commission’s concern that the requirements of Rule 1.6 be complied with, lawyers have always contracted for outside non-legal services, using their professional and management judgment to weigh the risks of contracting which will vary, depending on the circumstances.

We have some concerns that this new Comment #3, will be a cause of confusion among lawyers who are in the process of making decisions on the most cost effective way to purchase non-legal support services. There is a difference between outsourced service providers such as legal assistants and lawyers who are engaged directly in the delivery of legal services, and non-legal, nonlawyer service providers not engaged directly in the delivery of legal services.

Here are our concerns:

First, while it has always been the case that lawyers have been required to use their professional judgment in contracting for these services, the term “reasonable efforts”, as used in Comment #3, is subject to interpretation could be a cause of confusion when a lawyer or a firm decides to enter into a contractual relationship for such non-legal services.

Second, the statement that: “If information protected by Rule 1.6 will be disclosed to nonlawyer service providers outside the lawyer’s or law firm’s office, informed client consent to such disclosure may be required” can cause further confusion without a further explanation of when disclosure may be required and the nature of such disclosures.
In order for a client to give “informed consent”, the attorney must have knowledge of the risks involved in the disclosure and be able to explain to clients the nature of those risks. In particular, we do not believe presently, that most lawyers, particularly solo practitioners and lawyers in small law firms which do not have access to extensive IT experts or resources, have a sufficient understanding of the new web-based technologies that are the underpinning of hosted web services, and the risks associated with the use of those technologies. In order for Comment #3 to have any practical impact, the American Bar Association needs to assume an educational role through publications, white papers, and web-based CLE resources that are designed to provide guidance to the typical practitioner in this area. Our fear, is that without such guidance, lawyers may retreat from adopting web-based technologies and the benefits that these technologies promise, because of fear that they are not in compliance with the requirements of Rule 5.3.

Third, in our opinion, any amendments to the Rules that would require lawyers to directly supervise the work of non-legal service providers would be an impractical burden for the lawyer and likely result in the lawyer or firm avoiding the use of such services, however valuable, to avoid violating the Rules of Professional Responsibility. It makes sense to require the lawyer to have a duty to supervise the work of legal assistants and lawyers who perform work outside of the law firm when they are engaged directly in the delivery of legal services. To require that the lawyer also supervise the work of the kind of non-legal vendor as listed above would be excessive and intrusive in terms of regulating the management practices of a law firm.

5. Cloud Computing Security Vis-à-vis E-mail Security

In assessing the security and privacy of cloud computing, e-mail provides a useful reference point because of its relative maturity as a technology. In 1999, the ABA issued Formal Ethics Opinion No. 99-143 indicating unencrypted e-mail communications provided a “reasonable expectation of privacy” from both a technical and legal standpoint:

“The Committee believes that e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy.”

From a security and privacy standpoint, cloud computing technology is in every way superior to unencrypted e-mail. Unlike e-mail, most cloud computing providers encrypt all communications using SSL encryption, and take active measure to secure and control data flows. Using e-mail as a technological baseline that the ABA deems to provide a reasonable expectation of privacy, it is clear to us that cloud computing technology, if assessed by the same criteria, also provides a reasonable expectation of privacy. In this document, recommendation #2 “Minimal Set of Technology Standards for Cloud Computing Providers” provides guidance to law firms looking to understand cloud-computing vendor’s responsibilities regarding encryption, security, and more.

Please accept our sincere thanks for your consideration of the aforementioned recommendations.

We would be pleased to work with the Commission to develop a set of standardized Terms and Conditions that would be incorporated in agreements between cloud computing vendors and law firms as proposed in this letter.
We are available for further comment or clarification at your convenience the via the contact details below.

Sincerely,

The Legal Cloud Computing Association

Jack Newton
President, Clio (Themis Solutions Inc.)

Richard Granat
President, DirectLaw Inc.

Larry Port
Founding Partner and Chief Software Architect, RocketMatter LLC

David Dahl,
CTO, Total Attorneys, LLC
December 15, 2010

ABA Commission on Ethics 20/20
attn. Ellyn Rosen, Staff Counsel
321 N. Clark Street
Chicago, IL 60654
ethics2020@staff.abanet.org


Ladies and Gentlemen:

Following our comments and testimony submitted previously (see January 1, 2010 letter and October 14, 2010 testimony, attached as Appendix A to these comments), the Legal Marketing Association (LMA) is pleased to submit these comments to the ABA Commission on Ethics 20/20 (20/20 Commission) in its efforts to address critical issues affecting the professional values of the American legal profession. In our comments below, we focus on the key issues that are most relevant to law firm marketers and the law firms for which our members work. We also respond to questions posed by 20/20 Commission members during the October 14 testimony.

About the Legal Marketing Association

- LMA is a not-for-profit professional association with nearly 3,000 members worldwide.
- Our members hail from 43 U.S. states, several Canadian provinces and 10 other countries.
- LMA exists to serve the needs and maintain the professional standards of the professionals engaged in marketing, business development, client service, communications and public relations within the legal profession.
- The majority of LMA members work in law firms, ranging from global firms with more than 1,000 lawyers to small boutique practices.
- In fact, 93% of the AmLaw 200 employ at least one LMA member.

Issues that the 20/20 Commission is considering are of vital importance to LMA members and their law firms. Whether in developing content for firm websites or blogs, issuing client alerts on current legal developments, creating advertising campaigns, or updating Twitter feeds and other social media applications, LMA members are confronted on a daily basis with the challenges of complying with the myriad and often incongruent bar rules across many jurisdictions. We believe that the ABA can show leadership and foresight on these areas.

Summary of Comments and Recommendations

As elaborated upon in these comments, LMA urges the 20/20 Commission to consider the following issues and to structure its recommendations accordingly:
1. The Model Rules do not adequately address lawyers’ use of technology and new media—blogs, social networking, podcasts, etc. And, because we believe there is a fundamental difference between marketing and advertising, we do not believe these media should be considered advertising but rather requested information. Among other uses, these applications are used daily to provide educational content and CLE programming for clients and corporate counsel. Moreover, existing state and federal consumer protection statutes provide adequate remedies for inappropriate uses of these technologies; thus, there is no need for further regulation of these media by the ABA Model Rules.

2. The lack of uniform regulation, coupled with the inherent nature of Internet technology, makes it virtually impossible for law firms to comply with all bar rules across jurisdictions, or even to be certain which rules apply. Particularly problematic is language in Model Rule 8.5 relating to “offers to provide” legal services. LMA supports uniform regulation of lawyer ethics across all jurisdictions.

3. The ABA can show leadership to the states on these subjects by ensuring that it provides sufficient clarity in the Model Rules to guide lawyers in using these technologies appropriately, ethically and effectively, while not inhibiting the free flow of information about legal services. As buyers of legal services have become more sophisticated, the legal services arena has shifted from a seller’s market to a buyer’s market. Because of this, consumers — whether individuals without legal training or sophisticated corporate counsel and businesspeople — have more choices and more information at their disposal when selecting a lawyer or law firm.

Responses to Information Requests by the 20/20 Commission

At the October 14 hearing, 20/20 Commission members posed several questions to LMA relating to the adoption of new technologies for client development and information-sharing, as well as to the compliance burdens faced by lawyers given the lack of consistent lawyer regulation across all jurisdictions.

Below we offer some facts about rapidly evolving Internet-based technologies. As noted during the hearing, this is an area that literally changes every day. However, we are clearly at the beginning of a trend, and we expect the legal industry’s use of these tools to grow over time.

- In a November 2010 survey of LMA members:
  - 85% of survey respondents said that their law firms are engaged in marketing activities that employ social media (with social media defined to include blogs, Twitter, Facebook, LinkedIn, and similar sites).
  - Respondents find state bar rules confusing, complex and out of sync with the modern-day practice of law.
  - Member firms in the survey sample reported spending tens of thousands of dollars annually on compliance with state bar ethics rules (the plurality of responses was for the range $10,000 - $30,000). From this sample, we estimate the total cost of compliance across the legal profession to be in the hundreds of thousands, if not millions, of dollars annually.

- According to LexBlog's Annual “State of the AmLaw 200 Blogosphere” Report:
  - 123, or 62%, of the 2010 AmLaw 200 law firms are now blogging. This number is up from 39 firms, representing a 115% increase, since August 2007 when LexBlog released its first State of the AmLaw Blogosphere report.
The number of blogs published by the AmLaw 200 law firms has grown nearly 420% in that same time frame, from 74 to 387.

In the seven months since LexBlog released its fifth State of the AmLaw 200 Blogosphere report March of 2010, the number of AmLaw 200 law firms blogging has grown 28%.

According to a 2010 Zeughauser/Greentarget/ALM Survey of Corporate Counsel Adoption of Social Media:

- 62% of corporate counsel prefer to access outside counsel information online versus in print.
- 53% of corporate counsel predict that their use of new media to access legal industry news and information will increase in the next 6 - 12 months.

In an annual benchmarking study by UMass-Dartmouth of Fortune 500 companies’ adoption of social media (which we cite as a very rough proxy for adoption of these tools by “corporate America”):

- 298 (60%) of the 2010 Fortune 500 have corporate Twitter accounts and have tweeted in the past 30 days. This number is up dramatically from 35% in 2009.
- 116 (23%) of the primary corporations listed on the 2010 Fortune 500 have a public-facing corporate blog with a post in the past 12 months. This is up from 16% in 2008.

LinkedIn reported more than 85 million members in 200 countries as of December 2010, with a new member joining every second.

During March 2010, Facebook surpassed Google in weekly web traffic. Additionally, more than 30 billion pieces of content are posted to Facebook each month.

These statistics demonstrate that the Internet has moved from a “community billboard” hosting information for consumers to a platform that promotes a global conversation and creates even more expansive opportunities for an open exchange of information. No amount of regulatory restriction in the legal sector can stem the inevitable tide of social media and Internet-based communication. Of specific relevance to the issues under consideration by the 20/20 Commission, we believe that it is most appropriate to consider information accessed via the Internet as user-requested information as opposed to promotional or advertising information.

A complete list of citations to these, and other sources is attached to these comments as Appendix B.

Specific Recommended Changes to the Model Rules

Expanding on our core points above, we offer below some specific ideas and approaches that the 20/20 Commission may wish to consider as it completes its work.

1. The Model Rules do not adequately address lawyers’ use of technology and new media — blogs, social networking, podcasts, etc. And, because we believe there is a fundamental difference between marketing and advertising, we do not believe these media should be considered advertising, but rather requested information. Additionally, existing state and federal consumer-protection statutes provide adequate remedies for inappropriate uses of these technologies; thus, there is no need for further regulation of these media by the ABA Model Rules.

Technology has played a significant role in marketing and business development for the legal profession as it has for other industries. As evidenced by the facts presented above, lawyers are using technology to share all types of information about legal services. The benefits of this use for the legal market and for the general public are clear, and mechanisms to address any
inappropriate use already exist in the form of state and federal consumer protection statutes, accepted commercial practices and the legal profession’s strong legacy of self-regulation.

We urge the ABA not to regulate further a lawyer’s use of technology for communicating about the availability of legal services, and instead to provide clarity on permissible activities, as well as general guidance on how lawyers can use technology most effectively to grow their practices — in ways that respect the traditions of the legal profession.

Specifically:

While the Model Rules are for the most part succinct and clear, the comments are often complex and breed confusion. We suggest simplifying the comment language to provide improved guidance to the legal profession. As one example, the ABA could amend comments 1 and 3 to Rule 7.2 and comment 3 to Rule 7.3, to make clear that it does not consider all Internet activities to be advertising under the Model Rules.

2. The lack of uniform regulation, coupled with the inherent nature of Internet technology, makes it virtually impossible for law firms to comply with all bar rules across jurisdictions. Particularly problematic is language in Model Rule 8.5 relating to “offers to provide” legal services, and the Model Rules’ establishment of different standards for recipients of information under Model Rule 7.3. Under this rule, any partner in any law firm with a website could be disciplined in any jurisdiction in which the firm seeks clients, even if the lawyer has no other contact with the state whatsoever.

The ABA and the legal profession appropriately have put in place certain rules — covering issues unique to the practice of law — to protect clients and potential clients. LMA has an existing position statement dating from 2005 that supports uniform 50-state lawyer ethics rules. (This position statement is attached as Appendix C to these comments).

The ABA Model Rules primarily, and appropriately focus on those activities, attributes, and values that are most central to the profession and to the practice of law — admission to practice; attorney-client privilege and confidentiality; proper handling of legal matters, conflicts of interest, client accounts; and the like.

However, the Model Rules also address communications about legal services. This is where LMA’s primary interests lie. LMA supports full, free, truthful exchange of information about legal services — whether aimed at individual consumers or corporate clients, and whether aimed at those who are lawyers or those who are not. Indeed, our members or their firms are engaged in activities designed to communicate every day with clients and prospective clients about legal services. In our experience, sophisticated consumers of legal services and the general public alike are more than capable of discerning marketing messages that may be part of other communications about legal services.

Accordingly, in light of advances in the practice of law and changes in the market for legal services of all types, we encourage the 20/20 Commission to reconsider the appropriateness of Model Rule 7.3 (a) and (b), as well as the inclusion of the phrase “or offers to provide” in Model Rule 8.5 (a) (and elsewhere). These are nuanced issues, and we would be pleased to be part of a working group designated to clarify and simplify Model Rule comment language in these areas.

3. The ABA can show leadership to the states on these subjects by ensuring that it provides sufficient clarity in the Model Rules to guide lawyers in using these technologies appropriately, ethically and effectively, while not inhibiting the free flow of information.
about legal services or disadvantaging lawyers in both boom and uncertain economic times by removing a critical tool for developing client relationships.

While many states have adopted the ABA Model Rules, some have not, or have adopted modifications to the Model Rules that pose challenges to lawyers operating in a highly competitive, technology-enabled, global marketplace. We hope that, over time, the profession will move to embrace consistency based on sound commercial practices.

Some of the ABA Model Rules, and states’ interpretations of those rules, have not kept pace with the times and underestimate the public’s ability to discern marketing and advertising messages and to make informed decisions. More importantly to the current discussion, they overestimate the need for special rules to protect the public from fast-evolving uses of technology that are increasingly common business practices in all industries.

The ABA addressed some of these issues with respect to websites established by lawyers in August of this year in Formal Ethics Opinion 10-457. We now recommend updating and clarifying the Model Rules to conform to Opinion 10-457 and, further, to make the Model Rules more applicable universally, whether a law firm is consumer-based or a corporate-oriented practice.

As an example, Rule 7.3 - Direct Contact with Prospective Clients could be modified and updated to read as follows: (see marked version attached as Appendix D)

(a) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact if:

(1) the prospective client has made known to the lawyer a desire not to be solicited; or

(2) the solicitation involves coercion, duress, harassment or false information.

(b) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client 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:

(1) is a lawyer; or

(2) has a family, close personal or prior professional relationship with the lawyer; or

(3) previously has consented (or “opted-in”) to receive communications about the lawyer’s services (whether electronic or printed).

(c) 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 or telephone 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.
Should the ABA adopt the change proposed in Rule 7.3 (b)(3), we would also propose comment language to elaborate on the consent provided. For example, a comment could state: “Consent in this context includes not only requesting written information or joining a traditional mailing list, but also signing up to receive email newsletters or other electronic communications, joining RSS feeds, participating in exchanges on social media or blogs (such as leaving comments on blog postings, ‘following’ someone on social media outlets, etc.). None of the above should be construed to relieve lawyers of their obligations under any of the other Model Rules, including, in particular, Model Rules 1.18, 4.1(a), 7.1, 7.3, and 8.4(c). Lawyers are also advised to read the ABA Formal Opinion 10-457 with respect to websites maintained by lawyers.”

There is a substantial difference between “marketing” and “advertising.” State bars continue to designate all forms of public media, including websites and blogs, as “advertising.” We believe the ABA should provide education and guidance in this area while also making clear that it does not believe certain categories of lawyers’ activities are “advertising.” The solution to preventing the potential risks of providing information that may be misleading or overreaching is not to resort to the lowest common denominator level of prohibitions.

For example, we would recommend revising Rule 7.2 - Advertising, Comments [2] and [3] to read (see marked version attached as Appendix D):

[2] This Rule permits public dissemination of information concerning a lawyer’s name or firm name, address 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. Also, for purposes of this rule, “advertising” does not include lawyers’ provision of general information to the public in the form of, among other things, websites they maintain for their practice, newsletters and articles on legal developments, contributions to law blogs (including comments), or postings on social media websites, where these activities do not include solicitation of a prospective client.

[3] Questions of effectiveness and taste in advertising — whether in print, broadcast, or Internet media (collectively, “mass media”) — are matters of subjective judgment. One thing is certain, however: mass media is one of the most powerful tools lawyers can deploy for getting information to all sectors of the public, particularly persons of low and moderate income. Limiting the type of information that may be included in advertisements, or placing restrictions on uses of specific media that are burdensome or confusing for the lawyer (not to mention virtually impossible to enforce meaningfully), assumes that the bar can accurately forecast the kind of information that the public would regard as relevant and the manner in which the public desires to receive and process the information. Further, existing state and federal authorities, and widely accepted industry standards and guidance, provide adequate means for redress against false or misleading advertising practices. Thus, while lawyers are cautioned to consider carefully their use of mass media to ensure compliance with this rule and Rules 7.1 and 7.3 (in particular), we oppose the further regulation of lawyer advertising.

LMA appreciates the efforts of the ABA Commission on Ethics 20/20 to address the regulations governing legal marketing and business development. As mentioned above, we would welcome the opportunity to join a working group focused on simplifying and clarifying the Model Rules,
as well as to help educate ABA members and state bars on the use of social media as a tool for enhancing client relationships.

Respectfully submitted,

Nathan Darling  
2010 LMA President

Betsi Roach  
LMA Executive Director
# Appendix

**Appendix A**

LMA letter to ABA Commission on Ethics 20/20 dated January 1, 2010

LMA Testimony submitted in advance of 20/20 Commission Hearing in Chicago, IL on October 14, 2010

**Appendix B**

Selected Bibliography

**Appendix C**


**Appendix D**

Blackline version of proposed revisions to Rule 7.3 and comments 2 and 3 to Rule 7.2
January 1, 2010

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654
ethics2020@staff.abanet.org

Re: Preliminary Issues Outline - Legal Marketing Association Initial Comments

The Legal Marketing Association (LMA) is pleased to support the ABA Commission on Ethics 20/20 (Commission) in its efforts to address critical issues impacting the professional values of the American legal profession.

LMA is a not-for-profit organization with nearly 3,000 members worldwide dedicated to serving the needs and maintaining the professional standards of the men and women involved in marketing within the legal profession. The majority of LMA members work in law firms, ranging from global firms with more than 1,000 lawyers to small boutique practices. Members range from law partners to support staff, with many serving in a firm’s administration. More information about LMA may be found at www.legalmarketing.org.

During the Commission’s process, LMA’s interest and input will be focused mainly on the Preliminary Issues Outline, Section II - Issues that Arise in Light of Current and Future Advances in Technology That Enhance Virtual Cross-Border Access; Subsections A & C. This section seems most likely to encompass Rules 7.1 through 7.5 of the ABA Model Rules of Professional Conduct that govern communications concerning lawyer services, advertising and among other provisions, contact with potential clients. LMA also is interested in the Commission’s consideration of Rule 8.5: Choice of Law with regard to eliminating the phrase or offers to provide in 8.5(a). Additionally, there may be other provisions of interest as the work evolves.

In 2006, LMA’s International Board of Directors adopted a resolution supporting uniform regulation, interpretation and disciplinary enforcement of the rules of professional conduct governing client development among all jurisdictions of the United States. As part of the first phase of the Commission’s work, LMA would be pleased to provide further information, as well as the position paper in support of the resolution. More so than ever, and with the advent of new and developing technologies such as Facebook, Twitter, web blogs, etc., the current regulatory climate makes it difficult to comply with the myriad of state bar rules.

LMA encourages the Commission to consider Rules 7.1 through 7.5 and 8.5(a), and to amend/develop model rules that are balanced between protecting consumers of legal services, and allowing the legal profession to truthfully communicate to the lay public about the scope and availability of legal services.
LMA looks forward to participating in the Commission’s ongoing research and dialogue as it develops recommendations to the ABA’s House of Delegates. If appropriate, our organization would be pleased to assist the Commission in its efforts or present testimony at a future Commission meeting.

Thank you for your consideration.

Respectfully submitted,

Nathan Darling
2010 President

Betsi Roach
Executive Director
October 14, 2010

**Testimony of the Legal Marketing Association**  
**Represented by: Nathan Darling, 2010 President**

Good afternoon. I am Nathan Darling, President of the Legal Marketing Association.

The Legal Marketing Association (LMA) is pleased to support the ABA Commission on Ethics 20/20 in its efforts to address critical issues affecting the professional values of the American legal profession.

- LMA is a not-for-profit professional association with nearly 3,000 members worldwide.
- Our members hail from 43 U.S. states, several Canadian provinces and 10 other countries.
- LMA exists to serve the needs and maintain professional standards of the professionals engaged in marketing, business development, client service, and public relations within the legal profession.
- The majority of LMA members work in law firms, ranging from global firms with more than 1,000 lawyers to small boutique practices.
- In fact, ninety-three percent of the AmLaw 200 employ at least one LMA member.

Following the announcement of the Ethics 20/20 Commission, LMA established a dedicated task force to monitor the Commission’s work and to make recommendations regarding LMA’s participation in the process.

Issues that the Commission is considering are of vital importance to LMA members and their law firms. Whether in developing content for firm websites or blogs, issuing client alerts on current legal developments, creating advertising campaigns, or updating Twitter feeds and other social media activities, LMA members are confronted on a daily basis with the challenges of complying with the myriad and often incongruent bar rules across many jurisdictions.

More generally, LMA urges the Commission to propose guidelines and amendments to the Model Rules that are balanced between protecting consumers of legal services, and allowing the legal profession to communicate truthfully about the scope and availability of legal services. A significant component of the market for legal services is other lawyers and sophisticated business persons whose process for hiring lawyers, and their need for protection in doing so, differs from that of individuals with no legal training or previous experience engaging outside legal counsel. Because the rules tilt so far in one direction as to render the ability of law firms to provide information and to describe their strengths adequately a near impossibility, we do not think the public good is being served.

Today, we will outline our views and reactions to the recent issue paper developed by the Ethics Commission 20/20 Working Group entitled *Lawyers’ Use of Internet Based Client Development Tools.* We agree that many of these issues would benefit from further Commission guidance or, in some instances, possible amendment to existing Model Rules. LMA will be submitting more substantial response and comments by the Commission’s December 15 deadline.
Key Issues of Concern:

I. The Model Rules do not adequately address new media—blogs, social networking, podcasts, etc.

The nature of law firm marketing and business development has changed dramatically in the nearly 30 years since the Bates decision. With greater access to information and tools to compare and contrast among practitioners, consumers have benefitted from the changes that technology has created in the legal marketplace.

There is a growing concern in the legal community that the existing Model Rules do not adequately reflect the intent of or mechanisms associated with new and developing technologies, like Facebook, Twitter, web blogs, etc., all of which are “opt-in” services. With mounting evidence that informed decision makers are utilizing law firm resources in these media regardless of gender or age, it seems that to try and prohibit lawyer participation in a widespread social and business phenomenon is a “finger in the dike” approach to creating guidelines.

Illustrating this point, in a 2010 survey, sixty-two percent of in-house counsel respondents prefer to access outside counsel information online versus traditional print sources. (Zeughauser/Green Target New Media Engagement Survey, April 2010)

These structural changes in the way that information is made available and service is delivered demand that the Model Rules reflect not only the mechanisms through which information today is disseminated and accessed, but also the opportunities these mechanisms provide for consumers of legal services to directly vet the claims of practitioners. LMA contends that corporate law firms for the most part are self-regulating, creating guidelines for their partners, associates, and business professionals that clarify what is appropriate—that is, never being false or misleading or inadvertently giving advice that creates unintended lawyer/client relationships—and that the Commission would benefit from an approach that benefits from that work in progress by creating a model policy as a guideline.

We also believe that the legal profession would benefit from Commission recommendations that define and treat the related disciplines of marketing, business development, and advertising (whether technology-enabled or otherwise) as related but separate disciplines, each requiring different levels of oversight and guidance.

II. The lack of uniform regulation, coupled with the inherent nature of Internet technology, makes it virtually impossible for law firms to comply with all bar rules across jurisdictions.

In 2006, LMA’s International Board of Directors adopted a resolution supporting uniform regulation, interpretation and disciplinary enforcement of the rules of professional conduct governing client development among all jurisdictions of the United States. We will include our position statement to LMA’s testimony we will be submitting in December.

In view of the fact that technology now renders state and, indeed, international borders meaningless for purposes of access to information about legal services, LMA again urges the Commission to address a fundamental challenge: the divergence among jurisdictions of state bar rules, and inconsistent adoption of ABA Model Rules, makes it almost impossible for any law
firm with the desire to grow and expand its client base to comply universally with codes from different jurisdictions across the United States.

III. All sections of law firm and lawyer websites should not be considered “advertising” and should be considered as “requested information.”

The complexities surrounding the regulation of law firm and lawyer websites are of primary concern to LMA. We concur with the Commission’s concern that it is very likely that an entire firm website is not “advertising.” As noted in the Working Group’s paper, “lawyers use websites to disseminate information about their practices and to educate prospective clients…” Additionally, law firm websites provide access to substantive legal materials, CLE programming, event registration and recruiting information. Our members face significant challenges in constructing websites and other marketing initiatives that comply with laws and rules in all jurisdictions the firm practices or solicits clients, particularly given that the rules are inconsistent and sometimes conflicting.

We honor and respect prohibitions against false and misleading advertising, but believe in practice the model rules don’t differentiate clearly enough between marketing and making false and misleading statements, and we would like to help the Commission clarify the important distinctions.

In closing, we again urge the Commission to propose guidelines and amendments to the Model Rules that are balanced between protecting consumers of legal services, and allowing the legal profession to communicate truthfully—whether to the lay public or to sophisticated consumers, and using all available tools (including technology-based tools)—about the scope and availability of legal services.

Thank you for your time and consideration of these issues. As I mentioned, LMA will submit more detailed comments by December. If there are particular areas or issues on which the Commission would like our focused attention, please let us know.

Respectfully submitted,

Nathan Darling
LMA 2010 President
Appendix B: Selected Bibliography - Reports, Surveys and Studies

Legal Marketing Association, Member Survey on ABA Commission on Ethics 20/20 Survey (November 2010)


2010 Zeughauser/Greentarget/ALM Survey of Corporate Counsel Adoption of Social Media

Barnes, Nora Ganim, Ph.D., “The Fortune 500 and Social Media: A Longitudinal Study of Blogging, Twitter and Facebook Usage by America’s Largest Companies,” Center for Marketing Research at the University of Massachusetts Dartmouth (2010)

Experian Hitwise www.hitwise.com (measures the largest sample of internet users - 25 million worldwide, including 10 million in the United States)
Legal Marketing Association  
Position Statement #1, as Adopted by LMA Board of Directors  
January 25, 2006  
Chicago, Illinois

**LMA Position Statement (#1)**  
**Support of Uniform Ethics Rules**

In 2003, LMA voted to create a process under which the Association could develop position statements on issues relevant to the legal marketing profession. It was felt that this development would take LMA into a new level of credibility and influence by adopting and subsequently advancing stances on such issues. Additionally, the policies advanced by LMA will create an environment supportive of the needs of the membership.

Recently, a group of LMA members have seen an opportunity for the development of the first LMA position statement. Following the process outlined in the LMA Position Statement Policy, this group has developed the attached documentation which we respectfully put forward to the LMA National Board for their consideration at the July 25th board meeting, and this subsequent revision.

We have chosen our topic carefully. It is one we feel of significant relevance to the vast majority of our members and their firms. We have developed a position statement that draws from detailed research, debate and proposed policy development by the American Bar Association. At the same time, we have created a proposal that seeks to constructively influence the policy considerations of the highest courts in the states. We feel this position statement is critical to our profession, timely, backed by another credible, related authority, and suitably aggressive in its target market to attract appropriate attention to LMA.

Process Overview: According to LMA’s policy and process on position statements, should the Board determine that the attached is worthy of pursuit, LMA will put this position statement forward to the entire LMA membership for open discussion (on the listserv, in Marketing Briefs, and perhaps in a separate e-mailing to our members). There must be a minimum of ten weeks of opportunity for open discussion of this position statement by the LMA membership before the position statement is voted on. Membership discussion might result in small modifications to the position statement before it goes to a vote. Normally, the Board would then vote on the position statement, although in select instances, the Board may prefer to take the issue to a full membership vote. The Board will only entertain a vote on a position statement at either of two meetings per year: the in-person meetings in the fall and the one just prior to the annual conference each spring.

Working Group: A position statement must be put forward by a Chapter or National Committee. In this instance, the position statement is being put forward by Nathalie Daum on behalf of the Strategic Alliance Committee.

The working group that has developed this position statement includes the following LMA members: Alison Belfrage, Peter Darling, Josh Friedman, Heather Gray-Grant, Linda Hazelton, Jeffrey Morgan, Anne Schuster.

Broadcasting: Should this position statement be adopted by LMA, we would propose that the National Board then create a working group responsible for broadcasting the existence of this statement, and encouraging our Chapters to promote this position statement on a state-by-state basis.
Executive Summary

The Legal Marketing Association (LMA) is a not-for-profit organization serving the needs and maintaining the professional standards of marketing within the legal profession. The Association has 2,400 members. Most members work in law firms, ranging from global firms with more than 1,000 lawyers to small boutique practices. Members range from law firm partners to support staff, with many serving in the hierarchy of the firm’s administration.

The LMA advances a resolution urging the states’ highest courts to adopt the advertising and solicitation rules contained in Rules 7.1 through 7.5 of the American Bar Association’s Model Rules of Professional Conduct, as amended as a result of the ABA’s Ethics 2000 Initiative. The LMA also advocates a revision of ABA Model Rule 8.5, which deals with choice of laws.

Legal marketing increasingly relies on new technologies, such as weblogs, Websites and email, to serve the needs of law firms. Legal marketers regularly communicate information designed to assist with the selection of a law firm to those around the United States, and the world, often without regard to geographic constraints. This capability vastly exceeds the scope and intent of existing legal marketing regulation, which varies significantly state-by-state. This inconsistent regulatory environment makes meaningful compliance and effective enforcement almost impossible.

Appropriate, consistent regulation among the jurisdictions is needed. This regulation should be cognizant of the current state of communications technology and of the need of consumers to be protected from unscrupulous or misleading legal marketing. Adoption of the relevant Model Rules by all jurisdictions would preserve both the ability of legal marketers to provide information about legal services, and of consumers to receive it. The result would be increased public awareness of the availability and price of legal services, enhanced access to those services, lower fees and greater competition.
Legal Marketing Association  
Position Statement #1, as Adopted by LMA Board of Directors  
January 25, 2006  
Chicago, Illinois

Statement of Policy

RESOLVED, that the Legal Marketing Association supports uniform regulation, interpretation and disciplinary enforcement of the rules of professional conduct governing client development among all jurisdictions of the United States.

FURTHER RESOLVED, that the Legal Marketing Association encourages the states’ highest courts to consider a balance of the flow of legal commerce with consumer protection when considering modifications of rules of professional conduct governing client development.

FURTHER RESOLVED, that in order to establish uniformity among the jurisdictions and to achieve the balance in the flow of legal commerce with consumer protection, the Legal Marketing Association encourages the states’ highest courts to adopt, as currently drafted, Rules 7.1 through 7.5 of the ABA Model Rules of Professional Conduct.

FURTHER RESOLVED, that LMA encourages the states’ highest courts to adopt Rule 8.5 of the ABA Model Rules of Professional Conduct with one amendment: the elimination of the words “or offers to provide,” to ensure application of discipline is limited to those jurisdictions in which the legal services are actually provided.
Substantiation of the Statement of Policy

Introduction
The Legal Marketing Association (“LMA”) is a not-for-profit organization dedicated to serving the needs and maintaining the professional standards of the individuals involved in marketing within the legal profession. It has adopted the foregoing resolutions urging all U.S. jurisdictions to adopt the advertising and solicitation rules contained in Rules 7.1 through 7.5 of the American Bar Association’s (“ABA”) Model Rules of Professional Conduct, as amended by the ABA’s Ethics 2000 initiative. The LMA also advocates a revision to the choice of law provisions contained in current Model Rule 8.5.

Background
The LMA advances the policy set out here because the current confusing and conflicting ethics rules among the states fail to take into account the practicalities of marketing legal services across state boundaries. In particular, the LMA is concerned that technologies, such as Websites, email and blogs used both to support client development and to interface with prospective clients, result in the application of rules that do not serve to protect prospective clients yet hinder the ability of firms to provide information that may be used by those prospective clients to make decisions about the selection of legal services.

Put simply, these technological advances have made it relatively simple for law firms—both large and small—to develop helpful marketing messages and distribute them across the globe at the push of a button. Yet, the current regulatory climate makes it virtually impossible to lawfully engage in this type of marketing because each state has its own set of professional responsibility rules. Accordingly, such law firms are left to comply fully and limit their ability to compete in the global marketplace, or to disregard the rules and assume the risk that their lawyers may face disciplinary charges for the firm’s failure to comply with the ethics rules.

The status of the ethics rules is not simply an issue for law firms. It is also a problem for consumers of legal services. The conflicting patchwork of state ethics rules may tilt the balance between consumer protection and legal services marketing in ways that are detrimental to both the public and law firms.

Why is this so? Because law firm marketing is about the ability of the legal profession to truthfully communicate to the lay public about the scope and availability of legal services, and thus any unreasonable restriction on the ability of lawyers to engage in such communications will only hurt the public—which needs such information to make educated choices about legal representation. The First Amendment right to free speech is based on the premise that in a free marketplace of ideas, the truth will come out. This is also the theory behind legal marketing. The bulk of law firm marketing today is not the type of in-person, heavy-handed solicitation so feared (and rightfully so) by policy-makers, but rather involves the distribution of educational materials such as articles on case law and statutory developments, client seminars, and other valuable information that can only help individuals seeking an attorney to make an informed choice. In short, law firm marketing is a two-way street that, when properly regulated, can lead to an increased awareness by the public of the availability and price of legal services, better access to those services, more vigorous competition among lawyers, and lower fees.

Of course, the LMA is well aware that there is an important countervailing interest in this area—the need of the public to be protected from unscrupulous and overreaching communications from lawyers in an attempt to obtain business. In fact, LMA members are committed to the highest levels of professionalism and ethics, and they are in favor of a regime of well-reasoned ethical rules designed to protect consumers of legal services. What they cannot support, however, are rules that do not advance the goal of consumer protection, and which limit the ability of law firms to truthfully communicate the nature and availability of their services.
Legal Marketing Association  
Position Statement #1, as Adopted by LMA Board of Directors  
January 25, 2006  
Chicago, Illinois

Accordingly, the LMA urges the adoption of amended Rules 7.1 through 7.5 of the ABA Model Rules of Professional Conduct as amended by the ABA in 2002. In 1997, the ABA established the Commission on the Evaluation of the Rules of Professional Conduct, which became known as Ethics 2000. The goal of the project was to evaluate the then current regulatory climate governing legal ethics (including both the ABA’s Model Rules and the rules adopted by the states) and to make recommendations regarding possible amendments to the ABA’s Model Rules. To that end, the Commission engaged in significant fact-finding, the result of which led to a report recommending several significant amendments to Rules 7.1 through 7.5.
Rule 7.1\(^1\): The Prohibition against False and Misleading Communications

The need for the legal profession to condemn commercial speech that is false or misleading is the essential common denominator among the state rules. There is no question that consumers must be protected from false or misleading communications. However, the legal profession has not yet come to a consensus about the definition of “false or misleading” communications. In fact the states vary greatly on that which they prohibit as false or misleading. Prior to its changes in 2002, the ABA advanced a rule that identified four separate types of false or misleading communications. The first was a material misrepresentation. The second was an omission that would make the communication a misrepresentation. The third prohibited the creation of unjustified expectations and the fourth prohibited communications that created an unsubstantiated comparison of the lawyer’s services to those of another lawyer.

Most states continue to embrace all four parts, while several states include additional prohibitions as false or misleading communications. Problems have emerged, however, with strict interpretations of the third and fourth parts. For example, the prohibition of the creation of unjustified expectations has been used to prevent law firms from saying that their prospective clients can “trust them.” In an era when the legal profession strives for the public trust, ethics rules are promulgated and interpreted to prohibit a law firm from telling the public that it can be trusted. The rule has been interpreted to prevent a global multi-faceted firm of more than a thousand lawyers from designating itself as a “full-service” firm because the firm does not offer every possible legal service imaginable. Additionally, lawyers who have spent decades successfully practicing in a focused area of the law, and who have achieved high acclaim and widespread respect are forbidden from communicating that they are “experts” because such a representation is deemed an “unsubstantiated comparison” of the lawyer’s services with those of another. Restrictions that impose limitations such as these do far more to harm the ability of law firms to communicate their services than to protect consumers.

The ABA amended Model Rule 7.1 simply prohibits a material misrepresentation or omission that would create a material misrepresentation. The comment indicates that a communication could be a material misrepresentation if it leads a person to form an unjustified expectation that their results will be similar to those of a prior client. The comment also indicates a communication would be misleading if it leads a person to the belief that an unsubstantiated statement were substantiated. The comment then indicates that

\[^1\] The text of Rule 7.1, as amended by Ethics 2000 (marked to show changes from the prior version of the rule) is as follows:

**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: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.
Legal Marketing Association
Position Statement #1, as Adopted by LMA Board of Directors
January 25, 2006
Chicago, Illinois

disclaimers may be used effectively to assure that neither unjustified expectations nor unsubstantiated comparisons confuse potential clients.

The LMA urges that Amended Model Rule 7.1 be adopted in its entirety because it better accommodates the conflicting demands of a lawyer’s First Amendment right to engage in commercial speech and the public’s right to protection from misleading communications than the prior Rule.
ABA Model Rule 7.2 specifically governs lawyer advertising. The amended rule simplifies the prior rule by eliminating the listing of the specific types of media in which lawyers may advertise (which may have had the effect of prohibiting certain types of electronic advertising not included in the list, such as Web-based advertising). The amendment also eliminates the record retention provision, which had required all copies of lawyer advertising to be retained for a period of two years, along with a record of when and where such advertising is used. The prior rule was one of convenience for the disciplinary prosecution of violations. By requiring a law firm to retain copies of ads, disciplinary counsel could act on complaints more easily. However, they rarely did. At a time when law firms have the technological capacity to revise their Websites multiple times each day, and when the legal profession should be encouraging and not discouraging the most current information, the elimination of this requirement is appropriate. Model Rule 7.2 was also amended to permit a law firm to include the name of the firm responsible for the content of an ad, rather than the prior requirement of having the name of a particular lawyer identified. The prior rule served no purpose other than to impose a chilling effect on lawyer advertising, by forcing a firm to single out the lawyer who would be subject to discipline. The change, however, allows the firm to take responsibility and allows the state to seek discipline from any partner in the firm.

2 The text of Rule 7.2, as amended by Ethics 2000 (marked to show changes from the prior version of the rule) is as follows:

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded or electronic communication, including public media.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization 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; and

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

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.
Rule 7.3\textsuperscript{3}: Direct Contact with Prospective Clients

ABA Model Rule 7.3 addresses solicitation. States have a constitutional right to ban in-person solicitation because lawyers are trained in the art of persuasion and those in need of legal services are emotionally vulnerable. However, in certain circumstances this rationale does not hold up. The ABA amended Model Rule 7.3 to permit lawyers to solicit other lawyers, in-person. This enables lawyers to directly contact in-house counsel. The ABA Model Code of Professional Responsibility, which was replaced by the Model Rules in 1983, permitted lawyer-to-lawyer solicitation and this change merely reverts to that situation. The LMA also supports amended Model Rule 7.3’s prohibition of direct solicitation by means of real-time electronic communications, as it understands that these types of communications can be just as overreaching as in-person communications.

\textsuperscript{3} The text of Rule 7.3, as amended by Ethics 2000 (marked to show changes from the prior version of the rule) is as follows:

\textbf{RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS}

(a) A lawyer shall not by in-person or live telephone or real-time electronic contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

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

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, 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 (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), 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 or telephone 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.
Rule 7.4: Communications of Fields of Practice and Specialization
Amended Model Rule 7.4\textsuperscript{4} better enables lawyers to communicate their fields of practice and their

\textsuperscript{4} The text of Rule 7.4 as amended by Ethics 2000 (marked to show changes from the prior version of the rule) is as follows:

\section*{RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION}

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation;

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

\begin{enumerate}
\item the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
\end{enumerate}
certifications of specialization. The rule now allows a lawyer to communicate that he or she is certified as a specialist in a particular field of law where the lawyer has been certified by an organization if the organization has been approved by the appropriate state authority or the organization has been accredited by the ABA, and the name of the organization is clearly identified in the communication. The rule also permits lawyers to communicate that they specialize in fields of practice as long as the representation is truthful and does not imply that the lawyer is certified when he or she is not.

The LMA agrees with the rule’s amendment of the certification disclosure requirements because it eliminates the need for lengthy disclaimers in this area, while ensuring (by virtue of limiting the qualifying certifying agencies to approved state organizations or the ABA) that any communication by a lawyer of his or her specialty is a valid one and will not cause consumers confusion or harm.
Rule 7.5: Firm Names and Letterheads

Rule 7.5 addresses firm names and remains largely unaltered as a result of Ethics 2000. The rule should be adopted by the states as part of the provisions governing the communications of legal services.

\[\text{rule7.5}\]

The text of Rule 7.5 as amended by Ethics 2000 (marked to show changes from the prior version of the rule) is as follows:

**RULE 7.5: FIRM NAMES AND LETTERHEADS**

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
Rule 8.5: Choice of Law

Model Rule 8.5 recognizes that states will adopt differing provisions of their ethics rules and clarifies which state rules apply to lawyers who practice or are admitted in jurisdictions with different rules. The rule includes the provision stating, “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” [emphasis added]

As noted above, because technology allows for worldwide marketing at the push of a button, law firms with sophisticated Websites and email marketing programs could easily be deemed to be engaged in marketing in each of the 50 U.S. jurisdictions. Under amended Model Rule 8.5, an attorney in such a firm could be subject to the rules of more than one state, and thereby subject to discipline in more than one state. In other words, Rule 8.5 would restore the balkanization of ethics rules that Ethics 2000 was intended, in part, to resolve. Under this rule, any partner in any law firm with a Website could be disciplined in any jurisdiction in which the firm seeks clients, even if the lawyer has no other contact with the state whatsoever. The LMA simply believes this goes too far. By eliminating the words “or offers to provide” from the rule, this will ensure that lawyers are subject to discipline only in those jurisdictions where they actually practice law, not where their electronic communications might happen to be distributed. Therefore, the LMA encourages states to adopt Model Rule 8.5 only after amending it to delete this phrase.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.
Conclusion
Despite what the LMA feels are the salutary revisions of Ethics 2000, only a few states have adopted these changes. Some states have considered them and rejected them and in most states they remain under consideration. Unfortunately, a few states have reconsidered their client development rules independently of Ethics 2000 initiative and adopted even greater restrictions that they had before. In other words, despite the goal of increased uniformity advocated by Ethics 2000, the states are simply continuing on their prior paths of adopting parochial and protectionist ethics rules without real consideration for the adverse consequences of these rules, to the detriment of both lawyers and the lay public.

For these reasons, the LMA submits these resolutions urging all jurisdictions to adopt the Ethics 2000 amendments to the client development rules contained in Rules 7.1 through 7.5., and its proposed revision to Rule 8.5.
Background Information

A. Sponsors:

1. **Legal Marketing Association Strategic Alliance Committee**. Chair: Nathalie Daum, National Marketing Manager, Quarles & Brady Streich Lang LLP, One Renaissance Square, Two North Central Avenue, Phoenix, AZ, 85004-2391; Tele: 602-229-5377; Fax: 602-229-5690; ndaum@quarles.com; Immediate Past President and current Board Member, Legal Marketing Association

2. **Position Statement Working Group**. Members:

   **Alison M. Belfrage**, Director of Practice Development, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215-4291; Tele: 614-227-8829, Fax: 614-227-2390; abelfrage@bricker.com; Member, Legal Marketing Association

   **Peter Darling, J.D.**, Peter Darling Consulting, 751 Laurel Street #854, San Carlos, California, 94070; Tele: 650-261-9281; peter@peterdarling.com; Member, Legal Marketing Association and Society for Marketing Professional Services

   **Josh Friedman, J.D.**, Director of Marketing, Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C., 20 North Wacker Drive, Suite 2900, Chicago, IL 60606; Tele: 312-621-4400, fax: 312-621-0268; jfriedman@snsfe-law.com; Past Chair of the Chicago Bar Association's Solo and Small Firm Practitioner's Committee; Member, Legal Marketing Association

   **Heather Gray-Grant**, Director of Marketing & Business Development, Alexander Holburn Beaudin & Lang LLP, 2700-700 West Georgia Street, Vancouver BC V7Y 1B8, Canada; Tele: 604-643-2426; hgraygrant@AHBL.CA; Past President and current Member, Legal Marketing Association; Member, American Marketing Association (BC Branch)

   **Linda A. Hazelton, M.B.A.**, President, Hazelton Marketing & Management, 3810 Consolvo Road, Flower Mound, Texas 75022; Tele: 214-513-2257, Fax: 214-513-2872; hazeltonla@yahoo.com; National Board Member, Legal Marketing Association; Member, The Legal Sales and Service Organization, Inc. (LSSO)

   **Jeffrey Morgan**, Principal, Greenfield/Belser, 4161 Annapolis Road, Lakewood, CA 90712; Tele: 562-420-3000, Fax: 562-429-6505; jmorgan@gbld.com; Past National Board Member and current Member, Legal Marketing Association

   **Anne K. Schuster**, Director of Client Relations, Thompson Coburn LLP, One US Bank Plaza, St. Louis, MO 63101-1611; Tele: 314-552-6182, Fax: 314-552-7000; aschuster@thompsoncoburn.com; Member, Legal Marketing Association

B. No other policy of LMA addresses these issues.

C. The proposed policy is urgent because currently many state bar associations are assessing the need to adopt the revised Model Rules of Professional Conduct adopted in 2002 by the American Bar Association. While a majority of the jurisdictions that have already adopted a form of the Model Rules have kept their rules format substantially consistent with the Model Rules, several have strayed to varying degrees. The most common variation appears to be in the rules regulating lawyer advertising and solicitation. The purpose of this position statement is to show support for the revised ABA model rules and to urge those bar associations who are reviewing their state rules to take this opportunity to recast the form of their state rules in a manner consistent with the revised ABA Model Rules. Following these conventions would result in a consistent format for legal ethics rules in all states.
D. The adoption of this policy would not require expenditures by LMA outside of its working budget.
E. Dissemination of the proposed position statement to be determined at a later date.
F. Primary Sponsor: Legal Marketing Association Strategic Alliance Committee. Contact: Nathalie Daum, National Marketing Manager, Quarles & Brady Streich Lang LLP, One Renaissance Square, Two North Central Avenue, Phoenix, AZ, 85004-2391; Tele: 602-229-5377; Fax: 602-229-5690; ndaum@quarles.com
LMA Position Statement Policy and Process

This report summarizes the results of the LMA Position Statement Task Force. The Task Force, which was created at the Board's request, was comprised of Roberta Montafia, Ross Fishman, Will Hornsby, Diane Hamlin, Nathalie Daum, Stephanie Solakian and Heather Gray Grant. The purpose of the Task Force was to develop a full process around the submission, discussion and adoption of resolutions involving position statements for LMA on various issues.

Why Develop Position Statements?

Increasing the credibility of this profession and this Association has been a goal of LMA since NALFMA. Developing position statements with respect to issues relevant to our profession is a natural development of this profession, and would lead toward increased credibility. Credible professional associations become the voice for their industry. Due to our current size, structure and organization, we feel we are in a position to move into this next step. Further, we feel it is incumbent on the Board to recognize we are ready for this next step, and to facilitate its occurrence.

Process

1. Bringing forward resolutions: Any member of LMA may bring forward a resolution, but the resolution must come to the National Board through a Chapter or Committee. This ensures that prior to being received by the Board, a resolution has a certain degree of support. Resolutions must be brought forward in a standard format.

2. Open Discussion: Once brought forward to the Board, resolutions will be placed before the full membership for consideration and open comment. The resolution will be sent on the listserv, through our monthly blast e bulletin, will be housed on a page of our Website. Subsequent open discussion on the resolution will be encouraged through the listserv and blog on our Website.

3. Voting on Resolutions: in most cases, a resolution will be considered and voted on by the National Board (although the Board reserves the right to take this to a full membership vote, send out a survey to determine membership opinion, or anything in between. Certainly if the issue requires a bylaws change, normal bylaw change protocol will prevail). The Board will consider resolutions twice a year: at the Board meeting just prior to the Annual Conference, and in the fall in-person Board meeting. This means that all resolutions must be initially put to the Board ten weeks prior to these two Board meetings, and opened up for full membership discussion shortly thereafter.

4. Broadcasting decision: Once the position statement has been accepted or rejected, notification will go out to our membership through the listserv, our monthly e blast and the Web page dedicated to LMA position statements. Should the position be adopted, we will also send notification through headquarters to all interested parties. We will also consider sending out a press release generally with this position statement. Also, twice yearly we will produce a column in Strategies that outlines the position.

5. Position statement review: Every five years it will be the responsibility of the National Board to review all LMA position statements to see if they are still valid. If not, they will be dropped from the list (for example, we could be advocating a company or program that no longer exists). If the Board feels that position statement is still valid, the Board will then determine if they can simply re ratify the position statement and keep it on the list, or if membership involvement is required in the re ratification process.
Appendix D

Proposed modifications to Rule 7.3:

(a) A lawyer shall not, by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

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

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment or false information.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client 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:

(1) is a person specified in paragraphs (a)(1) or (a)(2) lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer; or

(3) previously has consented (or “opted-in”) to receive communications about the lawyers’ services (whether electronic or printed).

(d) Notwithstanding the prohibitions in paragraph (ab), 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 or telephone 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.
Appendix D -

Proposed revisions to Rule 7.2, Comments [2] and [3]

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address 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. Also, for purposes of this rule, “advertising” does not include lawyers’ provision of general information to the public in the form of, among other things, websites they maintain for their practice, newsletters and articles on legal developments, contributions to law blogs (including comments), or postings on social media websites, where these activities do not include solicitation of a prospective client.

[3] Questions of effectiveness and taste in advertising—whether in print, broadcast, or internet media (collectively, “mass media”)—are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now subjective judgment. One thing is certain, however: mass media is one of the most powerful tools lawyers can deploy for getting information to all sectors of the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the type of information that may be advertised has a similar effect and included in advertisements, or placing restrictions on uses of specific media that are burdensome or confusing for the lawyer (not to mention virtually impossible to enforce meaningfully), assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client and the manner in which the public desires to receive and process the information. Further, existing state and federal authorities, and widely accepted industry standards and guidance, provide adequate means for redress against false or misleading advertising practices. Thus, while lawyers are cautioned to consider carefully their use of mass media to ensure compliance with this rule and Rules 7.1 and 7.3 (in particular), we oppose the further regulation of lawyer advertising.
D.J. Marcus:

Ms. Vera-

I am writing to you to express my concerns about the ramifications of the ABA’s extended regulating of attorney websites, blogs, and social networking tools.

While large firms may have marketing departments and longstanding client relationships upon which they can rely, sole practitioners and small, startup firms rely explicitly on the tools mentioned in the issues paper for both clients and reputation as they build their practices. The ABA has already issued ethics opinions about the issues raised in the paper, such as inadvertent client relationships, advertising, and Article 7 rules. Attorneys who abide by ethics regulations already have enough information to use to make the proper ethics choices and will be hurt by additional restriction and regulation of their internet activities. On the other hand, attorneys who already stretch the rules won't care about a new white paper.

Please, let small firms and sole practitioners use responsible, internet marketing to build their practices without overbearing regulation.

D. J. Marcus
Attorney at Law
The D. J. Marcus Law Firm LLC
Jack Marden:

We should definitely rein in some of the more outrageous practices.
Roger Morrison:

The present advertising limitations on lawyers are too restrictive and already used to restrict competition. The present state rules do not need additions by the ABA.

If enacted, rules outlined in the "Issues Paper" will have many deleterious effects:
• The ABA’s proposed actions will cause a chilling effect on a lawyer’s right to commercial free speech, first established in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

• The public will suffer because there will be less information to find about attorneys, FAQs and articles about the law, and how lawyers can help them.

• Ethics burdens on marketing will unfairly hurt solos, GPs and lawyers in small and mid-sized firms, which heavily use online marketing. The ethics rules will not affect BigLaw firms that have hundreds of thousands of dollars to spend on costly offline marketing initiatives.
Tom Olofsson

Dear ABA,

I am not interested in having the ABA further restrict public access to legal services. We already suffer from too little understanding of how the law impacts people's daily lives and from too many incursions from non-attorneys offering services which involve legal issues and advice.

If the public's access to good legal information and education is restricted then only the bad information will be available.

I would like to see the ABA support the efforts of local attorneys in spreading the word that we are here to help.

--
Thomas J. Olofsson
Attorney at Law
December 15, 2010

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 N. Clark Street
15th Floor
Chicago, IL 60654-7598

RE: Comments to the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies: Lawyer’s Use of Internet Based Client Development Tools

Members of the Working Group:

LexisNexis is pleased to be able to provide comments to the Working Group on the Implications of New Technologies on Lawyer’s Use of Internet Based Client Development Tools. LexisNexis® (www.lexisnexis.com) is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis originally pioneered online information with its Lexis® and Nexis® services. A member of Reed Elsevier [NYSE: ENL; NYSE: RUK] (www.reedelsevier.com), LexisNexis serves customers in more than 100 countries with 15,000 employees worldwide.

It is the perspective of LexisNexis that the existing rules in the space of Internet Based Client Development Tools are currently sufficient to protect consumers. The existing rules do a good job of balancing the need for consumers to have access to information to help them make informed decisions when securing counsel with the need for protecting consumers and ensuring appropriate lawyer conduct. Following is commentary surrounding specific topics addressed in the Issues Paper.

Websites:
It is the viewpoint of LexisNexis that the recent ABA Formal Opinion 10-457, combined with various state bar rules related to internet advertising, are more than sufficient and no further investigation or ruling by the commission with regard to websites is required.

Pay-Per-Click/Pay-Per-Lead:
Lawyers who want to take advantage of pay-per-click or pay-per-lead advertising arrangements need to comply with Model Rule 7.2(b). Our opinion is that no additional amendments or changes are necessary. We believe these services offer a key benefit to lawyers by enabling them to grow their practice.

In addition, these services benefit consumers in three key ways:

1. Providing consumers with relevant online content and information. Most online legal advertising or connection services contain a vast library of content related to a consumer’s legal
issue. This provides the consumer with an opportunity to educate his or her self prior to making a decision to reach out to an attorney.

2. **Providing consumers with the opportunity to connect with a local attorney to assist with their legal need.** Often times, consumers are presented with many alternatives to address their legal issue and in many cases don’t know what type of attorney is required. These services simply help guide consumers to an attorney who has a valid bar license in their geography. Ultimately, the consumer has the right to retain this lawyer or seek representation elsewhere.

3. **Preserving consumers’ right to choose their legal representation.** These services do not promote or recommend an attorney and are a completely neutral party to the process. In addition, these services do not restrict nor give any preferential treatment to attorneys who participate.

**Blogging:**
Blogging and commenting on blogs allows attorneys to share their insights and opinions on current legal issues and areas of practice. The primary benefit of blogging is to establish the attorney as knowledgeable in his or her respective field. Similar to a letter to the editor, a lawyer should be able to actively communicate and contribute to discussions in his or her area of practice. It is our perspective that more information facilitates greater consumer choice.

**Social networking:**
Social networking is the modern version of referrals. The relationships already exist, and social networking just facilitates introductions online.

With modern privacy controls, consumers have more control over who is allowed to communicate with them. Both parties have to agree to communication (“friending” or adding someone, or choosing to block them) which protects consumers from unwanted communication and allows them to opt-out at any time.

The same ambiguities and overlaps about personal versus professional boundaries have presented themselves since the beginning of time. Cocktail parties, conferences, club membership affiliations and attendances, and many other social engagements present the very same issues. Social networking relationships are no different in this respect. As such, it is our point of view that special ethical rules or guidelines are not required for social networking.

This information is a perspective we hope your organization will consider as it considers publication of the proposed Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools. If you or others are interested in further information or discussion on this issue, LexisNexis stands ready to work with you.

Regards,

David Palmieri
VP / Managing Director
Marketing and Consumer Solutions
December 16, 2010

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 N. Clark Street
15th Floor
Chicago, IL 60654-7598

RE: Comments to the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies: Confidentiality-Related Concerns from Cloud Computing

Members of the Working Group:

LexisNexis is pleased to be able to provide comments to the Working Group on the Implications of New Technologies on confidentiality-related concerns from cloud computing. LexisNexis (www.lexisnexis.com) is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis originally pioneered online information with its Lexis® and Nexis® services. A member of Reed Elsevier [NYSE: ENL; NYSE: RUK] (www.reedelsevier.com), LexisNexis serves customers in more than 100 countries with 15,000 employees worldwide.

As you know, changes in technology are providing practitioners with a host of new tools to aid their practices. These tools provide opportunities both to enhance their practices and to provide even greater client services. It is critical for attorneys, clients, and service providers that these tools include the safeguards necessary to insure that attorney work product and client confidences are protected at all times from loss or from unauthorized access.

Our comments today focus on “cloud computing” systems, systems that often combine data storage, application software, and remote accessing capabilities. LexisNexis believes that a set of minimum best practices should be followed both by vendors and attorneys in offering or utilizing remote computing and information storage services that would provide both vendors and attorneys with a stable environment for these services. The net effect would be to remove confusion from the marketplace, ensuring a range of competitive offerings that attorneys could choose from without the need to themselves become experts in the underlying technology.

For the purposes of our comments the phrase “attorney-provided content” includes all information content provided by the attorney including client confidential information, attorney work product, attorney-client communications, and other practice-related information such as time sheets, billing records, and client contact information. “Attorney-provided content” would not include any software used to create, edit, store, or retrieve information.
Specific recommendations on best practices are set forth on Attachments A.-C. While the reasons for many of these practices may be evident, it is also possible that some recommendations may require further explanation or discussion. The Q. and A. set forth on Attachment D. may address some of these questions. Notwithstanding our effort to anticipate your questions we would be happy to meet with members of the Working Group to discuss our recommendations in detail if that would be helpful. Please contact Loretta Ruppert, Senior Director, Community Management, at 919-297-1840 at your convenience should you have any questions regarding our submission or if you would like to arrange for a meeting.

Sincerely,

Jonah M. Paransky
VP Law Firm Practice Management
LexisNexis
Attachment A.

Recommended Best Practices for all vendors offering SaaS, remote computing, and information storage services to attorneys to protect attorney-provided content:

- Encrypting all electronic communications between law firm systems, computers, and other supported devices and the remote computing system.
- Maintaining appropriate firewall and anti-intrusion protection for all attorney-provided content stored, including information stored inside the application environment.
- Vendor should regularly test (no less than quarterly) the environment using qualified third parties or internal auditors for vulnerabilities and potential security concerns.
- Vendor should maintain market leading information security and privacy certifications for example Systrust, Trustwave, or TrustE.
- Systems expected to contain confidential health information should regularly undergo HIPAA/HiTech review and certification by qualified third party or internal audit teams.
- Vendor should engage with a qualified third party or internal organization for 24x7 real-time monitoring and active protection of the environment against internal or external intrusion or compromise. This should be a multi-tiered defense including contemporary technologies including, but not limited to, firewalls, intrusion detection/protection systems, antivirus, etc.
- Formal testing of data separation between firms in a multi-tenant environment.
- A multi-year history in storing attorney-provided content is a definite plus.
- Vendor should limit the ability of their employees to access the systems that provide the services. In particular, best practices recommend:
  - Access to production systems restricted to a limited number of employees who have a critical need to access those systems, and who undergo background screening no less than annually.
  - All employees with ability to access production systems should have executed non disclosure agreements protecting attorney-provided content.
Attachment B.

Recommended Best Practices for data ownership of attorney-provided content:

- Vendor agreements, terms and conditions documents, and privacy policies should clearly reflect that the attorney/law firm is the owner of all attorney-provided content.
- Vendors should notify and involve the attorney/law firm with any government request for access to attorney-provided content, including subpoenas or other compulsory requests.
- There must be an easy, guaranteed way to remove/download/retrieve attorney-provided content from the vendor systems.
- Vendors should allow automatic download of attorney-provided content without vendor involvement.
- A grace period should be provided to allow attorney-provided content to be downloaded after a law firm has cancelled their contract or subscription.
- Vendors should not hold attorney-provided content hostage for timely payment – even in a contract dispute the timely ability for a law firm to access/download attorney-provided content is of paramount importance.
- After the termination of an agreement between the vendor and the law firm, the vendor needs to be able to certify (either by process or on a one-time basis) that the attorney-provided content is actually deleted/destroyed/purged from all vendor systems, including back-up tapes – to the extent permissible by law or regulation. This may take some number of defined months after contract termination.
- As standard in the SaaS space, anonymized use of data regarding law firm use is acceptable for the purposes of improving the product offering or trend reporting – as long as the data sets are large enough that no individual firm could be identified.
- Vendors must insure that any third parties who participate in the service agreement as subcontractors or software or service providers (e.g. outsourced vendors such as Amazon s3, Microsoft Azure, or colocation providers) are bound by the same or greater security and confidentiality obligations as apply to the vendor.
Attachment C.

Recommended Best Practices for the availability of SaaS vendor infrastructure:

- Law firms should only use vendors that provide guaranteed system availability of 99.9% uptime or better, excluding scheduled or emergency system maintenance.
- The vendor application should be supported from multiple, geographically distributed secure data centers that at a minimum maintain SAS70 Type II attestation.
- Vendor should provide continuity of operations (and have a documented Business Continuity and Disaster Recovery Plan) in case one of the service delivery centers experiences a catastrophic failure or loss of connectivity.
- Vendor Business Continuity and Disaster Recovery Plan testing should happen at a minimum quarterly.
- The applications should be served from a highly redundant infrastructure, to reduce the impact of system failure or component problems. The hosting platform should contain no single points of failure.
- The application and data should be regularly backed up to a remote location, to provide extra assurance of data protection and continuity.
Attachment D.

Prototype Best practice answers to ABA best practice questions

Q. Does the vendor offer (or would it be willing to negotiate) a Service Level Agreement (SLA) that guarantees a certain response time to customer service and/or technical support requests?
A. Yes, vendors should offer a Service Level Agreement that guarantees uptime and availability of the SaaS application and environment.

Q. Will there be any incidental costs for the SaaS solution, like data backup or support?
A. Many vendors charge in different ways. We strongly recommend attorneys choose both data backup and support as part of their SaaS packages.

Q. What are the storage increments? (Will you charge by the gigabyte of storage space?)
A. Law firms should insure that Vendor provides adequate storage, and beware of variable pricing plans that cause confusion over time.

Q. After launch, what happens if I don't pay – can you prevent me from getting my data back?
A. No, Vendors should not restrict customers from getting their data back for nonpayment.

Q. What kind of security screening do you have for your employees?
A. All vendor employees (and contractors with access to customer systems) should pass through formal background checks as part of the hiring process and then at a minimum annual reaccreditation.

Q. What kind of security do you have at your physical location/office (see Offices and Servers for more questions)?
A. Best practice physical security protections should be provided at all vendor facilities with access to attorney-provided information. This should include round-the-clock monitoring, badged access, etc.

Q. What are the redundancy features of your service (dual processors, UPS generator-supplied power, etc.)?
A. See answer above for redundancy best practices.

Q. Where are the servers physically located within the U.S. (state, city, building address)?
A. As a security best practice, vendors should not disclose actual locations of data centers. It is reasonable to request if the data centers are US based and that they be geographically disparate. Servers must be located in jurisdictions that recognize and honor obligations of confidentiality and privilege.
Q. How many locations will store my data?
A. Vendors should store data in no less than two geographically distributed data centers

Q. Are the servers:
• equipped with intrusion detection?
The answer should be Yes.
• constantly monitored in case of failure?
The answer should be Yes.
• equipped with automatic restart and resume capabilities for handling a variety of network conditions?
The answer should be Yes.
Natalia Vera
Senior Research Paralegal
Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street 15th Floor
Chicago, IL 60654-7598

Dear Ms. Vera:

The Technology work group of the 20/20 Commission has requested feedback regarding the various approaches that might be taken to establishing standards and providing guidance regarding technology issues related to the practice of law. This letter primarily responds to the “Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology.”

One of the possible approaches suggested is the adoption of specific technology provisions in the Rules of Professional Conduct. I am generally opposed to that approach. I believe that general provisions in the Rules that address technological issues as well as non-technological issues have been and will continue to be the best approach in the Rules.

Despite what some say, today’s technology does not present totally new ethical issues. Did the Code have specific provisions for using the telephone when telephone exchanges were run by human operators or when telephones were party lines? Did we need new rules when facsimile machines became common? I believe the answer is “No.”

Although some people casually refer to Rule 4.4(b) as the “inadvertent fax” rule, the rule is, of course, not limited to faxes. The possibility for the inadvertent production of a document has existed essentially forever. It has always been possible to place a letter in the wrong envelope or send the wrong letter with a messenger. It has always been possible to inadvertently produce documentation that should not have been produced. The proliferation of records and the newer means of distributing records has increased the likelihood of such errors but did not create the problem. Although Rule 4.4(b) was probably adopted as a result of the increased frequency of this problem, it appropriately did not address any specific technology. It was written to address the core issue. Any
rules prompted by current technology should similarly be drafted to address the core issue rather than any specific technology.

The Issues Paper mentions “cloud computing.” The Rules should not specifically address cloud computing. The Rules require an attorney to keep client information confidential. We don’t currently tell attorneys what kind of security they have to have on their offices or their file cabinets. We generally apply a reasonableness standard. If an attorney’s files were burglarized, we would look at the security measures the attorney had taken in light of the relative risk – both the security of the area and the sensitivity of the records. The same should be true of files stored through the use of technology – whether on a laptop, portable media, or in the “cloud.”

I agree that most attorneys need more guidance about how to take reasonable steps to secure information stored through the use of technology. However, I do not believe the Rules are sufficiently nimble to be the source of that guidance.

One approach I believe the ABA should consider is a certification process for vendors who provide technology used by lawyers. The ABA could set standards that vendors would have to meet in order to obtain certification. The vendor would apply to the ABA for certification and would then be able to advertise certification to lawyers. The certification would have to be subject to periodic review and renewal and possible revision or withdrawal if certain conditions developed. This certification would be particularly useful related to vendors who provide Saas, including cloud computing, and security software (such as antivirus, firewall, and encryption).

The certification process should be accompanied by an online and continuously updated resource that describes existing practices and emerging standards regarding lawyers’ use of technology. Such a resource would allow attorneys to analyze uncertified vendors on their own, if they chose. It would also provide guidance to attorneys and firms who would prefer to set up their own technology systems.

I would support a basic statement in the Rules along the lines that a lawyer using technology for the storage or transmission of confidential information must ensure that reasonable security, consistent with current technology industry standards is in place. I believe a statement in the rules that is much more specific than that would, in the long run, be a disservice to lawyers, clients, and the legal profession as a whole.

Sincerely,

Sara Rittman
Legal Ethics Counsel
ATTORNEY ADVERTISING AND FREEDOM OF SPEECH

By Normarie Rodríguez-Pérez
LL.M. Student – Jonh Marshall Law School

To assist the public in 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... The interest in expanding public information about legal services ought to prevail over considerations of tradition... – ABA Rules of Professional Responsibility – Comment to Rule 7.2

"Advertising is legalized lying."¹ The traditional notion of the public as a helpless captive audience, and of advertisers as "illusionists", had a significant impact on lawyer advertising efforts during the past decades. This idea –however– has shifted towards a less paternalistic view of clients, as a deeper constitutional analysis about the right of the public to know, and the right of attorneys to inform took place on 1977. On Bates v. State Bar of Arizona ², the Supreme Court struck down an Arizona Professional Conduct Rule that extremely limited lawyer advertising, and prohibited including the prices at which certain services were performed. The year before, on a case regarding pharmacists advertising ³, the same Court explained that the State’s protectiveness of its citizens rested in large measure on the advantages of their being kept in ignorance.

However, they noted the presence of a potent alternative to this approach: “that alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”. 4

Nowadays, both the paternalistic and the more liberal notions are facing each other as technology develops, and the means of communication grow exponentially. Websites, Blogs, and Social Networks, among others, have increased the public’s awareness and receipt of information, and the capability of advertisers to expand their audiences and the content of their messages. This ongoing communication wave—however—has reawaken old concerns about the need to regulate attorney-client communications through advertising. Courts, professional conduct organisms, scholars, and legislatures have faced the challenge of determining if said communication efforts need to be controlled, and how to control them. Most of them have approached the so-called problem on a media specific analysis, while others have tried to regulate on-line communications on a more general manner.

This comment will focus mainly on the “why” of lawyer advertising regulations, and the constitutional analysis of such regulations, and not so much on the “how” to limit each type of expression medium, with the intention of hopefully finding an answer as to which path should be taken when deciding if new legislation is needed. The first part

4 Supra n. 2.
will explain why lawyer advertising was initially restricted. Part II will take a look at the new mediums of expression, and the reasons why some argue that new protection is needed. Part III will review the current applicable rules, and Part IV will provide the constitutional analysis of commercial speech and advertising regulations. Part V will include the proposed advertising definition, and Part VI will conclude the analysis.

I. Why was regulation pursued?

In Bates v. State of Arizona \(^5\), the United States Supreme Court faced the challenge of determining whether an Arizona rule that restricted attorney communications was a valid limitation on speech, in light of the First Amendment of the United States Constitution. While explaining the State Bar’s position with respect to the reasons for such regulations, the Court indicated the following:

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled. \(^6\)

The State Bar’s reasons for restricting lawyer advertising and the Court’s analysis regarding each one of them in Bates were the following:

\(^5\) Supra n. 2.
\(^6\) Supra n. 2.
Client development and Freedom of Speech
Page 4

The Adverse Effect on Professionalism. — The State Bar’s contention was that “the hustle of the marketplace would adversely affect the profession’s service orientation, and irreparably damage the delicate balance between the lawyer’s need to earn and his obligation selflessly to serve”. 7 Also, that the client’s perception that the attorney was motivated by profit would make him doubt the lawyer’s commitment to his cause. The Supreme Court, however, indicated that this argument presumed a need to hide any type of economic interest from the clients, but clients rarely believe that attorneys will work for free. The Court then asserted that it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. “Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney”, it concluded. 8

The Inherently Misleading Nature of Attorney Advertising. — The State Bar also argued that advertising legal services would always be misleading because of these three reasons:

a. such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement

b. the consumer of legal services is unable to determine in advance just what services he needs, and

7 Supra n. 2.
8 Supra n. 2.
c. advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

As the Court explained, none of those concerns were real because, first of all, the only services capable of being advertised were the routine ones like uncontested divorces and personal bankruptcy petitions, among others. Secondly, a client is capable of knowing which service he desires. And thirdly, the Court perceived that the argument that attorney advertising would highlight irrelevant factors and fail to show the relevant factor or skill “assumed that the public was not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information”.  

The Adverse Effect on the Administration of Justice. The State Bar also argued that Advertising would promote litigation. This conclusion, however, could be perceived as an advantage because, although advertising might increase the use of the judicial machinery, the Court could not accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.

The Undesirable Economic Effects of Advertising. – It was claimed that advertising would increase the overhead costs of the profession, and that these costs then would be passed along to consumers in the form of increased fees. The Court, however, used the analogy of product advertising and explained that there is revealing evidence that where consumers have the benefit of price advertising, retail

9 Supra n. 2.
prices often are dramatically lower than they would be without advertising.

The Adverse Effect of Advertising on the Quality of Service. It was also argued by the State Bar that given the fact that the attorney was advertising a given "package" of services at a set price, he would be tempted to provide the standard package regardless of whether it would fit the client's needs. The Court concluded that an attorney who is inclined to cut quality, will do so regardless of the rule on advertising. Also, it concluded that the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized.

The Difficulties of Enforcement. Finally, it was argued that restriction was justified by the problems of enforcement if any other course was taken. The Court indicated that it suspected that most lawyers would behave as they always did: "They would abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system". ¹⁰

II. Is regulation needed today?

When Bates was decided, newspaper and yellow pages ads were the "fiercest" mediums of attorney advertising. The age of technology has greatly changed the ways in which lawyers exercise their now established right to advertise. ¹¹ When a modern lawyer sits down at her desk in the morning and turns on her computer, her home page may

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¹⁰ Supra n. 2.
come up as anything from Google, to the Wall Street Journal, to her Facebook home page. If she is posting, blogging, or tweeting in her professional capacity with her contact information about her trial successes, she might arguably be getting to close to the line of advertising.  

The availability of communication resources such as websites, blogs, social networks, and e-mails, among others, has alerted the regulating authorities about the ethic implications of said interactions. Why? Because communications are instant and more difficult to monitor, because of how easy it is to cross the line between advertising and solicitation, or maybe because of how hard it is to determine if an attorney-client relationship has come to life. Furthermore, there are no gate-keepers to information sharing, no editorial process and no hindrances. Good or bad, Web 2.0 technology has enabled social media to plunge forward and lawyers to be aware of it, harness it, and scrutinize it.  

Another concern is client information confidentiality. As it has been said, there is a difference between going back to the office and talking about a case with your supervisor, and posting the courtroom drama of the day on line. In Illinois, a former assistant public defender is facing disciplinary charges for blogging about client confidential information.  

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12 Wendy L Patrick, Esq, Ethical Attorney Advertising in the Electronic Age.  
13 Catherine Sanders Reach, MLIS, A guided tour of social media. ABA Legal Technology Center, www.lawtechnology.org.  
14 Wendy L. Patrick, Esq., “With ‘Friends’ Like These” The Ethics of Social Networking.
Before analyzing the increasing concerns about these new mediums of expression, let's take a closer look at the most common types. **Social media** has been described as media for social interaction, using highly accessible and scalable publishing techniques. Social media uses web-based technologies to turn communication into interactive dialogues.  

It is said to include blogs; wikis; social networking; bookmark, video and picture sharing sites; tagging; and review sites for movies, products, services, books, restaurants and more. Social media is not only about user generated content, it is about sharing information at a peer level where the middle man is at best a hindrance, and sometimes unwelcome.  

As it was explained by attorney Wendy L. Patrick,

Social networking sites are enormously popular. More than 200 million people have joined Facebook. How many lawyers are among the masses? Almost 50% of lawyers who responded to a recent 2008 Network’s counsel Survey commissioned by LexisNexis and Martindale Hubbell said they participated in online social networks. While many law firms and lawyers use business-focused sites such as LinkedIn and Avvo, Facebook offers the opportunity for both business and social contacts, and thus appeals to a wide variety of professionals.

Some lawyers can’t wait to post their latest victories on line for all to see. One good “tweet” can transmit a soundbite of your latest triumph to an enormous amount of people, as can posting it on your Facebook or Avvo page.

**A website**, on the other hand, as it was explained on the American Bar Association Formal Opinion 10-457:

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16 Supra n. 13.
17 Supra n. 14.
18 Supra n. 12.
19 Supra n. 13.
...may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements. More specific information about a lawyer or law firm’s former or current clients, including clients’ identities, matters handled, or results obtained also might be included.

Lawyer websites also can assist the public in understanding the law and in identifying when and how to obtain legal services. Legal information might include general information about the law applicable to a lawyer’s area(s) of practice, as well as links to other websites, blogs, or forums with related information. Information may be presented in narrative form, in a “FAQ” (frequently asked questions) format, in a “Q & A” (question and answer) format, or in some other manner.  

Modern lawyers frequently use the internet to showcase their practices. Flash movies, testimonials, and instant attorney profiles are just a click away in cyberspace. Attorney websites have become more common as an increasing number of lawyers are discovering the ease with which they can communicate their services, and the potential scope of their brilliant advertisements.  

Another frequent online medium of expression is the blog. A blog, short for “web blog,” is, as one legal blogger himself put it, “a website you can update as easily as you can send an e-mail.”

As it can be seen, information is available anywhere, and mediums to spread that information are extremely broad. However, the real question in terms of attorney advertising regulation should be if new

20 Supra n. 12.
21 Supra n. 11.
regulation is needed, or if the new forms of communication are already covered by the existent ethic codes.

The American Bar Association Model Rules for Professional Responsibility—and basically every state code—include specific regulations for legal advertising. Whatever conduct is not included in said specific rules is properly covered in some other areas such as: Rule 1.6: Confidentiality Of Information; Rule 3.6: Trial Publicity; Rule 4.1: Truthfulness In Statements To Others; Rule 4.2:

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22 (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm;
   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
   (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
   (4) to secure legal advice about the lawyer's compliance with these Rules;
   (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
   (6) to comply with other law or a court order.

23 (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

   (b) Notwithstanding paragraph (a), a lawyer may state:
      (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
      (2) information contained in a public record;
      (3) that an investigation of a matter is in progress;
      (4) the scheduling or result of any step in litigation;
      (5) a request for assistance in obtaining evidence and information necessary thereto;
      (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
      (7) in a criminal case, in addition to subparagraphs (1) through (6):
         (i) the identity, residence, occupation and family status of the accused;
         (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
Communication With Person Represented By Counsel; Rule 7.3: Direct Contact With Prospective Clients; and Rule 8.4: Misconduct. Based

(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

24 In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

25 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 to do so by law or a court order.

26 (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
   (1) is a lawyer; or
   (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
   (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
   (2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client 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 (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), 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 or telephone 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.

27 It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply 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; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
on these facts, which regulations govern the wording and graphics of Internet attorney advertising? The answer is: usually the same ones that govern attorneys advertising the traditional way in the Yellow Pages.  

Some have dealt with the issue of online advertising by making references to the current rules. For instance, the lines between e-mailing, chatting and personal solicitation have been drawn in some states like Florida, Michigan, West Virginia, Utah, and Virginia by allowing attorneys to participate in chats and online communications, as long as they do not contact specific persons with the intention of soliciting work. On the other hand, an analysis made about specific Blogs, based on their content, lead to the conclusion that, according to Model Rule Rule 7.2, said Blogs could be considered advertising. Since almost every aspect of the attorney’s professional behavior is covered by the rules, in terms of attorney advertising, the key should be to identify what is advertising, in order to make sure that said definition covers online as well as offline communications. That way, there is no need to distinguish between mediums of expression, and the risk of unduly regulating protected speech is lower.

For some people, this simple approach of merely re-defining advertising would fall short to cure the ethics/technology communications dilemma. However, what should be kept in mind is: what is the problem with communications falling outside of the scope of

28 Supra n. 12.
29 Supra n. 13.

30 Florida Bar Standing Committee on Advertising, Opinion A-00-1 (august 15, 2000).
30 Supra n. 14.
regulation? Let's say, for example, that according to the definition of advertising, a Blog falls outside of that definition, and hence it is considered the attorney’s protected right to speak his own mind. Besides the fact that the lawyer’s conduct would still be scrutinized by the aforementioned rules of professional responsibility, the online market itself could, might as well, serve as shields and deterrents of attorney misconduct.

As Catherine Sanders Reach indicated,

Social media is having a big impact on the law and the lawyers. The public is self-serving on legal forms sites like Legal Zoom, Dracn by quick turn-around and flat rates. They are accostumed to “do it yourself” on the Internet. They are often more inclined to seek information about the law before consulting with a Lawyer, changing the relationship from one of a counselor-client relationship to a collaborative, teamwork-based approach to representation. Clients are finding lawyers in different ways too — using sites like Avvo, JDSupra and Law Guru to not only allocate lawyers but ask questions in hopes of getting free legal advice. Lawyers should be aware of how clients seek legal help and the implications both pragmatically and ethically. The legal profession will adapt to this new culture or left behind. 31

Furthermore, as clients are more informed regarding legal services through the available online mechanisms, they are also more confident about rating, reviewing and sharing their lawyer’s performances on the Internet. This so called “unofficial advertising” could be so negative, that the attorney will more likely exercise precaution when communicating online. As Michael P. Downey indicated, although they may not realize it, almost all law firms also have an unofficial Internet presence. Lawyers and staff create social network profiles and other web pages that reference the law firm, contain

31 Supra n. 13.
firm-related pictures or content, and perhaps even discuss the firm’s activities and clients. Or they post comments that link to the firm or a firm email address on third-party sites, or feed third-party sites (such as AboveTheLaw.com) with firm information and images.32

The author says that by running the firm’s name through a powerful search engine like Google as well as through the most common social network sites, such as Facebook, LinkedIn, MySpace, and Twitter, the lawyer might be surprised—or disappointed—to learn that a person visiting these very popular sites will receive a very different impression of the firm than intended. This includes:

• Top-ranked search results are for former employees, including those who left in uncomfortable circumstances and likely have an ax to grind;
• Photos of lawyers or staff in embarrassing situations, or pictures of animals, cartoon characters, crying children, or favorite celebrities in lieu of lawyer or staff portraits;
• Information about sometimes embarrassing hobbies or interests, including odd collections or political or musical interests; and
• Discussions of daily activities, including overt or thinly veiled references to clients and client matters.

As it can be seen, online attorney communications are exposed to a sort of "checks and balances" system, which could lead to self-regulation. As it was explained by Catherine Sanders Reach,

It would be best for lawyers to be cautious, and be able to justify their activities on social networks in light of, rather than despite of, the ethics rules. Common sense and restraint, separating personal and professional networks, and a knowledge of the rules will go a long way in helping attorneys show how participation in social networks and microblogs helps the public perception of attorneys. When examples like the recent attorney blogger who publically commented on confidential client information, as well as making denigrating remarks about judges, became a headline generating disciplinary action in Illinois, everyone suffers. 33

Also, it has been indicated that a firm would likely be better served by educating its lawyers and staff about the limitations and risks of online activity, and by trying to ensure that the firm’s interests are protected when the online activities refer to or involve the firm or its clients. 34 The first recommended step for protecting the firm’s interests is to adopt and seek compliance with a firm social networking policy. This policy then serves as the cornerstone for an online-activity education and compliance program.

Finally, as the Comment to the ABA Model Rule 7.1 regarding information about legal services states, the old concerns about effectiveness and taste in lawyer advertising are matters of speculation and subjective judgment. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about

33 Supra n. 13.
34 Supra n. 32.
legal services to many sectors of the public. It also states that 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. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by the Rules.

Now that we have seen which types of electronic communications exist today, and analyzed the basic concerns about them, let's take a look at how the current Rules of Professional Responsibility deal with lawyer advertising.

### III. ABA Model Rules 7.1 & 7.2

ABA Model Rule 7.1 and 7.2 regulate "information about legal services". They state:

**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.

**Rule 7.2 Advertising**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(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.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

The Comment to Rule 7.1 states that: “this Rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful” (emphasis added).

As it can be seen, the rules currently prohibit any type of communication that is false or misleading about the lawyer or the lawyer’s services, including communication that is not considered advertising. The comment also states that whatever means are used to make known a lawyer’s services, statements about them must be truthful. In other words, the regulation is not medium specific, but content specific. It might as well apply to a newspaper ad, or to a blog, or a posting on a social network.

This approach, however, still falls short in terms of the definition of advertising. Even though the truthfulness requirement
applies to any type of media, it is also true that online communications could sometimes be considered advertising, and sometimes the lawful exercise of the attorney’s right to speak freely, even when they make slight references to the attorney’s services.

Even though the practical application of this Rule does not put significant restraints on advertising, it is our believe that a definition of advertising should be created, given the fact that States might still be able to restrict some types of electronic communications if there is a substantial state interest in doing so. For this reason, a definition that could be applied uniformly, and would also contemplate the First Amendment constitutional requirements for Freedom of Speech restriction, would put the States and the attorneys on a more comfortable position when deciding which types of communications could be restricted and which could not.

Furthermore, since advertising was considered “commercial speech” by the United States Supreme Court for the purposes of a constitutional analysis\(^3\), it is our believe that any definition should be construed in light of the “commercial speech” definition.

**IV. Advertising & Commercial Speech: Constitutional analysis**

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

\(^3\) Supra n. 3.
On 1977, Arizona’s Supreme Court upheld a State Bar’s disciplinary rule that restricted advertising by attorneys. Two attorneys had placed an advertisement in the Arizona Republic, a daily newspaper of general circulation in the Phoenix metropolitan area. The advertisement stated that appellants were offering "legal services at very reasonable fees," and listed their fees for certain services.

The advertisement constituted a clear violation of an Arizona Disciplinary Rule, which stated that:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. 36

The president of the State Bar filed a complaint and, after a disciplinary procedure was held, the two lawyers were censored. The United States Supreme Court went on to analyze the reasons why the restrictions were made, and found that none of them were strong enough to limit the attorney’s right to commercial speech.

The year before Bates, on Virginia State Board of Pharmacy, the Court struck down a ban on prescription drugs advertising and determined that advertising is considered commercial speech, which was defined as “speech whose purpose is to propose a commercial transaction, or, more broadly, as speech "related solely to the economic interests of the speaker and its audience"."37

37 Supra n. 3.
On Central Hudson v. Public Service Commission, the Court determined the “test” that any Government’s restriction on commercial speech should pass in order to be constitutionally valid. In that case, the Public Service Commission of the State of New York (Commission) ordered electric utilities in New York State to cease all advertising that promoted the use of electricity because there was a fuel shortage. However, the Commission intended to keep the prohibition after said shortage no longer existed. Central Hudson Gas & Electric Corp., challenged the order. On revision, the United States Supreme Court, citing the First Amendment case law, stated that:

The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[People] will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .". Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

The Court then explained: In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether

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the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In Board of Trustees of the State University of New York v Fox\textsuperscript{39}, regarding the “not more extensive than is necessary” prong, the court established that the regulation may not "burden substantially more speech than is necessary to further the government’s legitimate interests". The Court required the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit they require.

\textbf{V. Proposed Advertising Definition}

As it can be seen from the aforementioned cases, any Governmental regulation of commercial speech that concerns lawful activity and is not misleading, has to pursue a substantial interest, directly advance said interest, and the cost has to be carefully calculated. The ABA Model Rules of Professional Responsibility regarding advertising basically require said communications to be truthful and not misleading. However, it is not precisely clear what would fall under the “advertising” category.

It may be established that “advertising” entails commercial speech. However, the Supreme Court definition of commercial speech presents itself a problem when applied to online communications. Since

\footnotesize{\textsuperscript{39} Board of Trustees of the State University of New York v. Fox, 492 US 469 (1989).}
it comprises any communications which "propose a commercial transaction, or, more broadly, as speech "related solely to the economic interests of the speaker and its audience", it could include communications intended to propose a commercial transaction even though such proposal is not literally included, and those messages with contents that expressly propose the transaction. Lawyer communications through blogs, social networks or websites, for example, may contain articles or comments about the law, intended to attract clients, but which do not propose commercial transactions. On the other hand, some might be posted with no business intention whatsoever.

New York’s comment to Rule 7.1 of Professional Conduct, makes this distinction. It starts by stating that not all communications made by lawyers about the lawyer or the law firm’s services are advertising. According to the comment, advertising by lawyers consists of communications made in any form about the lawyer or the law firm’s services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, non-commercial communications motivated by a not-for-profit organization’s interest in political expression and association are generally not considered advertising. Of course, it adds, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law.
The comment also states that newsletters, client alerts, or Blogs that provide information or news primarily about the lawyer or law firm, generally would be considered advertising. Furthermore, communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer’s services, are not advertising.

As it can be seen, New York’s approach tries to pre-establish the type of communication involved, based on the attorney’s intent. This focus, however, would present a dilemma when deciding if a specific online message is advertising or not (and hence, should be restricted or not) because it would require the regulating authorities to guess what was on the attorney’s mind at the moment of creating the message. The fatal end result would be—in some cases—the restriction of protected speech, which was not intended to promote a transaction.

What can be done? Two state cases dealt with a “content” analysis, instead of an “intent” analysis. In Texans Against Censorship v. State Bar of Texas 40 plaintiff Jim S. Adler ("Adler") published an ad in the Pasadena Citizen newspaper, which related to whether the current system of electing state judges in Texas should be changed. When determining if the ad should be considered commercial speech, the court stated:

Although Adler admitted that he hoped to generate business by publishing it, the advertisement itself cannot be said to propose a commercial transaction. It appears obvious that anyone reading this advertisement, without knowledge that Adler published it with the specific intent of

obtaining clients, would not likely think it was published for the purpose of obtaining professional employment. At most, the advertisement suggests that "Jim S. Adler, attorney," would like to hear what subscribers of the Pasadena Citizen think about reforming the judicial selection process in Texas. Accordingly, Adler's advertisement must be understood to be noncommercial speech, and neither the state bar, nor any other governmental body, may regulate such speech, except in extraordinary circumstances.

Also, in Stern v. Bluestone 41, a case brought under the Consumer Protection Act (TCPA) of 1991 regarding "informational messages" sent via facsimile, the Court used the Federal Communications Commission’s (FCC) analysis of “facsimile communications”. It concluded that facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products".

As it may be seen, both cases used a content analysis of the communications to determine if they constituted advertising. On a more recent case from Illinois, Holtzman v. Turza 42, defendant was an Illinois attorney who hired Top of Mind Solutions, LLC ("Top of Mind") to create and distribute by fax and email one-page documents titled the "Daily Plan-It" to a list of persons supplied by defendant. It was also brought under the TCPA and the Court analyzed the communication

in light of the FCC’s interpretation of incidental advertising. It concluded the following:

In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a bona fide "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender".

This “factors test” could make it harder for attorneys to know in advance if certain communication might be considered advertising and could be regulated by their State Bar.

For the reasons stated above, the best suggested approach would be to define advertising in light of the commercial speech definition, but focused on the content of the message, instead of the attorney’s intent. For the purpose of the rules, advertising should be construed as: **that message which proposes a commercial transaction.** A commercial transaction should be defined as a direct invitation to engage on a commercial relationship. In the case of compilations such as newsletters or Blogs that do not propose commercial transactions, but which also contain incidental advertisements, the communication should be analyzed as a whole to determine if it should fall under the “commercial transaction” classification.
The downside of this approach would be the case in which a message does not propose a commercial transaction, but it’s located on a commercial medium such as an advertising pamphlet or a law firm website. In this case, the “business transaction” prong should be analyzed in terms of the context on which the message is posted.

Does the Blog merely contain the attorney’s mental impressions on a public issue? Is a social network page used as the law firm’s marketing tool, with the company’s information regarding successes and practicing areas, and also contact details, or is it an attorney’s private exercise of his free speech rights, even when there is an incidental ad? Is an attorney’s article located on a commercial publication, intended for lawyer advertising? Attorney advertising should be defined in light of the end result of the communication: does it propose a commercial transaction?

VI. Conclusion

As it was explained before, the traditional notion of the public as a helpless captive audience, and of advertisers as “illusionists”, is far from accurate these days. Technology and online mediums of expression have made it easier for attorneys to spread their advertising powers, but have also made the clients more aware of legal issues, and even more capable of reviewing, rating, and sharing their lawyer’s performances. The paternalistic approach in protecting clients and limiting lawyer advertising should be left in the past, and a more open, dynamic approach should be adopted towards advertising.
Professional Responsibility Rules should restrict the less, and let the State Bars, the market forces, and even the attorneys regulate their communication efforts. Restricting the less means making sure the public is not mislead by fraudulent messages, and assuring that attorneys comply with the current rules of conduct, while still letting them jump on to the technology bandwagon. How? The suggested approach would be to define which communications should be subject to restrictions, in light of the “commercial speech” constitutional analysis. Only communications that directly propose a commercial transaction should be regulated. That way, the market for legal services may flow normally, and attorney’s private right to free speech would not be unduly restricted.
Malcolm Ruthven:

Hello ABA,

As a long-time member of the California bar but lately back to the practice of law after a long time in other endeavors, I’m greatly concerned by the ABA proposing additional constraints on attorney internet-based marketing. We’re already prohibited from false and deceptive advertising. Isn't that enough? Anything additional gets into the realm of details which should not be of any ethics concern. I’m reminded of building codes that specify certain techniques, which become rapidly out of date, rather than results. In addition, further restrictions on internet-based attorney marketing will favor large law firms, with their existing large network of referral sources, over the solo or small-firm practitioner, especially those with new practices (like mine). The internet is a rapidly evolving medium and it should be allowed to develop as it does, constrained of course by the prohibition against false and deceptive advertising.

Sincerely,

Malcolm Ruthven
Attorney at Law
Patrick Scharmer:

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
via email

To the Commission:

I am writing in response the above mentioned issues paper published by the ABA Commission on Ethics 20/20.

As a solo attorney who is in the process of launching a new, online law office, I respectfully ask the Commission to exercise restraint in recommending any significant changes to the model rules. I work very hard in my practice to make certain that I am in compliance with the Wisconsin Rules of Professional conduct in all of my activities, and particularly, my online marketing activities.

As an attorney that offers unbundled legal services online, I target a segment of the legal services market that is often under-served. I am able to do that because I am able to keep my overhead costs very low by operating my law firm entirely online. My concern with additional regulation around online marketing, is that it will have a disproportionately greater impact on the small and solo firms as we do not have the financial resources to spend in the more expensive traditional marketing methods that larger firms can afford.

Using free and low-cost online marketing forums, while complying with my ethical obligations, allows me to keep my overhead low so that I can provide legal services to lower income individuals and families. Additionally, through my online law office, I can reach areas of my home state that are currently under-served by physical law offices.

Virtual law offices and the services they provide are a new and innovative means of providing legal services. The practitioners who are engaged in this form of practice and are working hard to comply with the existing ethical rules, need the support of organizations like the ABA, if we are going to succeed. Additional regulation that hampers the growth of this market is not the answer.

Thank you for your time and consideration.

Respectfully,
- Attorney Patrick Scharmer
Scharmer Law
Andy Seger:

Dear Ms. Vera,

Please find attached my comments to the ABA Commission on Ethics 20/20 issues paper entitled "Lawyers' Use of Internet Based Client Development Tools."

Best,
Andy Seger
December 15, 2010

Dear Commission:

I hope this finds you well. I write in response to your issues paper entitled “Lawyers’ Use of Internet Based Client Development Tools.” While your issues paper seeks comment on a broad range of topics, I limit my response to the second question listed in your Summary of Questions for Blogging and Discussion Forums:

Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers’ use of blogging? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the commission offer?

In response to that question, I enclose my article, forthcoming in the University of Toledo Law Review, entitled “Real-Time Electronic Contact – Advertising Rules Applied to Lawyers Who Blog.” As the title suggests, the article considers how ethical rules regarding advertising treat lawyers who use blogs to advertise their practices.

For reasons more fully detailed in the article, I propose that that, while lawyer-maintained blogs are properly treated by the Model Rules, a slight augmentation of Model Rule 7.3(a) is necessary to resolve ambiguity regarding the treatment of lawyers who respond to posts on non-lawyers’ blogs. Accordingly, Model Rule 7.3 should be reformed to prohibit “direct interpersonal conversations,” instead of “real-time electronic contact,” initiated by the lawyer when the primary purpose of the communication is pecuniary gain, regardless of the medium used.

I hope that my analysis aids in the ongoing discussion of these important issues. Thank you for providing an opportunity and forum to add to the conversation.

Warmest Regards,

Andrew J. Seger

Andrew J. Seger
andrew.seger2@gmail.com
937-626-4605
“REAL-TIME ELECTRONIC CONTACT”—ADVERTISING RULES APPLIED TO LAWYERS WHO BLOG

Andrew J. Seger*

“The casual conversational tone of a blog is what makes it particularly dangerous.”

Daniel B. Beaulieu

I. INTRODUCTION

BLOGS are an important medium for the rapid dissemination of information in the modern world. Blogs have become a prevalent force in contemporary society, as evidenced by statistical reports. According to recent data, ninety-five of the top 100 U.S. newspapers maintain a blog.1 In 2008, comScore2 reported 77.7 million unique blog visitors in the United States alone.3 On a global scale, the total annual blog audience was estimated to be 188.9 million people in 2008.4 Blogging has not only proliferated in the general public and news media, but within the legal community as well.

Blogs are an increasingly accepted form of legal communication. As of December 2007, there were between 2,000 and 3,000 legal blogs—with over 235 maintained by law professors.5 Legal academia has embraced the use of blogs; both ALWD and The Bluebook contain rules which govern citations to blogs in legal periodicals and court filings.6 The U.S. Supreme Court even cited a legal blog, further legitimatizing blogs as a source of relevant and reliable legal information.7 Certainly, the legal community is using blogs in several capacities

* J.D., The University of Toledo College of Law 2010; B.S., Wright State University 2007. I would like to thank Susan Martyn, Stoeppler Professor of Law and Values, of the University of Toledo College of Law for her guidance and insights. Any mistakes are solely attributed to the author.


3. See Winn, supra note 1.

4. Id.


and because of this widespread use, blogs are affecting the legal world in several ways.

Several recent news stories across the nation evidence blogging’s effect on the legal community. For instance, in 2005, bloggers weighed in during the nomination proceedings to replace Justice Sandra Day O’Connor.8 More recently, a New York judge ordered that an anonymous blogger’s name be revealed so that a defamation suit could proceed against him.9 In Illinois, a public defender was fired and is facing disciplinary sanctions because she allegedly revealed client confidences on her blog.10 Another lawyer was disciplined for posting inflammatory comments about a judge on her blog.11 Those examples evidence the varied ways that blogs have impacted the legal community.

As blogs continue to become more popular in the legal community, more and more legal implications will surface. One of the implications beginning to gain attention is the lawyer-blogger’s ethical responsibility. The American Bar Association (“ABA”) recently recognized this implication by forming the ABA Commission on Ethics 20/20 (“the Commission”).12 The Commission is charged with conducting a thorough review of the ABA Model Rules of Professional Conduct in the context of advances in technology.13 The Commission’s review of the Model Rules is likely to have a significant impact on state ethical rules, as the majority of states have adopted the Model Rules as their own.14 One of the advances in technology that the Commission is likely to consider is the ethical responsibility of lawyers who advertise via blogs.15

This article addresses the ethical implications of lawyers who use blogs to build their practice. Specifically, it analyzes the application of the ABA Model Rules regarding advertising16 to lawyers who blog.17 Part II provides a concise

13. The Commission will also review the rules in the context of “global legal practice developments,” but that is outside the scope of this article. See id.
16. The article will focus on MODEL RULES OF PROF’L CONDUCT RR. 7.1–7.3.
overview of the technology involved, how it functions, and how the legal community is using it. Part III begins with an overview of the ABA Model Rules regarding advertising, briefly tracks the development of those rules, and concludes by identifying the core concerns of the Model Rules. Part IV applies the Model Rules regarding advertising to lawyers who blog and proposes that, while lawyer-maintained blogs are properly treated by the Model Rules, a slight augmentation of Model Rule 7.3(a) is necessary to resolve ambiguity regarding the treatment of lawyers who respond to posts on non-lawyers’ blogs. This article concludes by highlighting some of the ethical rules lawyers who advertise via blogs should consider.

II. THE TECHNOLOGY

In order to fully understand the ethical implications of legal blogging, it is necessary to understand the technology and how the legal community is using it. This section begins by explaining the terminology used when discussing blogs. Next, it discusses how blogs function. The section concludes with a discussion of how the legal community uses blogs. The ways lawyers use blogs provides the foundation for the analysis in Part IV regarding how Model Rules 7.1 through 7.3 apply to such blogging.

A. Terminology

The term “blog” is a colloquial contraction of “web log.” The term, though not well defined, describes a variety of informational and social websites. The Merriam-Webster Dictionary first defined the word in 2004 as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer; also: the contents of such a site.” Alternatively, blog has been defined as “a Web site, usually maintained by an individual with regular entries of commentary, descriptions of events, or other...
material such as graphics or video.” While those definitions offer an idea of what a blog actually is, the line between blog and traditional website continues to blur as websites incorporate blog functionality and blogs become more sophisticated. Despite the difficulty in defining what a blog is, there are some generalizations that can be made about blog functionality. These generalizations are discussed in the subsequent section.

A few other terms will be used frequently in this article. “Blogging is the act of publishing information on a blog.” A “blogger” is a person who maintains a blog or publishes posts on a blog maintained by another. Each publication on a blog is known as a “post.” These terms will be used throughout this article’s analysis.

Additionally, one more important distinction must be drawn in order to understand the application of the Model Rules to blogging—the distinction between “first-person blogging” and “response blogging.” First-person blogging occurs when an author creates a new post on a blog. This is done by the creator of the blog or another author the creator has authorized to originate posts. Response blogging occurs when a blog reader replies to an author’s blog post. The distinction between first-person and response blogging becomes more apparent once one understands how blogs work.

B. How Blogs Work

Someone unfamiliar with blogs may not fully understand their functionality; however, blogs are actually very simple and quite intuitive. Virtually anyone with computer access can become a blogger. Creating a blog takes minimal time, effort, and knowledge of technology. Blogs can be created and customized in minutes by utilizing free internet formatting technology such as blogger.com or blogspot.com, among others. This technology allows a user to create a blog in a few simple steps by completing a series of online templates. After completing the process and setting up a blog, the creator is immediately ready to begin blogging.

22. Winn, supra note 1, at What Is a Blog? The Lines Continue to Blur.
23. Id.
24. The term “blawg” describes blogs which focus on legal matters. However, that term will not be used in this article because it adds nothing to the analysis.
25. Craddock, supra note 5, at 1355.
27. This article deals solely with blogs related to legal matters, therefore, there will be no distinction made between blogs and blawgs.
31. SUSANNAH GARDNER & SHANE BIRLEY, BLOGGING FOR DUMMIES 28 (2d ed. 2008).
32. Id. at 31-32.
Posting to a blog is as easy as creating one. By completing a simple online form, the blogger can post thoughts on any subject to the blog. For the purposes of this article, this is referred to as first-person blogging. When the blogger posts to the blog, the post is instantaneously available for viewing by others who might be searching for information on the blogger’s topic. Blogs are not always maintained by a single person; a blog creator can give others access to post to the blog as well. This allows a blog to have many independent contributing authors who can create posts at any given time.

A blog acts as an online journal, with the latest post displayed at the top of the webpage. When the webpage reaches its space limit, the last post is pushed onto another page, which is normally accessible by clicking a link at the bottom of the first webpage. Because posts appear chronologically according to their post date, other identifying information is attached to each post to allow a blog viewer to easily navigate to a post of interest without sifting through an endless stream of unrelated posts.

A blog post is given certain attributes making it easily retrievable by a viewer. Each post is stamped with the date, time, and author of the post. Additionally, a blogger can “tag” a post with keywords, such as “commercial speech” or “Second Amendment” so that a viewer can search and retrieve all posts relating to those terms. This gives blogs increased functionality and makes them effective in preserving past information for future viewers.

The final blog function of interest to this article is the ability of a blog reader to reply to a blogger’s post—referred to as response blogging. When a blogger creates a new post, a reader usually has the option to reply to the post with his own comments on the subject. The reader’s reply is displayed on the blog below the original post, and is instantaneously viewable to the blogger and other

33. Id. at 32.
34. Id.
35. Kellogg, supra note 28, at 32.
36. GARDNER & BIRLEY, supra note 31, at 46.
37. Id.
38. Craddock, supra note 5, at 1356.
40. Each post is identified by author; however, how the author is identified varies from blog to blog. Some blogs require that a formal name be entered. Other blogs only require an email address or nickname to identify the author. Regardless of the way a blog requires an author to self identify, in most cases, it is within the author’s discretion whether to provide accurate information or not. In any case, a lawyer who uses blogging to advertise will provide accurate identification so that potential clients can contact the lawyer. Even if a lawyer did not provide accurate identification, it is possible for a judge to order the identification of the author. See Cohen, supra note 9.
41. Craddock, supra note 5, at 1356.
42. GARDNER & BIRLEY, supra note 31, at 329-30.
43. Craddock, supra note 5, at 1356.
44. GARDNER & BIRLEY, supra note 31, at 45.
C. Blogs in the Legal Community

Non-lawyers within the legal community use blogs in several capacities. Judges use blogs as a form of scholarly discussion. Law students use blogs as a place to trade law school and law firm gossip. Law professors use blogs as an alternative to formal publication. There is a blog devoted to U.S. Supreme Court news. The blog’s importance in contemporary legal thought was highlighted in a 2005 Supreme Court case, which cited Professor Douglas Berman’s blog on sentencing. Blogging is not limited to non-practitioners; practicing lawyers use blogs as well.

Practicing lawyers use blogs in several ways. Lawyers with busy work lives use blogs as a way to stay connected in social and professional networks with which they would not otherwise have time to associate. Lawyers use blogs to read and disseminate legal news. Blogging appeals to the younger generation of lawyers who grew up with the internet and the expectation of rapid access to current information. Many of those lawyers also use blogs to read and spread up-to-the-minute legal news. Another common way lawyers use

46. Sometimes a blog’s creator must approve a response post before it is viewable to the public, but the creator sees it instantaneously, nonetheless.
47. GARDNER & BIRLEY, supra note 31, at 46.
48. Id. at 11-15.
49. Craddock, supra note 5, at 1355.
50. This includes non-practicing lawyers.
52. Craddock, supra note 5, at 1360.
58. Kellogg, supra note 28, at 32.
59. Id. at 32-38.
60. Craddock, supra note 5, at 1367.
61. Kellogg, supra note 28, at 32.
62. Craddock, supra note 5, at 1370.
blogs, which is the focus of this paper, is to build their practices through advertisement. 63

There are at least three ways that practicing lawyers use blogs to advertise their practices. 64 First, maintaining a blog showcasing a lawyer’s expertise in a specialized practice area helps the lawyer gain notoriety in that field. 65 Second, using a blog to educate non-lawyers on the state of the law serves to increase the likelihood that a reader would turn to the blogging lawyer when confronted with a legal issue. 66 Third, lawyers use blogs to generate business by maintaining client contact and impressing potential clients with an internet presence. 67 The ways in which lawyers can utilize blogs are many and varied, but it is certain that one of those ways is to advertise their practices. 68 Lawyers that advertise via blogs are regulated by the Rules of Professional Conduct. 69

III. THE MODEL RULES OF PROFESSIONAL CONDUCT

The ABA Model Rules of Professional Conduct provide the ethical framework that applies to communications, and thus blogging, by lawyers. 70 This section begins by explaining the Model Rules regarding legal advertisement. Next, the development of the rules is briefly described. Finally, the core concerns behind the Model Rules regarding legal advertisement are identified. These core concerns are used in the subsequent section to analyze whether the application of the Model Rules to lawyers who blog is in line with these concerns. That analysis supports the proposition that some modification of the Model Rules is necessary to resolve ambiguity surrounding lawyers who advertise via blogs and ensure that the core concerns of the rules are met.

A. The Model Rules Regarding Advertising

Model Rules 7.1 through 7.3 apply to lawyer advertising. 71 First, Model Rule 7.1 bans “false and misleading communications” by a lawyer. 72 “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.” 73 Next, Model Rule 7.2 affirmatively allows lawyer advertising, as long as the advertisement does not violate the other Model

64. Craddock, supra note 5, at 1371-72.
65. Id.
66. Id.
67. Id.
68. Kellogg, supra note 28, at 32-38.
70. Id.
71. See id. at RR. 7.1–7.3.
72. Id. at R. 7.1.
73. Id.
Rules.74 Finally, Model Rule 7.3 prohibits solicitation of clients through “in-person, live telephone, or real-time electronic contact” when a significant motive for the contact is pecuniary gain.75 Each of these rules is based on significant Supreme Court precedent.76

B. Development of the Rules

Historically, lawyer advertising was restricted based on rules dating to the days of British rule.77 Prior to 1977, there was a complete prohibition on lawyer advertising.78 The ban was based on the idea that tradesmen generally advertised their services and those involved in trades were not respected professionals.79 The practice of law was considered to be a public service profession held in high regard, and therefore above advertisement.80 Ultimately, this line of thinking was determined to be a rule of etiquette as opposed to one of ethics.81 In 1977, the U.S. Supreme Court overturned the prohibition on lawyer advertising in Bates v. State Bar of Arizona.82

The Bates Court ruled that a blanket ban on lawyer advertising violates the First Amendment to the U.S. Constitution.83 In that case, a group of Arizona attorneys directly violated an Arizona disciplinary rule84 by advertising their legal services in a Phoenix newspaper.85 At the time, Arizona’s rules prohibited all forms of legal advertisements.86 The Court began its analysis by identifying the lawyer’s speech as commercial and recognizing the protection that such speech is afforded.87 The state bar association argued that the restriction on lawyer advertising was justified for several reasons involving a decrease in the quality of the profession and an increase in economic costs.88

75. Id. at R. 7.3.
76. See ABA ANNOTATED MODEL RULES OF PROF’L CONDUCT 7.1–7.3 (2007).
78. Id.
79. Id.
80. Id. at 371-72.
81. Id.
82. Id. at 384.
83. Id.
84. The lawyers violated Arizona’s Disciplinary Rule 2-101(B), which was incorporated into Rule 29(a) of the Supreme Court of Arizona. That rule read, in part:
   A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.
85. Id. at 354.
86. Id.
87. Id. at 357.
Rejecting those arguments, the Court noted three main reasons for allowing lawyer advertisements. First, the legal services offered by the lawyers challenging the prohibition were not complex legal problems, but routine tasks. Therefore, they could be accurately priced before completion. Second, the Court reasoned that allowing lawyer advertisements would further the profession’s goal of making legal services available to as many people as possible. Third, allowing advertisement would enable consumer choice, driving down the cost of legal services as a whole.

Ultimately, the Court found the categorical ban on lawyer advertisement unconstitutional based on the notion that prohibiting lawyer advertisement deprives the public of valuable commercial information. Forbidding lawyers from making commercial communications restricts the information available to the public. Model Rule 7.2, allowing lawyer advertisements, is a product of the Court’s decision in Bates.

Model Rule 7.2, and the Bates logic, is not limited to printed newspaper ads. Restricting lawyer advertisement by medium would be inconsistent with the purpose of allowing such advertisements in the first place. The Bates decision has been applied to legal advertisement of different printed media as well. For instance, a state cannot prohibit using images and illustrations in legal advertisements. Additionally, lawyers have been given much leeway in the firm names they use to promote their firms. Applying the Bates decision to another situation, courts have allowed lawyers to use targeted mass mailings in some situations. Thus, the rationale behind the Bates decision permeates the law regarding advertising and is not limited to printed newspaper

89. Id. at 372-77.
90. Id. at 372.
91. Id. at 372-73.
92. Id. at 376-77.
93. Id. at 377.
94. Id. at 383-84.
95. Id.
98. See, e.g., Grievance Comm. for Hartford-New Britain Judicial Dist. v. Trantolo, 470 A.2d 228 (Conn. 1984) (“This [freedom of speech] protection would be fragile indeed if it were only applied to certain media and not to others. Advertising is advertising irrespective of the device or instrumentality employed.” (quoting In re Petition for Rule of Court, 564 S.W.2d 638, 643 (1978))).
Lawyer advertising is not completely unrestrained, however.\textsuperscript{111} As discussed in the previous section, lawyer advertisement is limited by Model Rules 7.1 and 7.3.\textsuperscript{112} These rules, like Rule 7.2, were drafted based on the holdings of significant Supreme Court decisions.\textsuperscript{113}

Model Rule 7.1 prohibits “false or misleading communication[s]” by lawyers.\textsuperscript{114} Such communications are prohibited for several reasons.\textsuperscript{115} For one, the public benefit of commercial communication is dependent on its truthfulness and reliability.\textsuperscript{116} Additionally, the states have a substantial interest in protecting

\textsuperscript{103} H ILL, supra note 97, at 101.

\textsuperscript{104} Id. at 100-05.

\textsuperscript{105} See, e.g., Trantolo, 470 A.2d at 228 (holding the trial court erred in reprimanding a lawyer for advertising via television because First Amendment protections apply to electronic media just as they apply to print media).


\textsuperscript{107} See, e.g., Mo. Ethics Counsel, Informal Advisory Op. 960040 (1996); FLA. RULES OF PROF’L CONDUCT 4-7.5(b) (3d ed. 2007).

\textsuperscript{108} See, e.g., Fla. Rules of Prof’l Conduct 4-7.5(b).


\textsuperscript{111} Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977) (indicating that this holding does not mean that lawyers advertisements cannot be regulated).

\textsuperscript{112} See MODEL RULES OF PROF’L CONDUCT R. 7.2(a) (2002) (limiting the allowed advertisements to those that do not offend Model Rules 7.1 and 7.3).

\textsuperscript{113} See generally ABA ANNOTATED MODEL RULES OF PROF’L CONDUCT RR. 7.1–7.3 (2006).

\textsuperscript{114} MODEL RULES OF PROF’L CONDUCT R. 7.1.

\textsuperscript{115} See generally ABA ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 7.1.

\textsuperscript{116} Bates, 433 U.S. at 383.
citizens who cannot make intelligent decisions about legal services. Finally, the states have a substantial interest in protecting their citizens from overbearing solicitation. The Supreme Court has consistently upheld prohibitions like Model Rule 7.1 based on the states’ interests in protecting consumers from misleading legal advertisement.

Model Rule 7.3 prohibits direct “in-person, live telephone[,] and real-time electronic” client solicitation for pecuniary gain. The rule was drafted based, in part, on the Supreme Court’s 1978 decision in Ohrailik v. Ohio State Bar Association. In that case, a lawyer urged his services upon two accident victims during an in-person encounter. The in-person encounters occurred very soon after the accident when the victims were especially vulnerable to persuasion; one even occurred in the hospital while the victim was still in traction. The lawyer’s conduct violated an Ohio ethical rule prohibiting in-person solicitation. The lawyer challenged the constitutionality of the rule, arguing that it violated his First Amendment rights. The court did not find the lawyer’s argument persuasive, ruling the regulation constitutional.

The Court found the regulation of the lawyer’s speech constitutional because it served two substantial government interests. First the Court felt that in-person solicitation can exert substantial pressure on clients and could cause them to make rash decisions without appropriate forethought. Whether the client decides to engage counsel on the spot or to not seek legal redress at all, such a decision should be made with proper consideration. Second, the Court found that the state has a great interest in regulating the legal profession. The Court recognized the dangers inherent in this type of interaction: “the possibility of undue influence, intimidation, and overreaching.” As such, the ban on in-person solicitation was held to be a permissible restriction of speech.

117. See, e.g., Bates, 433 U.S. at 365 (a rule that restricts the flow of economic information and “keep[s] the public in ignorance” about its nature and value is impermissible).
119. See Bates, 433 U.S. at 383; Went For It, 515 U.S. at 618; In re Primus, 436 U.S. at 412.
120. MODEL RULES OF PROF’L CONDUCT R. 7.3 (2002).
122. Id. at 450.
123. Id.
124. Id. at 453.
125. Id.
126. Id. at 468.
127. Id. at 457-60.
128. Id. at 457.
129. Id. at 457-58.
130. Id. at 460.
132. Ohrailik, 436 U.S. at 468.
C. Core Concerns of the Model Rules

The governing case law, the Model Rules, and the comments thereto point to several core concerns the Rules seek to promote. Model Rule 7.1 is concerned with protecting citizens from misleading information, which could cause them to make an uninformed decision about exercising their legal rights. Model Rule 7.2 is meant to promote the exchange of commercial legal information in the hopes of furthering the administration of justice. Promoting the dissemination of legal information to those who might not otherwise receive it allows persons needing counsel to “engage[e] in a critical comparison of the ‘availability, nature, and prices’ of legal services.” Model Rule 7.3 is meant to reduce the danger of “undue influence, intimidation, and over-reaching” that is inherent in private importuning of a direct interpersonal nature. Additionally, the rule aids in third party review of lawyer’s communications by prohibiting private, interpersonal client solicitation. The core concerns of the Model Rules aid in analyzing their application to lawyers who blog.

Whether the Model Rules properly treat lawyers who blog depends on whether the core concerns are satisfied by their application. The subsequent section examines the application of the Model Rules to lawyers who blog and whether this application satisfies the Model Rule’s core concerns. The next section takes the position that the application of the Model Rules to lawyers engaged in first-person blogging satisfies the core concerns and, therefore, the Model Rules appropriately treat those lawyers. Additionally, it supports the assertion that applying the Model Rules to response blogging does not conform with the core concerns; therefore, some modification of the rules is necessary.

IV. Application of the Model Rules to Lawyers Who Blog

Before proceeding into a detailed inquiry of the application of the Model Rules to lawyers using blogs, it is necessary to address the threshold issue of whether the Model Rules apply to the activity at all. Model Rule 7.1 applies to “all communications about a lawyer’s services,” including advertisements allowed by Model Rule 7.2 and solicitations permitted by Model Rule 7.3. Model Rule 7.2 applies to the advertisement of legal services involving “an

133. See, e.g., Farrin v. Thigpen, 173 F. Supp. 2d 427, 435-37 (M.D.N.C. 2001) (describing the Supreme Court precedent used to examine ethical violations under North Carolina’s rule prohibiting false or misleading advertisement).
135. Id. at 364 (advertising conveys important information regarding the nature, availability, and pricing of services).
136. Id. at 376.
138. Id. at 462.
139. Id. at 457.
140. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 3 (2002).
141. Id. at R. 7.1 cmt. 1.
active quest for clients.”

Model Rule 7.3 applies to “real-time electronic contact” involving direct solicitation of prospective clients for the purpose of pecuniary gain. It is important to note that not all legal blogging activity is within the scope of these rules. For instance, the rules presumably do not apply to lawyers engaged in political blogging, law professors engaged in scholarly blogging, or lawyers blogging about personal hobbies or experiences. However, the Model Rules are applicable to lawyers who use blogs to advertise their practices.

A. First-Person Blogging

The Model Rules properly treat lawyers who engage in first-person blogging regarding their practices. Model Rules 7.1 and 7.2 both apply to such blogging. Such application serves the purposes of those rules. Model Rule 7.3 is not applicable to lawyers who engage in first-person blogging regarding their practices. However, the non-application of that rule is consistent with the purposes of the rule. This section supports these assertions in greater detail, beginning with an analysis of Model Rule 7.1 and proceeding through Model Rule 7.3.

Model Rule 7.1 prohibits lawyers who engage in first-person blogging from making false or misleading communications about their services. Because
blogging is a form of communication, lawyers engaged in first-person blogging are prohibited from making false or misleading statements about their practices on their blogs. This prohibition serves the purpose of protecting citizens from false and misleading communications of lawyers which might cloud their judgment regarding exercising their legal rights. By prohibiting those statements on lawyer’s blogs, citizens who might view the blog are shielded from false or misleading communications by lawyers. Citizens’ judgment regarding their legal rights cannot be influenced by statements which do not exist. As such, the purposes of Model Rule 7.1 are properly served by the application of this rule to lawyers who engage in first-person blogging. A similar result is reached after analyzing Rule 7.2.

Model Rule 7.2 affirmatively allows lawyers to advertise their services to the public. By allowing lawyers to advertise their services, the rule seeks to assist the public in obtaining legal services by expanding the public’s knowledge of the law and available legal services. That purpose is furthered by allowing lawyers to use blogs to promote their services. When lawyers blog about their practices they increase the amount of information that a citizen can find. That increase in information allows the citizen to make a more informed decision regarding the exercise of his or her legal rights; therefore, applying the rule to lawyers who engage in first-person blogging yields the appropriate result. However, the analysis of Model Rule 7.3 is quite different.

Model Rule 7.3 prohibits direct solicitation of paid legal work via “real-time electronic contact” initiated by a lawyer. The rule applies to lawyers who solicit business from prospective clients. Solicitation involves a lawyer
initiating contact with a prospective client in hopes of gaining them as a client.\textsuperscript{162}

No such contact exists when a lawyer authors a first-person blog post as the lawyer is not initiating contact with any single prospective client. Creating a post merely makes the lawyer's communication available for the world to seek out, much like an ad in the telephone book.\textsuperscript{163} A person must affirmatively seek out the lawyer's communication before a "contact" occurs.\textsuperscript{164} Therefore, Model Rule 7.3 does not apply to lawyers who engage in first-person blogging because there is no solicitation involved.\textsuperscript{165} This conclusion is supported by an analysis of analogous advertising mediums.

Maintaining a blog is similar to maintaining a legal trade booth. Like a trade booth, a blog has information available to those who seek it out.\textsuperscript{166} The people who pass by a lawyer's informational booth are like those who surf the web for information. If a web surfer comes upon a lawyer's blog, the surfer can make the decision to employ the information available or continue on without taking notice.\textsuperscript{167} This is the same situation that a passerby of the informational booth encounters.\textsuperscript{168} Several authorities have concluded that it is within the ethical rules for a lawyer to maintain an informational booth as long as the lawyer waits there to be contacted by a passerby because the lawyer does not initiate contact with non-lawyers.\textsuperscript{169} Thus, it can be concluded that solicitation (leaving the trade booth to solicit business from patrons) is prohibited at trade shows, but advertising (maintaining a trade booth in general) is not.\textsuperscript{170} Likewise, it is presumably within the ethical rules for a lawyer to maintain a blog because the lawyer is not pressing his services upon anyone and web surfers are free to avail themselves of the information or to continue on.\textsuperscript{171}

Alternatively, blogging can be distinguished from email communications and chat rooms.\textsuperscript{172} It is generally accepted that Model Rule 7.3 prohibits a lawyer's use of an online chat room, but not from contacting prospective clients via email.\textsuperscript{173} This is because email communication is more analogous to

\begin{itemize}
  \item \textsuperscript{162} Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 7.3-2(a) (ABA Ctr. for Prof'l Responsibility 2005 ed.).
  \item \textsuperscript{163} RSS feeds are also viewer initiated. For an in-depth description of RSS feeds, see Steven Holzner, Secrets of RSS (2006).
  \item \textsuperscript{164} See Kellogg, supra note 28, at 37-38.
  \item \textsuperscript{165} Model Rules of Prof'l Conduct R. 7.3(a) (2002) (limiting the rule's application to "in-person, live telephone or electronic contact" solicitation).
  \item \textsuperscript{166} Utah Ethics Advisory Opinion Comm., Op. 99-04 (1999) (regarding legal trade booths); Gardner & Birley, supra note 31, at 11 (blogs are sought out via search engines).
  \item \textsuperscript{167} Gardner & Birley, supra note 32, at 255 (indicating ways to track the number of web surfers who visit a blog).
  \item \textsuperscript{168} Utah Ethics Advisory Opinion Comm., Op. 99-04.
  \item \textsuperscript{169} See, e.g., id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} In fact, there is less of an opportunity to offend Rule 7.3 concerns since the lawyer cannot go to a person and talk to them. The way a blog functions, the person must contact the lawyer first.
  \item \textsuperscript{172} See, e.g., Fla. Bar Comm. on Prof'l Ethics, Op. A-00-1 (2000) (distinguishing between email and chat room messages).
  \item \textsuperscript{173} See, e.g., id.; Utah Ethics Advisory Opinion Comm., Op. 97-10 (1997).
\end{itemize}
traditional mail, and chat rooms are more analogous to in-person encounters. Some commentators have suggested that blogging is more like email than chat rooms and, therefore, the rule should not apply. However, a more common sense analysis of the rule shows that it undoubtedly does not apply to legal blogging. Where emails, like traditional mail, are directed towards a specific recipient, a blog post is not. As previously noted, the post is only viewed by those who seek out information on the subject. Therefore, there is no contact initiated by the lawyer engaged in first-person blogging and Model Rule 7.3 does not apply. The non-application of this rule to first-person legal blogging is appropriate, considering the rule’s purpose.

Not applying Model Rule 7.3 to lawyers who post on a blog is consistent with the principles upon which the rule is based. Rule 7.3 seeks to avoid the “undue influence, intimidation, [and] over-reaching” that are inherent dangers in a live encounter with a lawyer. These inherent dangers are not present when a lawyer posts on a blog. A viewer who reads a lawyer’s post experiences no pressure to respond as a layperson might during an in-person encounter with the same lawyer. Unlike solicitations at nursing homes and trade shows, a lawyer’s post is not directed at a specific group. The lawyer does not seek out any one person; the contact through a blog is initiated only if the viewer responds to the lawyer’s post. Therefore, the inherent dangers the rule seeks to protect against are not present, and it is appropriate not to apply Model Rule 7.3 to lawyers who blog.

An analysis of the situation in Florida Bar v. Went For It, Inc. confirms that the concerns of the rule are not violated by not applying Model Rule 7.3(a) to lawyers who maintain blogs. In that case, the court upheld a thirty-day ban on advertising based, in part, on the state’s interest in protecting its citizens’ privacy in their homes. The Florida Bar Association proposed a thirty-day prohibition on direct mail advertising to accident victims and their families. An attorney referral service challenged the rule, arguing that the thirty-day prohibition

175. The Court placed a great deal of emphasis on this point in Fla. Bar v. Went For It, Inc. 515 U.S. 618 (1995).
176. GARDNER & BIRLEY, supra note 31, at 53-54.
177. Id. at 53.
178. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2002) (indicating that the rule only applies to lawyer-initiated solicitation).
179. Id. at R. 7.3 cmt. 1.
182. Id. (issue no. 3).
183. GARDNER & BIRLEY, supra note 31, at 45.
184. There is no chance of undue influence, intimidation, or over-reaching in the case of blogging.
186. Id. at 635.
187. Id. at 620.
violated the First Amendment rights of Florida attorneys. The Court held that Florida has a substantial “interest in protecting the well-being, tranquility, and privacy of the home.” Based on references to empirical evidence, the Court found the regulation was narrowly drawn to advance that interest. The Court upheld the rule as a constitutional regulation of commercial speech because it believed the rule would protect accident victims and their families from solicitation at a vulnerable time in their lives. While the Court struck down the complete prohibition on lawyer advertising in Bates, it upheld this limited (thirty-day) prohibition.

Because the accident victims and their families were presumably going through a very hard time in their lives, the Court determined that prohibiting lawyers from directly mailing to them would protect their privacy. The same concern—protecting citizens’ privacy in their homes—is not present when a lawyer engages in first-person blogging. Unlike direct mailing, or even email messages, a lawyer who posts to a blog is not contacting anyone. The danger that an accident victim’s privacy will be invaded or vulnerability exploited is not present in the case of first-person legal blogging because the viewer must seek out the blog before a communication takes place. Therefore, not applying Model Rule 7.3 to first-person blogging does not offend those concerns of the rule. However, when a lawyer responds to a non-lawyer’s blog, the Model Rules are applied in a different way.

B. Response Blogging

While the Model Rules can be appropriately applied (or not applied) to first-person legal blogging, when a lawyer replies to a post on another’s blog, another result occurs. This section discusses the ambiguity created by the inclusion of “real-time electronic contact” in Model Rule 7.3. This section supports the proposition that the inherent ambiguity should be resolved in such a way that removes response blogging from the purview of Model Rule 7.3. Removing response blogging from the purview of Model Rule 7.3 serves the purpose of the Model Rules regarding advertising. Several possible alternatives are identified and evaluated.

188. Id. at 621.
189. Id. at 625 (citing Carey v. Brown, 447 U.S. 455, 471 (1980)).
190. Id. at 628.
191. Id. at 630.
192. Id. at 633-39.
194. Went For It, 515 U.S. at 631-32.
195. Id.  
197. In Went For It, the Court was concerned with the privacy considerations of accident victims. 515 U.S. at 626-27. However, the same privacy concerns do not exist when an accident victim affirmatively seeks out legal information.
1. Application of the Model Rules

The language of Rule 7.3, when taken at face value, prohibits a lawyer from responding to a non-lawyer’s blog post in hopes of soliciting business. The rule reads, “[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain ….” 198 The application of this rule turns on whether responding to a blog post is “real-time electronic contact.” 199 It is obvious that such communication is electronic, as it is conducted using a computer that is attached to the world wide web. 200 Further, it is quite clear that a reply to a blog post is a “contact” between the lawyer viewing the blog and the blogger who made the original post because the lawyer is initiating a communication with the blogger. 201 When the lawyer responds to the blog post, the response is instantaneously viewable by the blogger and others who view the blog. 202 Therefore, if the rule is read facially, a lawyer who responds to a blog post is making a “real-time electronic contact.” However, this result is problematic.

Contrary to literal reading of the rule, the precedential case law and core concerns of Model Rule 7.3 indicate that a lawyer who replies to a non-lawyer’s blog post should not be prohibited by this rule. 203 The core concerns of Rule 7.3 do not suggest that response blogging should be prohibited; inappositely, they suggest that such blogging should be promoted by the rules. 204

First, the rule is concerned with the danger inherent in an interpersonal encounter between a lawyer, who is a trained advocate, and a layperson. 205 When a lawyer replies to a blogger’s post there is little danger that the blogger will be the subject of “undue influence, intimidation, [or] over-reaching” 206 as during in-person encounters with a lawyer. 207 The blogger is not face to face with the lawyer, the blogger cannot hear the lawyer’s tone or see the lawyer’s body language. The blogger is presumably comfortably sitting before a computer while reading the lawyer’s reply, and not in an unfamiliar place. For those reasons, the dangers the rule seeks to avoid are not present when a lawyer replies to a non-lawyer’s blog.

Second, the rule was meant to prevent the non-lawyer from feeling a compulsion to immediately respond without reflection on the lawyer’s

199. Model Rule 7.3 only applies to electronic communications that are “real-time.” Id.
201. It is also a communication with the readers of the blog, but not “contact” with them.
202. Kellogg, supra note 28, at 32-33. It is irrelevant that some blogs require the original author to approve the response before it becomes available to the public. This is still considered a “contact” with the author of the post.
204. Id.
207. Much like e-mail.
communication. When a lawyer replies to a non-lawyer’s blog post, there is little, if any, compulsion to immediately respond without reflection. The blogger is free to consider the lawyer’s communication, talk to others about its content, and to decide if and how to respond. The communication is much more like communication via email or regular mail than an interpersonal encounter. Therefore, the concern that the non-lawyer will feel a compulsion to immediately respond is not present, and Rule 7.3 should not apply.

Further, allowing response blogging serves the concerns that Model Rule 7.2 was created to promote. Rule 7.2 promotes the dissemination of legal information in such a way that fosters the administration of justice. If a lawyer is prohibited from responding to a blogger’s post by Model Rule 7.3, a valuable stream of information will be cut off from those who have a need for it. Therefore, if Rule 7.3 is read to prohibit response blogging as “real-time electronic contact,” the overall purpose of allowing attorney advertising will be undermined. Relevant case law supports this analysis as well.

The distinction between Bates and Ohralik illustrates this point well. In Bates, the Court allowed lawyers to advertise via newspaper. There was no interpersonal interaction between the lawyer and prospective client in that case. However, there was undeniable interpersonal interaction between the lawyer and prospective client in Ohralik. In that case, the lawyer solicited professional employment from an accident victim while she lay in traction in a hospital. The holding in Ohralik was narrow, however, and applies only to the “‘features of in-person solicitation’ … that were present in the circumstances of that case.” The distinction between those cases indicates that lawyer advertising which does not involve interpersonal contact between the lawyer and prospective client is permissible, while lawyer’s solicitation of prospective clients in a face-to-face encounter is not. In the case of response blogging, the lawyer who responds to another’s blog post is not engaging the prospective client in an interpersonal interaction. The lawyer who responds to another’s blog is much more like the lawyers who advertised their services in Bates.

Another case, which involves accountants as opposed to lawyers, also supports allowing lawyers to solicit business via response blogging. In Edenfield

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208. ABA, A LEGISLATIVE HISTORY, supra note 157, at 754.
209. GARDNER & BIRLEY, supra note 31, at 169 (discussing the various methods a blogger can use to control the replies to a blog post, termed “moderating”).
211. Id.
213. Id.
214. Ohralik, 436 U.S. at 450.
215. Id.
217. Bates, 433 U.S. 350 (striking down Arizona’s blanket ban on all advertising, while recognizing that some regulation of legal solicitation might be appropriate).
v. Fane, 219 an accountant challenged a professional rule prohibiting direct in-person solicitation of prospective clients—much like the prohibition challenged in Ohralik. 220 The Court struck down the regulation an unconstitutional restriction on speech and noted several reasons for distinguishing Edenfield from Ohralik. 221 First, accountants are not trained advocates (like lawyers) and their prospective clients are “sophisticated and experienced” business people (unlike the young accident victim in Ohralik). 222 Second, the accountant in Edenfield sought to approach prospective clients in the client’s office whenever the client desired. 223 Finally, there is little motivation for an accountant to exert “high pressure sales tactics” on prospective clients because this could impair, rather than enhance, the chances that the accountant is hired. 224 For those reasons, the Court held that the prohibition on direct solicitation by accountants was unconstitutionally restrictive. 225 The Court’s logic indicates that the dispositive issue in determining whether solicitation is permissible are the circumstances in which the solicitation is performed and the means by which it is accomplished. 226

The Court’s reasoning is similarly applicable to the lawyer who engages in response blogging as a form of advertising. First, while lawyers who blog are trained advocates, their advocacy skills likely become less forceful when typed instead of spoken. 227 Additionally, when a lawyer responds to a blogger’s post, the lawyer is not communicating with someone who has no knowledge of the subject of discussion; the blogger likely has some knowledge of the subject or would be unable to author a post on the topic. 228 Second, the blogger, like the accountant’s prospective client, will read the lawyer’s response in a place and time of the blogger’s choosing (whenever the blogger decides to log on to a computer and check the blog). 229 Finally, a lawyer who uses high pressure sales tactics in a static blog message to a potential client is likely to offend that person and the person is unlikely to respond, lest they receive another disturbing communication from the lawyer. 230 Thus, the logic that led to allowing accounts to solicit prospective clients through in-person contact suggests lawyers should be allowed to do the same through response blogging.

The inconsistency between a facial interpretation of Rule 7.3 and the purpose-based evaluation of its applicability demonstrates the problem with the language “real-time electronic contact.” On one hand, the plain language of the

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219. 507 U.S. at 774.
220. Ohralik, 436 U.S. 447 (holding an attorney’s overly aggressive solicitation of potential clients was not constitutionally protected).
221. Edenfield, 507 U.S. at 775.
222. Id. at 775-76.
223. Id. at 776.
226. Similar to the business people in Edenfield, 507 U.S. at 775.
227. Id.
228. Much like the lawyer visiting the accountant’s office in Edenfield, 507 U.S. at 775-76.
229. Id.
rule indicates it may be applicable to response blogging (which is “real-time electronic contact”). Such a reading would prohibit lawyers from responding to non-lawyer’s blogs in hopes of soliciting business. On the other hand, the rationale upon which the rule was based suggests that response blogging should be promoted. This ambiguity should be resolved by reformatting Model Rule 7.3. There are several variations on the language of Model Rule 7.3 which have been proposed by ethics committees and used by various jurisdictions. The subsequent section of this article will identify and analyze some of these variations.

2. Possible Language Changes to Model Rule 7.3

States have taken four different approaches regarding attorneys who solicit business via electronic media. The first approach takes no position on electronic communications at all, presumably leaving the application of the rule to the appropriate governing authority.230 The second approach prohibits all forms of direct contact, including contact via electronic media.231 The third approach utilizes a case-by-case determination, by the appropriate governing authority, as to whether the activity violates the rule.232 The fourth approach attempts to address the issue presented by including alternative language (different from “real-time electronic contact” as in Model Rule 7.3).233 An analysis of each of these approaches shows that each has inherent flaws and should not be adopted by the ABA Commission when reforming the Model Rules.

At least three jurisdictions make no mention whatsoever of electronic communications as solicitation for legal employment.234 Two of these jurisdictions235 maintain the language of Model Rule 7.3 prior to its amendment in 2002.236 They only prohibit in-person and live telephone solicitation of

230. See, e.g., MINNESOTA RULES OF PROF’L CONDUCT R. 7.3(a) (2005) (“A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain ….”).

231. See, e.g., ARKANSAS RULES OF PROF’L CONDUCT R. 7.3(a) (2009) (“A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”).

232. Phila. Bar Ass’n Prof’l Guidance Comm., Opinion 98-6 (1998), available at 2000 WL 18973 (conversational interactions with persons on the internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such).


234. MINNESOTA RULES OF PROF’L CONDUCT R. 7.3(a); VIRGINIA RULES OF PROF’L CONDUCT R. 7.3 (2002); WEST VIRGINIA RULES OF PROF’L CONDUCT R. 7.3(a) (1989).

235. MINNESOTA RULES OF PROF’L CONDUCT R. 7.3(a) (2005); WEST VIRGINIA RULES OF PROF’L CONDUCT R. 7.3(a) (1989).

236. MODEL CODE OF PROF’L RESPONSIBILITY R. 7.3(a) (2002) (amending language to include the term “real-time electronic” contact in addition to existing in-person or live telephone contact).
prospective clients. Another jurisdiction’s rule is even more narrow, only prohibiting in-person solicitation which offends the concerns of overreaching. These formulations of the rule are deficient for one glaringly obvious reason—the rule fails to treat instances where lawyers solicit professional employment via online conversations, such as chat rooms. The back and forth dialogue of a chat room poses the same dangers of undue influence, intimidation, and over-reaching posed by face-to-face contact. By completely ignoring such electronic communications, there is no restriction on lawyers who decide to cross the line into impropriety in the virtual world. While this formulation of the rule is not restrictive enough, other jurisdictions have enacted rules that are overly restrictive.

Several jurisdictions prohibit electronic contact altogether. Some prohibitions are very broad, prohibiting “any form of direct contact, in-person or otherwise.” Others are more narrow, allowing written contact, but only by U.S. mail. These blanket prohibitions on direct contact offend the rationale of Model Rule 7.2. Model Rule 7.2 promotes the dissemination of information regarding legal services and recognizes the value of new technologies in pursuit of this goal. These rules would likely prohibit response blogging and

237. MINNESOTA RULES OF PROF’L CONDUCT R. 7.3(a); WEST VIRGINIA RULES OF PROF’L CONDUCT R. 7.3(a).
238. VIRGINIA RULES OF PROF’L CONDUCT R. 7.3 (2002).
240. Some jurisdictions have opined that legal electronic advertisements should be more closely scrutinized and regulated than print advertisements. See, e.g., Comm. on Prof’l Ethics & Conduct v. Humphrey, 377 N.W.2d 643, 646 (Iowa 1985).
242. See, e.g., ARKANSAS RULES OF PROF’L CONDUCT R. 7.3(a) (“A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”).
243. HAWAI’I RULES OF PROF’L CONDUCT R. 7.3 (2000). First, that rule prohibits direct in-person and live telephone solicitation of business. Id. at R. 7.3(a). Then, in a subsequent section, the rule requires that all written communications be sent via U.S. Mail. This rule prohibits response blogging because it involves written communication that are not sent via U.S. Mail. Id. at R. 7.3(f).
245. MODEL RULES PROF’L CONDUCT R. 7.2 cmt. 3 (2002).
246. Assuming, arguendo, that the response blogging is advertising in nature.
deprive the public of access to this valuable source of information.\footnote{Bates, 433 U.S. at 377 (noting public access to information about legal rights is an important aspect of allowing legal advertisement).} Restricting the information about legal services available to the public is not an appropriate result.\footnote{\textit{MODEL RULES OF PROF’L CONDUCT} R. 7.2 cmt. 1 (2002).} Therefore, these rules are not appropriate formulations of Model Rule 7.2.

In the opinion of the Philadelphia Bar Association, the Pennsylvania rule regarding lawyer solicitation should be applied to electronic communications on a case-by-case basis.\footnote{\textit{Phil. Bar Ass’n Prof’l Guidance Comm., Op. 98-6 (1998), available at 1998 WL 112691 (conversational interactions with persons on the internet do not constitute improper solicitation, but in any one particular case, the interaction may evolve in such a way that it could be characterized as such).} In the opinion of the Philadelphia Bar Association, the Pennsylvania rule contains a prohibition on solicitation by real-time electronic contact.\footnote{\textit{P. A. RULES OF PROF’L CONDUCT} R. 7.3(a) (2005) ("The term ‘solicit’ includes contact in-person, by telephone or by real-time electronic communication . . .").}} However, the Philadelphia Bar Association, when confronted with the question of whether a lawyer can participate in a chat room, opined that lawyers could participate in chat rooms and whether the communication is an improper solicitation should be considered on a case-by-case basis.\footnote{\textit{Phil. Bar Ass’n Prof’l Guidance Comm., Op. 98-6, available at 1998 WL 112691.}} Such a case-by-case analysis is fraught with its own faults when applied to response blogging. The analysis does not provide lawyers with guidelines to follow when engaging in response blogging. This could dissuade lawyers from engaging in such conduct altogether, thus offending the rationale behind Model Rule 7.2. On the other hand, leaving each instance to a case-by-case analysis will not put lawyers on notice of what constitutes a violation. Therefore, the concerns of the rule could be violated more often. For these reasons, a case-by-case analysis is not a desirable resolution.

Other jurisdictions have included their own language variations in place of “real-time electronic contact” in an attempt to properly treat the subject. In an effort to limit the application of the prohibition on direct solicitation to those situations where the communication is similar to an in-person encounter, some jurisdictions have used the term “interactive computer-accessed communication” to describe the prohibited conduct.\footnote{\textit{See, e.g., NEW YORK RULES OF PROF’L CONDUCT} R. 7.3(a) (2009).} This language is better than the language of Model Rule 7.3 because it comes closer to describing the types of encounters that should be prohibited.\footnote{\textit{MODEL RULES OF PROF’L CONDUCT} R. 7.3 cmt. 1 (2002) (which references ‘a direct interpersonal encounter’).} However, the language also has its flaws. The language is flawed because virtually all communications—whether direct or indirect—are “interactive.” They are interactive because one person sends a communication and another receives the communication and responds. Whether the receipt and response happens instantaneously or is protracted, the
communication is “interactive.” An interactive communication is not necessarily fraught with the dangers of “undue influence, intimidation, [and] over-reaching,” therefore, not all “interactive” communications should be prohibited.

Another formulation of the rule comes even closer to properly defining the scope of prohibited conduct. The use of the term “immediate” to describe the prohibited contact is the most appropriate rule in place at this time. The ethics committee in one jurisdiction prohibited solicitation via “immediate electronic conversation,” and another via “immediate electronic discussion.” Both of these formulations of the rule come very close to describing the conduct that should be prohibited. They both describe situations in which an online interaction is comparable to a live in-person encounter with a lawyer, which is properly prohibited by the Model Rules. However, these rules are insufficient for the same reasons that “real-time” is insufficient. The ambiguity surrounding these terms renders them less than optimal formulations of the rule.

C. Proposed Amendment to Model Rule 7.3(a)

There is a possible formation of the rule which would resolve the ambiguity and simplify its application. Model Rule 7.3 should be reformed to prohibit “direct interpersonal conversations” initiated by the lawyer when the primary purpose of the communication is pecuniary gain, regardless of the medium used. This language has several advantages over the current rule. First and foremost, it resolves the ambiguity presented by “real-time electronic contact.” Changing the language of the rule clarifies that response blogging is not prohibited by the rule. Additionally, the inclusion of this language in the rule more directly describes the type of behavior that should be prohibited. Directly identifying the type of interaction that is prohibited will ensure that the rule will continue to be effective as new forms of communication are embraced by the legal community.

The proposed reformation serves the concerns of the Model Rules regarding advertising. First, it does not change the effect of Model Rule 7.1, prohibiting false or misleading communications by lawyers. Second, it clearly allows contact that could erroneously fall within the definition of “real-time electronic contact” such as response blogging. The change would clear up the gray area

256. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmts. 2-3 (2002).
258. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1.
259. Id. at R. 7.3 cmt. 2.
261. See the discussion regarding the misapplication of the current rule in section IV.B., supra.
created by the current rule. Finally, the proposed rule prohibits communications envisioned by the current rule. Therefore, reforming the rule to prohibit “direct interpersonal conversations” initiated by a lawyer with the primary purpose of pecuniary gain would serve the purposes of the Model Rules regarding advertising and resolve the ambiguity of the current rules.

The proposed language would also ensure that other forms of technology are properly treated by the Model Rules. Prohibiting “direct interpersonal conversations” changes the focus of the rule from the form of the communication to the communication’s fundamental nature. For example, whether a website’s functionality is “real-time” or merely an “electronic communication” does not matter. The communication that occurred on that website becomes the focus of the inquiry. Thus, contemporary and emerging technology would not fall into any grey area created by the ambiguous term “real-time electronic contact.” Focusing the prohibition of Rule 7.3 on the “direct interpersonal” nature of a communication restrict only those communications envisioned by the rule, regardless of the communication’s form.

D. Other Considerations for Lawyers Who Blog

As a practical matter, lawyers do use blogs to solicit business. Because they allow lawyers to reach a broad audience with a minimal investment of time and money, blogs will continue to serve as a valuable marketing tool in the legal community. As such, it is imperative that lawyers consider the limitations and requirements imposed by the applicable professional rules regarding advertising. This section provides a brief outline of the issues that lawyers who use blogs to advertise should consider in order to conform with the ethical rules.

Model Rule 7.1, which was discussed in some detail in the previous sections, is easily interpreted and applied to lawyers who blog. The rule imposes several restrictions on what lawyers can ethically post on a blog. A lawyer cannot post any false or misleading statements about his services on the blog. A blog post will be considered “false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the

262. See Ohralik, 436 U.S. at 447. The current rule is meant to prevent overbearing solicitation as seen in Ohralik. The proposed rule serves that concern without overburdening acceptable forms of solicitations.
263. Kellogg, supra note 28, at 35.
264. As of the date of this article, 24 states have a professional rule that is identical to Model Rule 7.3(a). Several other states have a substantially similar rule. Of particular interest to this article, a majority of states include the term “real-time electronic contact” as suggested by Model Rule 7.3(a). Thus, any change to Model Rule 7.3(a) will be scrutinized by the states, and there is a strong chance that a change would be adopted in a large number of states. See Appendix A for a comparison of the states’ advertising rules to Model Rule 7.3(a).
265. The rule only requires that communications regarding a lawyer’s services not be false or misleading. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2002).
266. Id.
267. Id.
statement [(i.e., the entire post)] considered as a whole not materially misleading.”268 A lawyer who authors blog posts about courtroom achievements must make sure that no unjustified expectations that the same result could be achieved for another client is created, which is a misleading statement under the rule.269 Additionally, the lawyer should be careful not to make unsubstantiated claims regarding a comparison of other lawyer’s services or fees.270 Including a disclaimer in the post can help protect the lawyer from violating these rules.271

Model Rule 7.2 imposes other requirements on lawyers who use blogs to advertise. First, the rule limits the payment for advertising services to those which are “reasonable.”272 This requirement requires that if a lawyer pays another to design, maintain, or otherwise service his blog, these payments must be reasonable.273 The rule also affirmatively permits referring clients to another lawyer.274 The final requirement of Model Rule 7.2 applicable to lawyers who blog is that the communication “include the name and office address of at least one lawyer or a law firm responsible for its content.”275 This requirement would apply to lawyers who engage in first-person blogging, as well as to those who engage in response blogging. Lawyers should keep in mind that there is some precedent indicating that including an email address or a link to a website containing the information is not enough to satisfy this rule.

Model Rule 7.3 has implications beyond those discussed in the preceding sections of this article.276 Pursuant to this rule, a lawyer is allowed to use a blog to solicit business from other lawyers or from people with a “family, close personal, or prior professional relationship with the lawyer.”277 The lawyer cannot use his blog to solicit professional business if the prospective client has informed the lawyer that the contact is not wanted.278 Additionally, the lawyer cannot use his blog to solicit business “if it involves coercion, duress or harassment.”279 The lawyer must also “include the words ‘Advertising Material’ … at the beginning and ending of any … electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).”280

268. Id.
269. Id. at R. 7.1 cmt. 3.
270. MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2002).
271. Id. See also N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 771 (2003), available at 2003 WL 23099783 (a prominently placed disclaimer on a website containing misleading testimonials or past results may be sufficient to cleanse the advertisement’s misleading nature).
272. MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(1).
273. Id. at R. 7.2 cmt. 5.
274. Id. at R. 7.2(b)(4).
275. MODEL RULES OF PROF’L CONDUCT R. 7.2(c) (2002).
276. Remember that this rule does not apply to first-person blogging. See the discussion of the application of the rule to first-person blogging in section IV.A., supra.
277. MODEL RULES OF PROF’L CONDUCT R. 7.3(a)(1)-(2).
278. Id. at R. 7.3(b)(1).
279. Id. at R. 7.3(b)(2).
280. Id. at R. 7.3(c).
V. CONCLUSION

There are several ethical implications related to lawyers who blog, and a lawyer must be cognizant of several ethical rules when posting to a blog or responding to another’s post. A lawyer who uses a blog to build the lawyer’s practice may be subject to the ethical rules regarding advertising applicable in any jurisdiction where the blog is accessible to the public. The Model Rules regarding advertising, which a majority of jurisdictions have adopted, appropriately treat lawyers who author posts on blogs to build their practices. However, Model Rule 7.3(a) should be modified by the Commission on Ethics 20/20 to resolve the ambiguity created by the language “real-time electronic contact.” Resolving this ambiguity in such a way that excludes response blogging from the purview of the rule serves the core concerns of the Model Rules regarding advertising.
APPENDIX A

<table>
<thead>
<tr>
<th>State</th>
<th>Rule</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>The term “solicit” includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient. Alabama Rules Prof’l Conduct R. 7.3(a) (2009).</td>
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<tr>
<td>Arizona</td>
<td>Identical, except that the rule prohibits a lawyer from compensating another for violating the rule as well. Arizona Rules Prof’l Conduct R. 7.3 (2009).</td>
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<td>Arkansas</td>
<td>A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. Arizona Rules Prof’l Conduct R. 7.3 (2010).</td>
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<td>California</td>
<td>A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited. Rule 1-400(C). A solicitation means any communication concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain. California Rules Prof’l Conduct R. 1-400 (1997).</td>
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<td>Connecticut</td>
<td>A lawyer shall not initiate personal, live telephone, or real-time electronic contact, including telemarketing contact, with a prospective client for the purpose of obtaining professional employment. Connecticut Rules Prof’l Conduct R. 7.3 (2007).</td>
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<td>D.C.</td>
<td>This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Comment 5 to Rule 7.1. (The District has not enacted Model Rule 7.3 other than in this comment.)</td>
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<td>Delaware</td>
<td>Identical. The Delaware Lawyer’s Rules Prof’l Conduct R. 7.3 (2008).</td>
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<td>Florida</td>
<td>The term &quot;solicit&quot; includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6. Florida Rules Prof’l Conduct R. 7.4 (2002).</td>
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<td>Georgia</td>
<td>A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer’s firm, lawyer’s partner, associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment. Georgia Rules Prof’l Conduct R. 7.3(a) (2004).</td>
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<td>Hawaii</td>
<td>A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. (f) Written communications to prospective clients for the purpose of soliciting professional employment are subject to the following requirements: (1) written communications to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and not by facsimile or e-mail. Hawai’i Rules Prof’l Conduct R. 7.3 (2000).</td>
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<td>State</td>
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<td>Illinois (pre-2010)</td>
<td>The term &quot;solicit&quot; means contact with a person other than a lawyer in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient. Illinois Rules Prof’l Conduct R. 7.3 (2007).</td>
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<td>Indiana</td>
<td>A lawyer shall not seek or recommend by in-person contact (either in the physical presence of, or by telephone, or by real-time electronic contact), the employment, as a private practitioner, of the lawyer, the lawyer’s partner, associate, or the lawyer’s firm, to a nonlawyer who has not sought advice regarding the employment of a lawyer, or assist another person in so doing unless the contacted non-lawyer has a family or prior professional relationship with the lawyer. Indiana Rules Prof’l Conduct R. 7.3 (2005).</td>
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<tr>
<td>Iowa</td>
<td>A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client. A lawyer may engage in written solicitation by direct mail or e-mail to persons or groups who may need specific legal services because of a condition or occurrence known to the soliciting lawyer. (With Conditions.) Information permitted by these rules may be communicated by direct mail or e-mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. (With filing condition.) Iowa Rules Prof’l Conduct R. 32:7.3 (2005).</td>
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<tr>
<td>Kentucky</td>
<td>No lawyer shall directly or through another person, by in person, live telephone, or real-time electronic means, initiate contact or solicit professional employment from a potential client. Kentucky Rules Prof’l Conduct SCR 3.130(7.09) (2009).</td>
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<td>State</td>
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<td>Louisiana (after Oct 2009)</td>
<td>Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer’s request or on the lawyer’s behalf or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. Louisiana Rules of Prof’l Conduct R. 7.4(a) (2009).</td>
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<tr>
<td>Louisiana (pre-Oct 2009)</td>
<td>A lawyer shall not solicit professional employment in person, by person to person verbal telephone contact or through others acting at his request or on his behalf from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.</td>
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<tr>
<td>Maine</td>
<td>A lawyer, in person, by live telephone, or by real-time electronic contact, shall not solicit professional employment from a non-commercial client if such solicitation involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits. The prospective client’s sophistication regarding legal matters; the physical, emotional state of the prospective non-commercial client; and the circumstances in which the solicitation is made are factors to be considered when evaluating the solicitation. A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer. Maine Rules Prof’l Conduct R. 7.3(a) (2009).</td>
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<td>Maryland</td>
<td>Identical. The Maryland Lawyer’s Rules of Prof’l Conduct R. 7.3(a) (2005).</td>
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<td>Massachusetts</td>
<td>A lawyer shall not solicit professional employment for a fee from a prospective client known to be in need of legal services in a particular matter by written communication, including audio or video cassette or other electronic communication, unless the lawyer retains a copy of such communication for two years. Massachusetts Rules Prof’l Conduct R. 7.3(c) (2000).</td>
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<tr>
<td>Michigan</td>
<td>A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact …. Michigan Rules Prof’l Conduct R. 7.3(b) (1990).</td>
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<tr>
<td>Minnesota</td>
<td>A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. Minnesota Rules Prof’l Conduct R. 7.3(a) (2005).</td>
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<td>Missouri</td>
<td>A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative. Missouri Rules Prof’l Conduct R. 4-7.3(a) (2007).</td>
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<td>Nevada</td>
<td>The term &quot;solicit&quot; includes contact in person, by telephone, telegraph or facsimile, by letter or other writing, or by other communication directed to a specific recipient. Nevada Rules Prof’l Conduct R. 7.3(a) (2007).</td>
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<td>New Hampshire</td>
<td>A lawyer shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment. New Hampshire Rules Prof’l Conduct R. 7.3(a) (2008).</td>
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<td>New Jersey</td>
<td>New Jersey allows lawyers to contact prospective clients, with limitations. One such limitation is a communication that involves coercion, duress or harassment. Another limitation is if the communication is &quot;unsolicited direct contact&quot; with a prospective client concerning a specific event. There is also a time limitation on communications like that upheld in <em>Florida Bar Ass’n v. Went for It, Inc.</em>, 515 U.S. 618 (1995). New Jersey Rules Prof’l Conduct R. 7.3 (2004).</td>
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<td>New Mexico</td>
<td>Identical. New Mexico Rules Prof’l Conduct R. 16-703(A) (2008).</td>
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<tr>
<td>New York</td>
<td>A lawyer shall not engage in solicitation: by in-person or telephone contact, or by realtime or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client. New York Rules Prof’l Conduct R. 7.3(a)(1) (2009).</td>
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<td>North Dakota</td>
<td>Identical, with added words &quot;or the lawyer’s representative.&quot; North Dakota Rules Prof’l Conduct R. 7.3(a) (2004).</td>
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<td>Pennsylvania</td>
<td>A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term &quot;solicit&quot; includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements. Pennsylvania Rules of Prof’l Conduct R. 7.3(a) (2008).</td>
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<td>Rhode Island</td>
<td>Identical. Rhode Island Rules Prof’l Conduct R. 7.3(a) (2009).</td>
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<td>South Carolina</td>
<td>Identical. South Carolina Rules of Prof’l Conduct R.</td>
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<td>Tennessee</td>
<td>If a significant motive for the solicitation is the lawyer’s pecuniary gain, a lawyer shall not solicit professional employment by in-person, live telephone, or real-time electronic contact from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no family or prior professional relationship. Tennessee Rules Prof’l Conduct R. 7.3(a) (2003).</td>
</tr>
<tr>
<td>Texas</td>
<td>A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer’s advice regarding employment .... Texas Disciplinary Rules Prof’l Conduct R. 7.03(a) (2005).</td>
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<tr>
<td>Utah</td>
<td>&quot;other real-time communication&quot; Utah Rules Prof’l Conduct R. 7.3(a) (2005).</td>
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<td>Vermont</td>
<td>Identical. Vermont Rules Prof’l Conduct 7.3(a) (2009).</td>
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<tr>
<td>Virginia</td>
<td>A lawyer shall not, by in-person communication, solicit employment as a private practitioner for the lawyer, a partner, or associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if: (1) such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made. In-person communication means face-to-face communication and telephonic communication. Virginia Rules Prof’l Conduct R. 7.3 (2002).</td>
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<td>Washington</td>
<td>A lawyer shall not, directly or through a third person, by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted. Washington Rules of Prof’l Conduct R. 7.3(a) (2006).</td>
</tr>
<tr>
<td>West Virginia</td>
<td>A lawyer shall not by in-person or telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a motive for the lawyer’s doing so is the lawyer’s pecuniary gain (pre ethics 2000 rule). West Virginia Rules Prof’l Conduct R. 7.3 (1989).</td>
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With the emergence of a “Surveillance Society” in corporate America, employees often are denied any expectation of privacy when using a computer at work and thus also may forfeit the protection of the privilege for documents created or messages sent at work. As lawyers in private practice are learning, sometimes the hard way, an employee’s use of an employer’s computer network to communicate with an outside lawyer may result in the loss of the attorney-client privilege. Lawyers and scholars are only beginning to address the implications of recent court decisions in the employer-employee context generally.

Even fewer have awakened to the potential nightmare that privacy-compromising computer policies may create for practicing professionals inside law schools. Most in the legal academy, especially those outside of legal clinics, have yet to appreciate the threat to attorney-client confidentiality posed by university data privacy policies or practices that allow persons in the university outside of the attorney-client relationship to gain access to computer documents and to email on the university network. And scholars have yet to explore the dangers to academic freedom raised by university insistence on the right (even if rarely exercised) to monitor faculty electronic communications and internet use.

The modern American law school is not only an institution of professional education and scholarly research. It is a law firm. Indeed, the typical law school hosts multiple law firms, including both associated and independent legal practices, all operating under the same roof. The legal clinic is the most visible center of active legal practice, while many law professors outside of the clinic maintain active law practices, as traditional practitioners, consultants to lawyers, or as pro bono counsel engaged in professional service to the community. Many tens of thousands of lawyers had their first practice experience as part of a law school clinical or other representation program. Thus, a proper introduction to the importance of client confidentiality, both in classroom instruction and in a practice experience, must be assured in the law school practice settings.

In law schools, clinical faculty, staff, and students, as well as pro bono and moon-lighting law professors, may compose practice documents on a university-owned computer and send client-related communications through the university’s connection to the internet. And yet reliance on the university’s equipment, network, and information technology personnel may raise disquieting questions about confidentiality. University data privacy policies and practices that are indifferent to professional responsibilities may undermine confidentiality and could even put the protection of the attorney-client privilege at risk.

Accordingly, the assurance of privacy in computer files and electronic communications is essential in law schools: for law practice-related educational experiences for students; for faculty professional service, pro bono, and consulting activities; and for faculty academic freedom. Law school deans and law faculty need to be aware of how university-provided technology may be used and administered in a way consistent with, or instead damaging to, the distinct professional nature of legal education.
Nicholas Halbur, who was a clinical fellow here at the University of St. Thomas, and I have authored the attached paper on the subject, which will be published later this fall in the Utah Law Review, and which we attach as part of our submission.

Gregory Sisk  
Orestes A. Brownson Professor of Law  
University of St. Thomas School of Law (Minnesota)
INTRODUCTION: PRACTICING LAW IN THE LAW SCHOOL SETTING AND THE PROFESSIONAL DUTY OF CONFIDENTIALITY

The modern American law school is not only an institution of professional education and scholarly research. It is a law firm. To be more specific and much more accurate, the typical law school hosts multiple law firms, including both associated and independent legal practices, all operating under the same roof.¹ The legal clinic is the most visible center of active legal practice and is most closely integrated with the law school’s central mission of legal education. Less conspicuously, many law professors outside of the clinic maintain active law practices, as traditional practitioners, consultants to lawyers, or as pro bono counsel engaged in professional service to the community.²

¹ See Laura L. Rovner, The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics, 75 U. Cin. L. REV. 1113, 1179 (2007) (outlining “[t]he serious ethical and practical issues involved in treating the law school, including the clinic, as part of the same law firm”).

Absorbed in the substance of his or her foray into legal representation, and having little experience (or interest) in the management side of a law practice, the typical law professor gives little thought to the implications of composing practice documents on a university-owned computer or sending client-related communications through the university’s connection to the internet. The moonlighting professor likely remains blissfully unaware that reliance on the university’s equipment, network, and information technology personnel raises disquieting questions about confidentiality. Unbeknownst to the average practicing professor, university data privacy policies and practices that are indifferent to professional responsibilities may undermine confidentiality and could even put the protection of the attorney-client privilege at risk.

With self-conscious recognition of their law school practice activities as being the operation of a law firm, clinical legal education faculty tend to be ahead of the curve on these questions. And, indeed, clinical faculty have been quicker to identify confidentiality issues and take affirmative steps to ensure that university technology is used within the clinical facility in a manner that guards client information. Nonetheless, many law school clinics only now are awakening to the realization that university data privacy policies applicable generally to university faculty, staff, and students could be the Achilles’ heel to the protection of confidentiality. Even more so, the non-clinical faculty member who engages in a part-time legal practice from his or her law school office may assume (often wrongly) that the university offers the same certain and dependable protection of confidentiality as does a reputable internet service provider.

In the past four years, many in the wider legal community have been alarmed by a series of cases in which courts have denied the protection of the attorney-client privilege over communications because a message was sent through an employer’s computer network or a document was prepared on an employer’s computer. Thus, if the company policy grants the employer the right to access electronic messages and files, the privilege may be denied for electronic communications between an employee and a lawyer as not having been made in confidence. The judicial trend toward denying the privilege has extended beyond e-mail transmitted on an employer’s network to include

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3 See Rovner, supra note 1, at 1179–80 (discussing “[t]he boundaries of the clinic—that is, which faculty (and staff) should be considered part of the clinic law firm’); Nina W. Tarr, Ethics, Internal Law School Clinics, and Training the Next Generation of Poverty Lawyers, 35 WM. MITCHELL L. REV. 1011, 1020 (2009) (identifying the confidentiality issues that arise when deciding “how the [clinical] law firm has been defined”).

4 Tarr, supra note 3, at 1022-26.

withdrawal of the privilege for documents created on employer computers. Even when a document created on a work computer had been deleted and could only be retrieved by forensic methods, the privilege may be lost if the employer’s written policy explicitly stated that there was no expectation of privacy.\footnote{6}{See Banks v. Mario Indus., 650 S.E.2d 687, 695–96 (Va. 2007).}

Forewarned by these cases arising in the corporate employer setting, each university should reexamine its data privacy policies to accommodate the legal, fiduciary, and ethical responsibilities of its professional schools. If the university explicitly disclaims expectations of privacy in electronic communications or allows university officials or technology personnel to monitor or access electronic communications and computer files, the university policy stands in direct conflict with the professional obligations of faculty, staff, and students in the law school who are representing clients. By waving the red flag of a published policy that disavows privacy for electronic documents, data, and communications, a university foolishly invites outsiders to seek access to confidential client information created by legal and other professionals working inside the university. Even if outside requests for information by opponents in litigation are successfully resisted, as is likely, such intrusive efforts may embarrass the law school and the practicing professionals inside its walls.

Importantly, well beyond preserving the privilege, the lawyer is bound to protect the confidentiality of all client representation information and to prevent access by any stranger to the attorney-client relationship. “The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”\footnote{7}{Model Rules of Prof’l Conduct R. 1.6 cmt. [3] (2009).}

If professional schools are to uphold their responsibilities to safeguard client confidentiality, university or law school policies must be revised to strictly control internal access to computer files and electronic messages and to allow for privilege objections to be raised to external requests for information. Professional confidentiality in computer and network use may be guaranteed and strict restrictions on access to client-related content may be implemented without neglecting the legitimate needs of the university to effectively address abuses of information technology.
I. PRACTICING LAW IN THE LAW SCHOOL SETTING AND THE PROFESSIONAL DUTY OF CONFIDENTIALITY

A. Law Professors Practicing as Lawyers

In the modern law school, law professors often do more than teach and write about the law. They may keep a hand in the actual practice of the law. In so doing, faculty may work with or be assisted by staff and students, who become integral actors in the legal practice. Many (probably most) of the practice activities occurring inside the law school building are part of the educational mission. Other practice activities arguably enhance the professional and scholarly understanding of the faculty so engaged, even if they also supplement the compensation of the practicing professor.

As the most visible practice center in the typical law school, the legal clinic represents clients in programs that are central to the teaching curriculum. Clinic faculty and staff practice law as a primary function of their university employment. They supervise law students in a limited legal practice, creating further ethical duties for both supervising clinic faculty and staff and their students. Outside of the traditional legal clinic, law school seminars or similar programs may involve limited representation of clients, offer consulting advice to practicing lawyers, or include law-related advocacy in real-world settings.

Increasingly, legal clinics integrate professional counseling services from other professions, such as psychology or social work. Thus, the confidential needs of other professional faculty, staff, and students in the university demand attention as well. Indeed, the stumbling block placed by clumsy university electronic data privacy policies is not uniquely encountered within the law school. University technology policies that are tone-deaf to professional roles intrude equally on the confidentiality of practices in various other professional schools within the university, including medicine, nursing, psychology, and social work.

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Beyond the legal clinic, and “[r]egardless of the position one takes on the academic ethics of outside practice, it is clear that a significant number of professors provide legal services to individuals and entities.” 11 Many law faculty engage in the practice of law by direct representation of clients or, more commonly, on a consulting basis with lawyers and law firms, both with and without compensation. As a personal kindness or community service, law professors frequently offer uncompensated legal advice to members of the bar, law reform organizations, and former students, such as when professional responsibility professors answer telephone calls from practitioners who face an ethical quandary.

With respect to compensated work, many law professors find this activity reconnects them to the practice of law and thereby enhances their teaching, writing, and student advising. 12 Although American Bar Association accreditation standards presume that full-time faculty members are not regularly engaged in law practice, 13 the standards speak approvingly of limited “outside professional activities” that “relate to major academic interests or enrich the faculty member’s capacity as a scholar and teacher, [and] are of service to the legal profession and the public generally.” 14 Likewise, while warning against “[e]xcessive involvement in outside activities” that impairs the professor’s primary obligations to the institution, the Association of American Law Schools states that professional work “may help bring fresh insights to the professor’s classes and writing.” 15

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12 Little, supra note 2, at 369.

13 ABA Standards, supra note 8, Standard 402(b), Interpretation 402–4, at 34 (stating a presumption that a faculty member is not full-time if he or she “[r]egularly engage[s] in law practice or [has] an ongoing relationship with a law firm or other business”).

14 Id. Standard 402(b) at 32.

15 Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, ASS’N OF AM. LAW SCHOOLS (May 2003), http://www.aals.org/about_handbook_sgp_eth.php. See also ASS’N OF AM. LAW SCHOOLS, EXECUTIVE COMMITTEE REGULATIONS § 6-4.2, at 60 (2005), available at http://www.aals.org/about_handbook_regulations.php (providing that when “determin[ing] whether outside professional activities are properly limited so as not to divert a full-time faculty member from the primary interest and duty as a legal educator,” various factors should be considered including whether “the outside activity coincides with the full-time teacher’s major fields of interest as a teacher and scholar,” whether the professional activity is “a source of novel and enriching experience that can be directly utilized in the person’s capacity as teacher and scholar,” and whether “the outside activity may properly be characterized as public service, as distinct from the pursuit of private purposes”).
With those caveats in mind, Bruce Green observes that “since law professors’ memories of their pre-academic experience may fade or become increasingly irrelevant as the nature of law practice changes, there may be reason to encourage law professors to dip their toes back in the water from time to time.”16 Nor is the value of such rejuvenation limited to traditional podium law faculty who wish to close the distance between the classroom and modern legal practice. Appreciating legal writing as an integral component of both legal education and continuing professional development, Joan Blum and Kathleen Vinson report that consulting work with law firms helps legal writing faculty stay “current on developments and trends in writing in law practice as well as provide new ideas to infuse their teaching and scholarship.”17 Affording pecuniary opportunities for outside work may also be necessary for the law school that wishes to attract and retain quality faculty.18

Outside of the formal curriculum and distinct from compensated legal practice, law professors may represent clients on a pro bono or public interest basis. As David Luban urges, “law teachers and law schools have the same pro bono responsibilities as lawyers and law firms.”19 Moreover, as Bruce Green reflects, law professors who practice pro bono “serve as role models for students who, it is hoped, will render pro bono services themselves after they are admitted to the bar.”20 While some professors leave the building to participate in outside pro bono programs, many provide legal representation to the disadvantaged and advocate for legal reform from their faculty offices. Indeed,

16 Bruce A. Green, Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach?, 42 S. TEX. L. REV. 301, 330 (2001); see also Rovner, supra note 1, at 1120 (arguing that the benefits of collaboration between clinical and classroom faculty “also inure to the classroom teachers, who have the opportunity to consider legal issues that are textured and complex, and which provide ‘real world’ opportunities for the classroom teacher to employ her expertise”).

17 E. Joan Blum & Kathleen Elliott Vinson, Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms, 60 MERCER L. REV. 761, 763 (2008).

18 See Little, supra note 2, at 369 (suggesting that “the opportunity to also enjoy some outside pecuniary gain may make the difference to some talented lawyer-professors”); Blum & Vinson, supra note 17, at 763 (noting that financial compensation for consulting legal writing faculty “can be important for members of a profession who are generally underpaid”).

19 David Luban, Faculty Pro Bono and the Question of Identity, 49 J. LEGAL EDUC. 58, 58 (1999); see also DEBORAH L. RHOE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 24–25 (2005) (addressing the need for greater participation by law faculty, as well as their currently inadequate role, in pro bono programs); Ian S. Weinstein, Report of the Working Group on Representation Within Law School Settings, 67 FORDHAM L. REV. 1861, 1865 (1998-1999) (concluding that “the better approach is to put everyone, lawyers, law students, and law professors, under the same moral obligation [to provide pro bono legal services] and do all we can to make that obligation real”).

20 Green, supra note 16, at 306.
the typical law school considers such professional service in annual, promotion, and tenure evaluations.

For those law practice activities that are part of the law school curriculum or that involve pro bono/public interest service, use of university and law school resources by faculty, staff, and students is unremarkable. For faculty law practice or consulting work that is compensated, professors generally refrain from calling on law school personnel for assistance and from drawing (other than minimally) on university resources. But, typically, law professors are permitted to use university networks for electronic communications, to prepare documents on university-owned computers with university-provided software, and to store documents on university servers. Moreover, when the university allows faculty work on practice matters in faculty offices with university equipment, rather than obliging professors to conduct all outside practice work at home or elsewhere, professors are more readily available in the law school building for committee meetings and scholarly colloquia, hallway chats with colleagues about teaching and scholarship, and advising students.

**B. Law Professors and the Ethical Duty of Confidentiality**

When engaged in a law practice, “how faculty act with respect to ethical issues is at least as important as what they say.”\(^{21}\) Ensuring that support staff and supervised students in a curriculum-based practice experience understand and abide by professional ethics is likewise essential.\(^{22}\) The law professor thereby confirms his or her commitment to the norms and standards of the legal profession. The American Bar Association rightly insists that “the highest standards of ethics and professionalism should be adhered to within law schools.”\(^{23}\)

Of foremost importance in modeling ethical behavior for our students, the practicing law professor must act vigorously to protect the confidentiality of

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\(^{21}\) Rovner, *supra* note 1, at 1186.

\(^{22}\) See Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 35 (2003-2004) (saying that “[e]very clinical teacher is a legal ethics and professional responsibility teacher”); Tarr, *supra* note 3, at 1011–12 (stating that “it is incumbent upon clinics to model the highest level of professionalism, to impress upon students the importance of ethics when representing clients who have the least power in our society and the least access to lawyers or the legal system”).

representation information. As one of us has previously written about attorney-client confidentiality as general matter:

When teaching law students in my professional responsibility class each year, I always emphasize that the first duty of the lawyer is to protect the client’s confidences. Perhaps no other element of the attorney-client relationship is as fundamental as the sacred obligation of the lawyer to keep the confidences of his or her client. As attorneys, we serve as agents and advocates seeking to advance the legal objectives of our clients, but we also serve as confidants in whom our clients may repose trust. Because our clients are guaranteed confidentiality, they are willing to share their most private thoughts and relate the most sensitive and embarrassing information, secure in the knowledge that what has been shared will be safeguarded and will never be used against them by the lawyer.

Under Rule 1.6 of the Model Rules of Professional Conduct (which has been adopted in some form in nearly every state), every lawyer must institute appropriate measures within his or her law practice to safeguard client information. The lawyer must ensure that venues for confidential communications are available and are maintained as private when necessary. Both traditional hard-copy documents and all forms of electronic data must be well secured. Access to information by those who are not advancing the interests of the client as part of the representation must be precluded. And the lawyer must respond vigorously and promptly to assert confidentiality whenever representation information is sought by others to which a colorable objection may be made.

In addition to the general duty of the lawyer to preserve the confidentiality of client information, the law affords a special protection—the attorney-client

24 See Blum & Vinson, supra note 17, at 788 (observing that, whether the consulting legal writing faculty member “is in the position of lawyer or ‘assistant,’ the consultant should take care to preserve client confidences”).


26 See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 16 (2006).

27 See id. at cmt. 17.

28 See id.
privilege—to communications between lawyers and clients under certain circumstances. While the lawyer generally is obliged to protect all information relating to the representation and not voluntarily disclose such information, the lawyer nonetheless may be required to respond to a lawful subpoena or court order that seeks information outside the parameters of a legally recognized privilege or other legal protection. But, with certain exceptions and limitations, the lawyer may not be forced to divulge the substance of communications falling within the attorney-client privilege and indeed must take appropriate steps to assert and competently advance the privilege in response to any request. Thus, the substance of communications between an attorney and a client (and the contents of related documents) constitutes a specially-protected category of confidential information.

The modern articulation of the elements of the attorney-client privilege is stated succinctly in the Restatement of the Law Governing Lawyers approved by the American Law Institute in 2000: “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”

As stated, then, one of the fundamental factors for recognition of the privilege is that the communication was made in confidence. Not only must the client have the subjective intent to speak confidentially with the lawyer, but the circumstances surrounding the communication must be such that the participants may reasonably presume that the communication will remain confidential. For this reason, the privilege may be waived (or simply fail ever

29 RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY § 1.6-1 (2008-2009 ed. 2008). Beyond the attorney-client privilege, representational materials may be protected by the work-product doctrine, which protects the “mental processes of the attorney.” United States v. Nobles, 422 U.S. 225, 238 (1975). The rules of civil procedure provide a substantial but not absolute measure of protection to the attorney’s work-product, that is, the attorney’s preparation of plans, notes, and reports and his or her accumulation of materials in anticipation of litigation. See Fed. R. Civ. P. 26(b)(3)(A). Lawyers practicing within a law school setting also need the opportunity to resist requests from opponents for non-privileged information that may be protected by the work-product doctrine.

30 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000). The traditional formulation of the attorney-client privilege contained eight elements:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN H. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961).

31 Wennert v. Gulf Oil Corp., 264 N.W.2d 374, 378 (Minn. 1978).

32 Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir. 1956).
to attach) “when communications between the attorney and client take place in
the presence of a third party who is not an attorney.” If the lawyer or client
fail to take adequate precautions to avoid being overheard by a third person,
which includes failing to ensure that the means of communication are secure,
the privilege is surrendered.

As Laura Rovner explains, with specific respect to a law school clinical
practice, “[i]f the privilege is waived, the consequences can be quite serious.”
Both the lawyer and the client, as well as any third persons who intercepted the
communication, may be required to testify or respond in discovery to questions
about the information that was shared. Moreover, by allowing this unseemly
situation to develop, in which the privilege is lost, the lawyer may be subject to
professional discipline and liable for malpractice if the client suffered harm.
The effect on vulnerable clients, who make up the familiar clientele of law
school clinics and law professors practicing pro bono, could be devastating. For
“poor clients who often have experienced the service professions or
governmental agencies as adversaries rather than advocates,” Nina Tarr
counsels, “it is particularly important for them to feel confident that the
information they are providing will be protected.”

Finally, law professors occasionally work on matters, whether in
representing a client or as a service to the profession or judiciary, in which they
are subject to court orders requiring confidentiality. Both the faculty member
and the university would be subject to a contempt citation by the court if
confidentiality in those communications and documents within the university
setting should be compromised.

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34 Rovner, supra note 1, at 1162.
35 Rovner, supra note 1, at 1162.
36 Tarr, supra note 3, at 1017–18.
II. Employer Data Privacy Policies and the Threat to the Attorney-Client Privilege

In the past few years, the legal news media has given increased attention to a growing number of court decisions in which the protection of the attorney-client privilege was rejected because the communications between the lawyer and client had been made through e-mail transmitted on an employer’s network or because documents had been created on an employer’s computer, when the employer’s announced policy was that such communications and data are not guaranteed to be private.37 After the alarm was sounded in the legal press, the story was taken up by traditional media as well, such as the Wall Street Journal.38 Led by student note authors,39 legal scholars are only now beginning to focus on these cases and to consider their implications for employment law, workplace privacy, the protection of the attorney-client privilege, and professional ethics.

Lawyers and clients may create documents on computers and communicate electronically across the internet without forfeiting the attorney-client privilege or violating professional standards of confidentiality.40 The American Bar Association’s Standing Committee on Ethics and Professional Responsibility, as well as those states that have addressed the matter in ethics opinions, agree that professional confidentiality is adequately protected in the ordinary use of e-mail. Because the expectation of privacy for e-mail generally is no less reasonable than for conventional telephone calls and because the unauthorized interception of an electronic message is a violation of federal criminal law, a lawyer usually may communicate with a client using e-mail, without encryption.

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or specific client consent, through internet access provided by a reputable internet service provider.\(^{41}\)

However, the acceptable use by lawyer and client of computer technology, e-mail, and other electronic files for professional matters is based on the assumptions that the network on which the computer system exists is truly secure and private; that no stranger to the attorney-client relationship has a right of access to the content of electronic files; and that the supporting technology staff have been instructed about confidentiality and are answerable to the lawyer or the client who creates the documents or transmits the confidential communication.

The commercial workplace in the United States stands as nearly the antithesis of a confidential environment. As one student note describes it, “the modern corporate attitude toward personal e-mail in the workplace is one of begrudged tolerance coupled with surveillance.”\(^{42}\) According to multiple reports, more than three-quarters of employers monitor employee use of computer networks, including recording data, tracking visits to web sites, and reviewing e-mail messages.\(^{43}\) Employers justify these intrusions into employee privacy on various grounds, such as limiting potential respondeat superior liability for employee abuse of e-mail to engage in harassment, defamation, or fraud; to uphold the public reputation of the company; to protect against the disclosure of propriety employer information; to prevent embezzlement of employer finances; to maintain the security of the employer’s computer network; and to ensure that employees remain productive in advancing the employer’s commercial interests and do not devote excessive time to personal computer use on the job.\(^{44}\)

Although federal law prohibits the interception of electronic communications, these protective statutes have been rendered “almost meaningless in


\(^{42}\) Losey, supra note 39, at 1181.

\(^{43}\) Ann C. Hodges & L. Camille Hébert, The Electronic Workplace, 12 EMP. RTS. & EMP. POL'Y J. 1, 7-8 (2008); Losey, supra note 39, at 1181; Williams, supra note 39, at 349-50.

the workplace.” Because prior consent by the parties for access to the communications is a defense under the federal statute, the employer may extract consent by the employee to interception of electronic data, either expressly by signed agreement or impliedly by notice that there is no expectation of privacy in the employer’s computer system and networks. A couple of states place extremely minimal restrictions on employer surveillance, by requiring fair notice to employees. Nor are employees protected by the common-law tort of invasion of privacy because the courts have regarded monitoring undertaken for a business purpose as “incapable of being ‘highly offensive’” for that cause of action. In general, employers in the United States have free rein to monitor employee e-mail and internet use.

Although speaking in the different context and with respect to the somewhat different standard of privacy for the validity of searches by law enforcement under the Fourth Amendment of the Constitution, the Supreme Court in City of Ontario v. Quon stated that “[a]t present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve.” However, while finding a city police department to have acted reasonably in searching personal text messages sent by an employee “[b]ecause the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope,” the Court suggested that employers are in the position to control the legal environment governing use of employer-provided communication technology: “[E]mployer policies concerning communications will of course shape the

45 Smith-Butler, supra note 44, at 67.
47 Sherman, supra note 44, at 666; Smith-Butler, supra note 44, at 67; Williams, supra note 39, at 364. See generally MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW 286 (2d ed. 2003) (“It has been generally accepted” that the necessary consent “need not be actual” as “long as employees are given ‘sufficient notice’ of the employer’s policy or practice to monitor electronic communications . . . .” (quoting Berry v. Funk, 146 F.3d 1003, 1011 (D.C. Cir. 1998))).
51 130 S. Ct. 2619, 2630 (2010).
52 Id. at 2632.
reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."\textsuperscript{53}

A calamitous collision between attorney-client confidentiality and employer surveillance was inevitable and should have been more widely anticipated by lawyers and clients than appears to have been the case. One law review note author well described the perilous situation that was emerging: "[I]f workplace monitoring is construed as disclosing the contents of a privileged communication to the employer, even though this disclosure is likely inadvertent by the employee, it may constitute a waiver of the privilege."\textsuperscript{54}

Severe body-blows to the attorney-client privilege inflicted by employer data privacy policies were delivered by four cases in 2006 and 2007, two arising in New York, one in New Jersey, and one in Virginia:

First, in Scott v. Beth Israel Medical Center Inc.,\textsuperscript{55} a physician filed suit against his former employer, a hospital, for wrongful termination. The physician filed a motion for a protective order requiring the hospital to return all the physician’s e-mails to his attorney that had been sent on the hospital’s network, claiming that the e-mails were protected by the attorney-client privilege.\textsuperscript{56} The hospital’s e-mail policy stated that electronic mail systems were to be used for business purposes only and that all messages sent were the property of the hospital. The New York state trial court opined that the employer’s "‘no personal use’ policy combined with a policy allowing for employer monitoring and the employee’s knowledge of these two policies diminishes any expectation of confidentiality."\textsuperscript{57} Thus, the court held that the attorney-client privilege did not attach, leaving the hospital free to access and use those e-mails in the litigation.\textsuperscript{58}

Second, in Kaufman v. Sungard Investment Systems,\textsuperscript{59} a federal district court in New Jersey likewise denied the privilege for e-mail communications between a lawyer and client over the employer’s network as not having been made in confidence.\textsuperscript{60} The court reached this conclusion based directly on the employer’s e-mail policy, which read:

\begin{itemize}
  \item \textsuperscript{53} \textit{Id.} at 2630.
  \item \textsuperscript{54} Williams, \textit{supra} note 39, at 366.
  \item \textsuperscript{55} 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007).
  \item \textsuperscript{56} \textit{Id.} at 438–39.
  \item \textsuperscript{57} \textit{Id.} at 441.
  \item \textsuperscript{58} \textit{Id.} at 477.
  \item \textsuperscript{59} No. 05-cv-1236, 2006 WL 1307882 (D.N.J. May 10, 2006).
  \item \textsuperscript{60} \textit{Id.} at *3.
\end{itemize}
The Company has the right to access and inspect all electronic systems and physical property belonging to it. Employees should not expect that any items created with, stored on, or stored within Company property will remain private. This includes desk drawers, even if protected with a lock; and computer files and electronic mail, even if protected with a password.61

Although a federal district court in New York reached a different outcome from *Kaufman* in another case involving communications with a lawyer on an employer’s computer, that New York decision appears to turn on the specific and somewhat unusual facts of the case. In *Curto v. Medical World Communications*,62 the court held that an employee’s e-mails to her attorney that were retrieved from the employer-provided laptop computer were privileged, despite the employer’s e-mail policy which instructed employee’s not to have an expectation of privacy in the computer system.63 The court observed that (1) the employee worked primarily from home using a computer provided by the employer, (2) the employee did not use the employer’s network but instead connected from home to an internet service provider, (3) the employee used her own personal e-mail account, not her work e-mail, and thought she had deleted the e-mails before returning the computer to the employer, and (4) the employer had not regularly enforced its e-mail monitoring policy.64 In particular, the court emphasized the employee’s use of the computer at her home and the employer’s infrequent enforcement of its computer usage policy.65

Third, even using alternative non-employer e-mail systems has not proven to be a talisman for employee privacy in communications and attendant preservation of the attorney-client privilege. In *Long v. Marubeni America Corp.*,66 a federal district court in New York held an attorney-client e-mail sent via a “private password-protected e-mail account” still was not sufficiently confidential when the employee used the employer’s system on which privacy

61 *Id.* at *4; see also Leor Exploration & Prod. LLC v. Aguiar, Nos. 09-60136-CIV, 09-60683-CIV, 2009 WL 3097207, at *4 (S.D. Fla. Sept. 23, 2009) (denying privilege over employee’s e-mail with attorney sent through the corporate server because the corporation’s “employee handbook states that [the corporation] owns all electronic communications and that individuals using the [corporation] email system have no expectation of privacy.”).


63 *Id.* at *8.

64 *Id.* at *1, 3.

65 *Id.* at *8.

was not guaranteed.\textsuperscript{67} Thus, based upon the employer's written policy that there is no right of personal privacy in matter stored, sent, or created on the employer's system, the court held the privilege was lost for e-mails stored in temporary internet files that the employer has retrieved.\textsuperscript{68} Still, most courts to date have drawn the line here, holding that an employee who uses a personal web-based e-mail account has a reasonable expectation of privacy, at least for privileged communications, even if the e-mail is sent across the employer's network or from an employer-provided computer.\textsuperscript{69} At the same time, however, an employee cannot be confident that confidentiality in electronic communications is secure by bringing his or her own computer to work, if the employee connects to the internet through the employer's network, which again may be subject to an employer network monitoring policy.\textsuperscript{70}

Fourth, the judicial trend toward denying the privilege for communications or data sent or created on an employer's computer system has extended beyond the use of e-mail on an employer's network to also include documents created on employer-owned computers. In \textit{Banks v. Mario Industries},\textsuperscript{71} the Virginia Supreme Court described the facts of the case as follows:

\textit{Pursuant to Mario's employee handbook, Mario permitted employees to use their work computers for personal business. However, Mario's employee handbook provided that there was no expectation of privacy regarding Mario's computers. [Employee] Cook created the pre-resignation memorandum on a work}

\textsuperscript{67} Id. at *3.
\textsuperscript{68} Id. at *1–3.

\textsuperscript{70} See Losey, \textit{supra} note 39, at 1188 n.51; see also Marjorie J. Peerce & Daniel V. Shapiro, \textit{The Increasing Privacy Expectations in Employees' Personal Email}, 13 No. 8 J. INTERNET L. 1, 14 (2010) (explaining that employers may view temporary internet files on a company computer, including those that reveal an employee's personal web-based e-mail communications, but may not actually log-in to the employee's web-based account and, in some jurisdictions, may not review an employee's privileged communications with an attorney); Nick Akerman, \textit{Time to Review Corporate Computer Policies}, NAT'L L.J., Feb. 1, 2010, at 17 (advising corporations in designing computer policies to "[m]ake clear that all data created in furtherance of any personal use belongs to the company—including use of the company systems to access personal Web-based e-mail accounts—and may be monitored by the company and will not be confidential").

\textsuperscript{71} 650 S.E.2d 687 (Va. 2007).
computer located at Mario’s office. Cook printed the document from this computer, and Cook sent it to his attorney for the purposes of seeking legal advice. Cook then deleted the document from the computer. Mario’s forensic computer expert, however, retrieved the document from the computer’s hard drive.\textsuperscript{72}

The Virginia Supreme Court held that the communications had been made under circumstances that were not confidential and thus the privilege was waived.\textsuperscript{73} Thus, even though the document on the work computer had been deleted and could only be retrieved by forensic methods, the fact that the employee handbook said there was no expectation of privacy resulted in the loss of the privilege.

To be sure, not all courts have turned a cold shoulder to the attorney-client privilege when invoked by employees who had used employer computers or networks to create documents or send messages. However, most of the cases in which courts did sustain the privilege for employee data that was created or transmitted on employer-owned technology have involved the use by employees of web-based personal and password-protected e-mail accounts rather than the employer’s e-mail system.\textsuperscript{74} Other cases holding that the employee may have retained a reasonable expectation of privacy sufficient to preserve the privilege have turned on such factors as the employee’s application of special encryption to conceal documents on the computer\textsuperscript{75} or nagging doubts about the formality

\textsuperscript{72} \textit{Id.} at 695.

\textsuperscript{73} \textit{Id.} at 695–96. In \textit{United States v. Hatfield}, No. 06-CR-0550 (JS), 2009 WL 3806300 (E.D.N.Y. Nov. 13, 2009), a federal district court upheld a corporate executive’s assertion of the privilege over legal documents stored on a company computer against the government prosecuting a criminal charge. However, as the “ultimately deciding factor,” the court found that “the evidence unambiguously show[ed]” that the corporation itself “believed that employees did not forfeit applicable privileges by maintaining personal legal documents on their company computers.” \textit{Id.} at *10.

\textsuperscript{74} See \textit{supra} note 69. For contrasting opinions on whether an employer should be permitted to monitor an employee’s workplace use of web-based personal e-mail accounts, compare Echols, \textit{supra} note 44, at 274 (arguing that, in light of respondeat superior liability risks, “employers will be able to legally take advantage of the new technology and justifiably monitor employees’ web-based e-mail accounts when they are used in the workplace”) with Sherman, \textit{supra} note 44, at 675–82 (acknowledging that employers may monitor messages sent through the employer’s e-mail system but advocating changes in law and policy to protect the confidentiality of workers’ webmail).

\textsuperscript{75} In \textit{People v. Jiang}, 33 Cal. Rptr. 3d 184, 202–05 (Cal Ct. App. 2005), the California Court of Appeals upheld the privilege against a prosecutor’s subpoena for documents created by the defendant on his employer’s computer, notwithstanding the employer’s policy denying expectations of privacy in the employer’s system, when the defendant had segregated the documents into a separate folder labeled “Attorney” and had encrypted the files with password protection and when the employer’s policy was described as designed only to safeguard

-17-
and consistent application of the company’s policy on personal e-mail use by employees.\textsuperscript{76}

As a recent example, in \textit{Convertino v. U.S. Department of Justice},\textsuperscript{77} a federal prosecutor successfully intervened in litigation by another party against his government employer to assert the attorney-client privilege over e-mails to his private outside counsel sent over the Department of Justice-provided e-mail system. Even though the Department of Justice had access to those e-mails, the United States District Court for the District of Columbia held that the prosecutor had a reasonable expectation of privacy because the Department did not prohibit personal use of the e-mail and the prosecutor “was unaware that they would be regularly accessing and saving e-mails sent from his account.”\textsuperscript{78}

Importantly, attorneys practicing in the university law school environment may well be able to distinguish the adverse cases discussed above and successfully overcome a challenge to the privilege, even if the university does maintain a formal data privacy policy reciting that users have no expectation of privacy in data on university computers or networks:

First, in each of the cases outlined above, the breach of confidentiality occurred on the client’s side of the communication, where the client was or should have been on notice of his or her employer’s policy denying privacy in electronic data. By contrast, in the case of law school-based representation, the client is unlikely to be aware of the university’s data privacy rules governing the attorney as university employee. The client thus will have acted with a reasonable expectation that communications with the lawyer were private, including those made to the lawyer at his or her faculty office through university equipment. As one federal court explains, “[t]he attorney-client privilege belongs to the client, not the attorney, and it is thus the client’s to intellectual property and not to invade the privacy of employees. See generally John Gergacz, \textit{Employees’ Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege}, 10 COMPUTER L. REV. & TECH. J. 269, 284–86 (2006) (arguing that an employee’s claim of privilege should be strengthened if communications with the attorney over the employer’s network were encrypted).

\textsuperscript{76} See Stengart v. Loving Care Agency, 973 A.2d 390, 393–97 (N.J. Super. Ct. App. Div. 2009) (noting factual disputes about whether the employer had finalized and disseminated an electronics communication policy, whether it applied to executive employees, and the scope of the policy, although concluding that the privilege would attach to personal e-mail accounts even if covered by the employer’s policy), \textit{aff’d}, 990 A.2d 650, 659 (N.J. 2010) (noting that it was not clear the language of the employer’s policy covered “the use of personal, password-protected, web-based e-mail accounts via company equipment”); In re Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D.N.Y. 2005) (finding the evidence “equivocal regarding the existence or notice of corporate policies banning certain uses or monitoring employee e-mails”).


\textsuperscript{78} Id. at 110.
waive.”79 (Of course, the fact that the threat to confidentiality in the university setting may emerge on the lawyer’s side of the equation, rather than the client’s, turns the ethical spotlight on the lawyer. Accordingly, those of us who practice in a law school setting have a heightened responsibility to ensure that any fissure in confidentiality opened by university policy or practice is closed.)

Second, the cases holding that employees lost the privilege by using employer technology arose in a traditional business context, where expectations of privacy are low,80 rather than in the university setting, where principles of free exploration of ideas and academic freedom prevail.81 Indeed, despite the privacy-denying rhetoric of some university data privacy policies, most universities in fact do restrict access to faculty and even student e-mail accounts. In day-to-day practice, university officials are unlikely to engage in general monitoring of electronic communications transmitted through university networks.

Third, when law professors, staff, and students practice law in the law school setting, they generally do so in furtherance of the university’s mission, depending somewhat on the connection of the representation to the professional curriculum and whether the lawyer receives outside compensation for the legal practice. Thus, in contrast with use of employer technology for the employee’s personal interests, as in the cases discussed above, the practicing law professor ordinarily is undertaking an activity that is integrated with his or her employment responsibilities.

Fourth, in each of the employer-employee cases, the privilege may be lost because the party seeking to use the information is the very employer that had obtained direct access to the information which the employee now wishes to recover and conceal after it already was revealed. By contrast, in the university-law school setting, the potential intrusion into the privacy of communications is an internal hazard from elsewhere inside the institution. Allowing outside third parties to penetrate into the university computer network and override the attorney-client privilege for information stored there would be an aggressive extrapolation. However, in the context of internal communications within a corporation, the court have held that undue dissemination of a communication beyond the lawyer and those agents of the client who are authorized to make decisions or speak for the client may forfeit the privilege by diluting

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79 In re Grand Jury Subpoena, 132 F. Supp. 2d 776, 779 (S.D. Iowa 2000); see also In re Seagate Tech., LLC, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (“The attorney-client privilege belongs to the client, who alone may waive it.”).

80 See supra notes 42–50 and accompanying text.

81 See infra notes 86–92 and accompanying text.
confidentiality. Thus, maintaining internal security over professional confidences is essential to put the privilege on its most secure footing.

Whatever the prospects for fending off outside requests for confidential client information in the law school setting, and we believe they are healthy, the employer-employee cases outlined above should set off alarm bells for institutions and faculty of legal education. At many law schools, the argument for protecting privileged communications with clients is less solid than it should be—precisely because the university has adopted a general policy that does not expressly guarantee privacy and that fails to strictly control access to electronic data even by university officials. Even if the protection of the privilege may be sustained against outside trespassers, the lawyer’s broader ethical duty to maintain client confidentiality applies to anyone outside the representation. Thus, whatever the implications for the privilege, practicing law professors are required by professional ethics to secure client information against prying eyes elsewhere in the university.

III. UNIVERSITY DATA PRIVACY POLICIES AND THE THREAT TO CONFIDENTIALITY WITHIN THE LAW SCHOOL

Based on our own unscientific survey of university data privacy policies through internet searches and discussions with law school colleagues around the country, we find that the substantial majority of universities and colleges do expressly afford some level of privacy protection for faculty, staff, and students in using computer systems. However, confidentiality of electronic data on university-owned computers and systems typically is circumscribed and contingent. University policies commonly allow retrieval of files and e-mail, even if not by contemporaneous monitoring, for various reasons and under

82 See Fed. Trade Comm’n v. GlaxoSmithKline, 294 F.3d 141, 147 (D.C. Cir. 2002) (holding that a company was obliged to “limit[] its dissemination of the documents in keeping with their asserted confidentiality”); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) (“Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege.”).

83 See supra notes 24-36 and accompanying text (discussing breadth of confidentiality requirement and the special subset of confidential communications within the attorney-client privilege).

84 Because of the non-random nature of an internet search to uncover university data privacy policies, because law school specific policies regarding confidentiality may not be available on-line, and because we have no wish to point an accusing finger at any particular institution, we have not identified any individual university with the descriptions of data privacy policies in the text above, nor have we included quotation marks around language and paraphrases drawn from the described policies.
various circumstances. Even when access is allowed only upon a particular showing of user abuse or exigency, the policies frequently confer authority on university officials or information technology staff to make the judgment whether access is justified. Such exceptions and authorizations to privacy rules are difficult to reconcile with professional duties of confidentiality.

Even more troubling, a significant minority of university policies begin from the stated premise that users of computer systems are not guaranteed or should not expect privacy, even if that formal disavowal of privacy is then qualified by other protective provisions in the policy. The principle that animates professional duties is, of course, precisely the opposite: that confidentiality must be preserved. Thus, as developed further in the next section of this article, university policy rhetoric that derogates privacy in electronic communications and documents is distressing and dangerous, even if other protections and restrictions on access prescribed in a particular policy restore a substantial measure of protection. Beyond the pressing need to protect professional responsibilities within the university, assurances of privacy in the exploration and expression of ideas should be appreciated as in keeping with the inquiring spirit of the academic enterprise.

For our purposes, university data privacy policies may be classified into three basic categories: (1) policies that strongly emphasize privacy and substantively afford a high level of protection to confidential electronic data; (2) policies that explicitly repudiate any guarantee of privacy for data; and (3) policies that may promise confidentiality, but then withdraw the protection by exceptions or by permitting specified university officials or technology personnel to gain access to the content in a manner that likely contravenes professional duties of confidentiality.

A. Privacy-Protective Policies

A minority of universities accords the highest level of privacy protection to electronic data and communications, largely equivalent to that of a reputable internet service provider. The policy may promise to uphold confidentiality in the same manner as that afforded to telephone communications and paper mail. The policy may state that individual users are the owners of the files they create and the messages they send, with rights of privacy to control access by others. The policy may expressly forbid the monitoring, observation, or reproduction of files or e-mails by anyone other than the intended recipient. In particular, the policy may direct that no one—university official or technology staffer—may access the contents of files or e-mail of any user without that user's prior consent.
Privacy-protective university policies tend to be textually grounded in the nature of the academic community. The policy may refer to principles of academic freedom, freedom of expression, or freedom of speech. The policy may explain that information privacy is integral to the free exchange of ideas within the university. The policy may profess reverence for a diversity of perspectives and values expressed in the academic institution.

Law schools affiliated with such privacy-protective universities are in the fortunate position of not needing to obtain any significant revision or updating of the university data policy. Still, to the extent such a policy allows access to be granted by certain university officials even under special circumstances, the policy begins to slide toward the third category described below. Moreover, as discussed in the next section of this article, law faculty still must ensure that the university’s protective actions match the policy words, including training and supervising information technology staff about professional confidences and the central role that such staff have in security of information.

**B. Explicit No-Privacy Policies**

At the opposite end of the spectrum, a small minority of universities follows the corporate employer model and explicitly warns users that they do not have an expectation of privacy in files and e-mail. Although such policies may assure users that active monitoring is not regularly performed by the university, these policies invariably reserve the right of university officials or information technology staff to examine files and intercept e-mail, especially if an individual is suspected of violating university policies or the law in the use of university technology or when evidence of other misconduct is believed to exist in the individual’s files or e-mail. Prior notice to the user may not be given and permission is certainly not required.

Such bare-bones-no-privacy policies are manifestly nconsistent with professional obligations of confidentiality. In both public proclamation and internal substance, such policies are simply intolerable for any law faculty, staff, or students engaged in or assisting with the practice of law. As discussed further in the next section, by conspicuously denying any guarantee of privacy for data—which would include not only electronic communications but files on computers and networks—such a university policy poses a continuing risk of embarrassment or worse for practicing professionals within the university.
C. Policies Protecting Privacy with Exceptions

Falling somewhere in between the two extremes, the standard university data privacy policy affirmatively purports to protect privacy but then allows various exceptions for certain situations or certain officials to interrupt the full enjoyment of that confidentiality. The policy may speak reverently of the privacy rights of computer users but then allow university access to files and e-mails whenever an individual is suspected of violating university policy or the law, whether related or unrelated to the use of the university technology. Although such policies may require some substantiation of misconduct or an emergency before access may be granted, a university office ordinarily reserves to itself the decision when such access is necessary and appoints itself to be the investigating party.

More often than not, a measure of privacy is retained by requiring permission from high level university officials, such as a provost or vice president, before access to a user’s files and e-mail is allowed. Still, in some policies, the power to examine files and e-mails is delegated to the department of information technology. In addition, a policy may permit a university employee’s supervisor to gain access to files, including e-mail, upon termination of employment. In any event, as also discussed further in the next section of this article, a lawyer simply may not permit an outside person, who is not under the lawyer’s supervision or control (or otherwise restrained by strict professional confidentiality standards), to have unrestricted access to client confidential information.

In the end, the professional rules governing attorneys, as well as professionals in other fields, demand that university encroachments into private documents and confidential messages be arrested. For too many law schools (and other professional schools as well), their university’s data policy as written stands as an obstacle to the professional duty to zealously protect confidential information. Moreover, a university policy that undermines privacy protections may invite opponents in litigation to challenge the privilege, which could embarrass law faculty, staff, or student practitioners and their clients or could cause delays and greater expense in resolution of disputes. Accordingly, university data policies must be brought into compliance with professional obligations.
IV. REVISING THE UNIVERSITY DATA PRIVACY POLICY TO PRESERVE PROFESSIONAL CONFIDENTIALITY

To ensure that legal practitioners within the law school may uphold their professional responsibility to protect confidential information, university data policies (or separate law school policies) should include five elements: (1) a public declaration that privacy is guaranteed or at least that professional confidences will be protected; (2) strict controls over internal access to data; (3) an opportunity to raise challenges to external requests for access to data; and (4) supervision and training of information technology staff regarding professional confidences, while still maintaining (5) appropriate protection of legitimate university interests.

A. Public Endorsement of Confidentiality in Files and E-mail

In the private commercial sector, employer monitoring of employee communications and data and the employer’s warning that no privacy is guaranteed may serve several recognized purposes, even if the intrusiveness of the means applied continues to be debated. The employer may wish to verify that employees are devoting their work hours to the purposes of the business. The employer may fear that any statement made by an employee reflects on the business and may affect its market position and profitability. Employees may be agents of the employer able to transact business and commit the employer to contractual obligations. Employees may have access to trade secrets or other proprietary information. Indeed, many private employers forthrightly discourage employees from making any personal use of business computers and electronic communications.

By contrast, while faculty are employees of the university, their assignment is not to single-mindedly promote the pecuniary interests of the employer. Because of the very “nature of universities,” Nancy Rapoport explains, “[f]aculty members are not ‘employees’ of the university in the same sense that other university workers are ‘employees.’” Faculty have a broader duty to the

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85 See generally Finkin, supra note 47, at 281 (outlining the reasons why an employer may wish to monitor); see also supra notes 43-44 and accompanying text.

86 See Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of Academic Freedom 33 (2009) (discussing the early role of the American Association of University Professors in challenging “this idea that faculty were employees serving at the mere sufferance of their employers” in an ordinary business enterprise).

common good or at least to the larger world of academics, which as the American Association of University Professors (AAUP) stated in its 1940 *Statement on Principles of Academic Freedom and Tenure*, “depends upon the free search for truth and its free exposition.”\(^8\) Moreover, faculty members usually do not transact any business on behalf of the university or serve as the university’s agents in contract negotiations. Students as well are involved in such communications using university technologies, and they plainly are not employees of the university.

Institutions of higher education have a distinctively different mission than commercial enterprises, a mission that demands less rather than more control of information and of the members of the university community who seek, analyze, and disseminate that information. Near the beginning of the last century, the AAUP articulated the three basic purposes of the university: “(1) to promote inquiry and advance the sum of human knowledge; (2) to provide general instruction to the students; and (3) to develop experts for various branches of the public service.”\(^8\) As Neil Hamilton writes, “[t]he university is the one community in the liberal intellectual system whose specific mission is the seeking, making, and disseminating of knowledge through unrestrained public criticism.”\(^9\)

The university’s unique mission can be advanced only in an environment in which there is respect for privacy and the dignity of the members of that educational community. A university or college is a community, within which the university administration often takes on a role akin to that of the government, obliged to respect the privacy and academic freedom of its members. A university computer data policy that withholds the protection of privacy effectively says that the faculty, staff, and students in the community cannot be trusted. And, as the United States Supreme Court has said with respect to academic freedom, “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust.”\(^9\) For these reasons, the academic freedom animating the university mission “applies with no less force to the use of electronic media for the conduct of research and the dissemination of findings and results than it applies to the use of more traditional media.”\(^9\)


More generally, Geoffrey Hazard and William Hodes explain that respect for confidentiality has a solid moral base in the nature of a free society. Confidentiality, they explain, “creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens.”93 Sissela Bok says that the “first and fundamental premise” for confidentiality is “that of individual autonomy over personal information,” thus respecting individuals and maintaining privacy.94 These principles of individual liberty and autonomy apply with even greater force to institutions of higher education, which should encourage the free exploration of the truth, including the autonomy that comes with confidentiality in private communications.95

Accordingly, beyond and aside from the special confidentiality needs of professionals practicing in a university setting, a university electronic data policy should be premised on privacy and include only limited exceptions for extraordinary circumstances.96 Each university data policy should begin with a clear and forthright declaration that users are entitled to a presumption of privacy in files and communications, even if such privacy cannot be absolutely guaranteed. With specific regard to electronic communications, the AAUP rightly advises, “[t]he basic standard for e-mail privacy should be that which is assured to persons who send and receive sealed envelopes through the physical mail system . . .”97 At the very least, a university policy that starkly announces there is no guarantee of privacy in communications and data on campus should be deemed unacceptable and replaced. Academic freedom, the ethical culture of

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95 For the many law schools affiliated with Catholic universities, assurance of a high level of privacy in personal communications is necessary to uphold the inherent dignity of each person. Catholic teaching affirms the moral weight of confidentiality, especially but not only in professional settings. See CATECHISM OF THE CATHOLIC CHURCH ¶ 2491 (U.S. Catholic Conf., 2d ed., Washington, D.C., 1997) (referring to “professional secrets,” including the duty of lawyers to keep confidences absent causation of “very grave harm,” and further saying that “[e]ven if not confided under the seal of secrecy, private information prejudicial to another is not to be divulged without a grave and proportionate reason”).

96 See AAUP Report on Academic Freedom and Electronic Communications, supra note 92, at 49 (“Every college or university should make clear, to all computer users, any exceptions it deems necessary to impose upon the presumed privacy of communications, whether in print or in digital form.”) (emphasis added).

97 AAUP Report on Academic Freedom and Electronic Communications, supra note 92, at 49.
higher education, and regard for basic human dignity demand that universities
set a higher standard than the corporate surveillance model.\textsuperscript{98}

In any event, privacy disclaimers in university policies contradict the
premises of professional confidentiality. As one student of corporate data
policies warns, “[i]f the policies make clear that the employee has no expectation
of privacy while using a workplace computer, then it is logical to establish a
presumption that privilege has been waived.”\textsuperscript{99} To be sure, notwithstanding a
university-wide statement that tells users they do not have an expectation
of privacy in electronic data, a court still may uphold the attorney-client privilege
for law school practices based upon the unique setting of the university\textsuperscript{100} or
concrete confidentiality measures that actually have been put in place within
the law school. But the fact that professional confidentiality ultimately may be
vindicated despite the university’s rhetorical denial of privacy is no reason to
overlook the foolishness of such a university declaration.

A university data privacy policy that announces to the world that computer
users within the university have no expectation of privacy sticks out like a sore
thumb. At a minimum, the university policy should include an express provision
that files and e-mail in professional settings within the university are subject to
special confidentiality treatment.

\textbf{B. Restricting Internal Access to Confidential Data}

Declaring that confidential data is protected, at least in professional settings
within the university, sends an important public message about privacy
expectations within the university. However, affirmation of privacy is no
substitute for actually protecting confidential data. In addition to a university
policy that informs the reader that privacy in electronic data is guaranteed, or
at least that professional confidences will be protected, the university must
establish (or allow the law school separately to establish) definite and
enforceable restrictions on access that create a truly confidential professional
environment. Because professional faculty, staff, and designated students may

\textsuperscript{98} In addition, universities are required under the federal Family Educational Rights and
Privacy Act to maintain the confidentiality of student “education records” and “personally
identifiable information,” which also precludes release to “other school officials” who are not
determined “to have legitimate educational interests” in receiving the information. 20 U.S.C §
1232g (2006). Thus, if a university’s disclaimer of privacy in electronic communications and files
were taken at face value, it would be unlawful for faculty to use the university’s computer
systems for reporting grades, discussing academic work with students, etc.

\textsuperscript{99} Losey, \textit{supra} note 39, at 1203.

\textsuperscript{100} See \textit{supra} notes 70–74 and accompanying text.
have files and communications that are protected by a privilege or other legally recognized protection, access to the content of their e-mail, files, and other data must be strictly controlled. Moreover, lawyers are obliged to do more than protect privileged communications; they are required by professional ethics rules to more broadly protect as confidential all information related to the representation.

Specifically, data privacy policies must be revised to exclude university officials and personnel from access to law faculty, staff, and student files and e-mail that may contain client representation information. Because a university official or information technology staffer is not a necessary party to a communication between a lawyer and client and ordinarily would not be acting in furtherance of the representation, allowing such a person to be “present” by monitoring or accessing files and e-mails would intrude into the confidentiality of the communication and could thereby destroy the privilege. The university provost, vice president, or other university official is hardly exempt from this required exclusion. Indeed, as Robert Kuehn and Peter Joy properly warn, “as a general rule, [law] school administrators not working in the clinic are not part of the law clinic firm, do not have an attorney-client relationship with clinic clients, and are not entitled to confidential client information unless the client has consented to the disclosures.” In sum, the university data policy, or a separate policy that governs professional schools, should prohibit access by anyone other than the practicing lawyers themselves to files and e-mail created and sent by law faculty, staff, and students involved in a practice experience.

When the university suspects wrongdoing by a law professor (or staff member or student) who is engaged in practice inside or outside the clinic, university officials may not simply retrieve files or communications without first resorting to a process that allows the practitioner to defend the client’s confidentiality. To begin with, no request for access should be presented without

101 See Williams, supra note 39, at 363 (“If the employer’s monitoring of employees’ e-mail use means the employer is ‘present’ during the communication . . . and the employer is not a necessary party to the communication . . . then the communication will not be ‘confidential’ and therefore will not be protected by the privilege.”).

102 Kuehn & Joy, supra note 10, at 109; see also ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1208 (1972) (stating that the lawyer-client relationship exists between the client and the lawyers in the clinic, not the members of the clinic governing body, including the law school dean and faculty, and the fact that the dean may be a lawyer does not change the ethically significant fact that he or she is outside that relationship); Rovner, supra note 1, at 1179 (“[M]ost law schools do not operate on the premise that the clinic includes non-clinic faculty and staff, nor should they.”); Tarr, supra note 3, at 1020 (“[L]aw school administration may not necessarily be allowed access to confidential client files without client permission.”); cf. MODEL RULES OF PROF’L CONDUCT R. 6.3 cmt. 1, (2010) (explaining that a lawyer who serves as an officer or board member of a legal service organization “does not thereby have a client-lawyer relationship with persons served by the organization”).
other credible evidence of serious wrongdoing by the person and a genuine need to review that person’s files as part of an investigation limited to that wrongdoing. If a legally recognized protection of confidentiality is then invoked on behalf of a client, the practicing lawyer is entitled to have that claim considered by an impartial person committed to the protection of client confidences. Ideally a confidentiality/privilege review would be conducted by a judge, but, under special circumstances and subject to the guarantees of a confidentiality agreement, another lawyer might examine the files and e-mails for the narrow purpose of separating out evidence of wrongdoing from client information.

For an accused person who practices inside the law school clinic, other lawyers within the clinic who would properly have access to client information would be well-situated to evaluate whether non-privileged evidence of wrongdoing is present in files or e-mails. Peter Joy and Robert Kuehn report that most law school clinics appear to be structured as a single law firm, with different subject matter clinics “treated as components of a single law office.”103 Thus, they conclude, “[a]s a practical matter, most clinical faculty have access to all of the client-confidential information in their clinic, and they may have access to confidential client information in other clinics sharing space and staff with their clinics.”104 If separate subject matter clinics do not operate as a single law office, then additional protections may need to be implemented before any review of confidential files or e-mails could be conducted.

For non-clinical faculty engaged in law practice, an alternative confidentiality review process would have to be established. In theory, the law school dean, who presumably would be a lawyer and bound by legal ethics standards, might be able to conduct that review, if the dean had no conflict of interest on the subject matter of the professional confidence. Because the review would be conducted only upon a prior showing of probable cause and necessity, would be for the discrete purpose of identifying evidence of serious wrongdoing by the faculty member, and would be subject to a confidentiality agreement, the dean’s review might not directly interfere with the attorney-client relationship or acutely compromise confidentiality. University administrators may prefer this approach, both because they are likely to be more familiar with the dean as an individual and because they may perceive the dean to be more responsive to the administrative interests of the university.

However, we find the prospect of the dean simultaneously supervising an investigation of faculty misconduct and conducting a review of potentially confidential client files or e-mails to be disquieting as a matter of professional

103 Joy & Kuehn, supra note 9, at 530 n.132.
104 Joy & Kuehn, supra note 9 at 551.
ethics, unwise as a matter of university governance, and likely to present a conflict of interest as a practical matter in most, if not all, cases. The dean is a prominent member of the university administration, he or she may not have the appropriate practice experience and familiarity with legal ethics standards to evaluate confidentiality claims, the dean’s intrusion into faculty files and e-mails may provoke controversy or later be seen as heavy-handed by a jury if the matter becomes enmeshed in litigation, and the dean’s involvement might be perceived to contradict the longstanding understanding that law school administrators are strangers to the attorney-client relationship between a law professor and client.105 For these reasons, if a confidentiality review of a faculty member’s files and e-mails is to be undertaken at all, the dean is an awkward choice as reviewer.

If any provision for internal access to e-mails and files without approval by a magistrate is thought necessary (and we doubt that it is), the law school community might be well served by designating the director of the legal clinic as the person to conduct a confidentiality review, even of non-clinical faculty who are suspected of serious wrongdoing. By virtue of the position, the clinic director will be a licensed lawyer familiar with the day-to-day practice of law, experienced in complying with legal ethics standards in the jurisdiction, and committed to the principle of attorney-client confidentiality. Even so, the clinic director would have to sign a confidentiality agreement and confirm that he or she has no conflicts of interest with the faculty member’s clients before conducting the confidentiality/privilege review.106

Absent a carefully designed policy for an internal confidentiality review, the only legitimate and the safest method for the university to gain access to a law professor’s files and e-mails should be a lawsuit for a declaratory judgment or an injunction to release the documents. In that ideal way, an impartial judicial actor with the power of judgment would evaluate the claim of attorney-client privilege for files or e-mails, with an in camera review if necessary.

C. Providing the Attorney with an Opportunity to Challenge External Requests for Access to Confidential Data

While the university must comply with legitimate requests for information from those outside the university, when the information sought includes the files or e-mails of a practicing law professor, staff member, or student, the

105 See supra note 102 and accompanying text.
106 See generally Joy & Kuehn, supra note 9, at 522–60 (discussing conflicts of interest in law clinic practice).
university ordinarily must delay responding and allow the target (or another lawyer within the confidential relationship) to assert a claim of privilege or other legally recognized protection. In particular, when a civil subpoena is presented to the university that seeks documents or e-mails created or sent by practicing professionals or their assistants, these persons need the opportunity to ask the court to quash that subpoena on the grounds of privilege or another legally recognized protection. Although a university practice of referring all subpoenas to university legal counsel is a positive step, careful adherence to professional ethics demands the policy be revised to give immediate notice of civil subpoenas to faculty, staff, and student assistants in the professional school, so that a court challenge may be raised by those professionals whose files or e-mails are sought.

To be sure, the university is likely to balk at delaying a response for information demanded by law enforcement, whether presented by a search warrant or otherwise, and prior notice to the target of the request may be difficult or even prohibited by law. Although having such requests forwarded to university legal counsel may provide some protection when overzealous law enforcement requests are made, the university may have to respond immediately when a law enforcement request is made, leaving the professional to raise objections of privilege after the fact. In so acting, the university would behave no differently than an internet service provider, which also is likely to respond without hesitation or prior notice to the user when law enforcement so insists.

Because public universities may be subject to other legal requirements, including open records or freedom of information laws, ensuring simultaneous protection of professional confidences may require careful threading of the needle. Still, the university should remember that compliance with freedom of information requests presumably means only that non-privileged and responsive information must be preserved and made available within a reasonable time. It does not mean—it cannot mean—that the university may ignore safeguards for legally recognized privileges or bypass procedures that allow for the confidential nature of files and e-mails to be ascertained and protected.\footnote{For a report on ongoing litigation about whether the Rutgers University legal clinic must disclose client information under the New Jersey Open Public Records Act, an outcome that likely would prevent clinics at a public university from continuing to represent clients, see Peter Schmidt, \textit{Open-Records Dispute Could Complicate Work of Public Law-School Clinics}, \textit{Chron. of Higher Educ.}, June 8, 2009. Amici briefs filed in the state appellate court by the Clinical Legal Education Association, the Society of American Law Teachers, the American Association of University Professors, and the Association of American Law Schools emphasize that law school based practices, such as a legal clinic, must offer clients the same confidentiality and professional autonomy as a private law firm. \textit{Id.} Brief for Clinical Legal Education Ass’n et}
University information technology personnel present a special case because, unlike university officials who may wish to investigate suspected wrongdoing, they need to gain access to computer systems and networks for the content-neutral purpose of keeping everything running smoothly. For the benefit of both practicing professionals and others within the university, technology support staff is responsible for ensuring the university’s computers, servers, e-mail system, and networks are working effectively and securely. Nonetheless, university technology staff must be subject to careful oversight and training by the practicing professionals within a professional school.

Some have suggested that university technology staff could be recognized as part of the legal practice support staff, akin to secretaries, legal assistants, and technology support at a law firm or corporate legal department. But technology support staff hired and supervised outside the law school do not comfortably fit in that category and should not ordinarily be regarded as part of the litigation “team.”

In a law firm setting, lawyers are obliged to maintain supervisory control over their legal assistants and to take steps to ensure that those legal assistants uphold the professional and ethical responsibilities of the lawyer. Rule 5.3 of the Model Rules of Professional Conduct provides:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:

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108 See Tarr, supra note 3, at 1023 (suggesting that “[t]he [university] technology staff can be considered part of the support staff of the law firm” but then emphasizing that lawyers in the clinic must ensure “that the staff is trained and understands the distinctive nature of the work of the clinic or client confidentiality”).

109 In the corporate legal department setting, the in-house lawyers represent only the corporation. Because the employer is also the lawyer’s client, questions about privilege and confidentiality require a somewhat different analysis, as the other employees are also agents of the client. Even in that setting, in-house corporate legal counsel are obliged to ensure that they maintain supervisory control over other employees with access to confidential information and that clear procedures are in place to secure such information. In any event, lawyers in the law school do not represent the university as a client, but rather represent other persons who are independent of the university and to whom the lawyers owe duties independent from the university. Thus, the corporate legal department model is inapposite.
(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer; [and]

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer . . . .

By contrast, the administrators and employees of the university who work in an information technology department typically are not directly subject to the supervision of the lawyers practicing within the law school. University personnel usually may not be disciplined or discharged by administrators or law professors in the legal clinic or elsewhere in the law school. Classifying university technology staff as outside personnel may be important so that lawyers in the law school regard them with greater detachment and exercise reservation when it comes to granting access to confidential data. Moreover, when technology personnel are from the university and not the law school, training regarding confidentiality may prove more difficult but must be addressed insistently.

University technology staff probably should be regarded as the equivalent, not of in-house support staff, but of out-sourced computer service providers. When a law firm delegates support service work to an outside company, the managerial and supervisory lawyers in the firm must adopt appropriate measures to ensure that these independent contractors also understand and adhere to professional ethical standards. Speaking specifically to use of an outside computer maintenance company, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility advises that the law firm “must ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality” of law firm computer files. Assuming adequate oversight and confidentiality measures, the use of

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110 MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009).

111 See Tarr, supra note 3, at 1023 (observing that training of technology staff “can be particularly difficult if the technology staff is from the university and not within the law school”).

112 ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (discussing the obligation lawyers have when outsourcing legal or nonlegal support services).

outside technology support personnel does not threaten the attorney-client privilege.

Accordingly, a deliberate and considered plan of instruction and supervision of university technology staff should be undertaken, with particular attention to the obligation not to disclose confidential information. Some legal clinics require anyone in a position to obtain access to confidential information to sign a formal confidentiality agreement. Indeed, with respect to outsourced computer support services, the ABA Standing Committee has said that the lawyer is “well-advised” to obtain a written “assurance of confidentiality.” 114 The university may already have written confidentiality agreements for its information technology personnel, which are signed by employees or included in their job description through an employee handbook. Practicing lawyers in the law school may wish to supplement that duty of general confidentiality by reminding university technology support personnel of the special protection given to client confidences and the great harm that may result if those confidences are not maintained.

For university technology personnel who do not work in the law school regularly, or otherwise have not developed a trusting relationship with the practicing lawyers, law school personnel probably should be present when university technology staff are working on computers, servers, and e-mail accounts. What amounts to reasonable supervision of university technology support staff will depend on the circumstances, such as whether the work being performed involves access to content, whether an individual technology staff person has been assigned to the law school and is known to be trustworthy, etc. When technology staff do properly have access to files or e-mail in doing their work, they should be instructed to avoid viewing content and to treat the content as strictly confidential. Importantly, unauthorized viewing, reproduction, or disclosure of the content of files or e-mail by technology staff should be treated as serious misconduct that results in discipline or discharge. While law school administrators and faculty may not have the direct power of supervision, their complaints of any abuse of confidentiality by university technology support persons must be taken seriously by their superiors.

114 Id. at *2.
E. Reasonable Protections for University Interests

If professional confidences are to be protected, a university or law school data privacy policy necessarily will be one-sided in favor of confidentiality. At the same time, the university does have legitimate interests in ensuring the proper operation of the computer network and in investigating and halting abuses of technology. Likewise, the university and law school as employers have an interest in the lawful and appropriate behavior of employees. Properly understood, and with a realistic appraisal of university needs, a robust protection for professional confidences need not be at war with the university’s legitimate interests in computer system integrity, proper use of university technology resources, and appropriate employee conduct.

Strong privacy protection does not inhibit the university from addressing problems and taking actions that do not involve the examination of the content of data. If, for example, an individual’s downloading or uploading of material involves excessive use of bandwidth, restricting the bandwidth available to that individual or terminating network use may be appropriate. Likewise, if the university discovers that someone is sending an excessive number of e-mails from a university e-mail account, suggesting that the person is either spamming or that his or her e-mail account has been hijacked by outsiders, university technology staff may address these problems by suspending the e-mail account, notifying the person of the problem, and directing the person to select a new password, all without any need to gain immediate access to the contents of communications.

Likewise, while taking away a faculty member’s privileges would raise other academic freedom issues,115 the suspension or termination of an individual’s use of computers, networks, e-mail accounts, etc., does not constitute a direct intrusion into privacy. Indeed, in extraordinary cases, the university could bar an individual from campus altogether. Thus, if ongoing misconduct is feared, the university remains empowered to prevent it. The preeminent confidentiality commitment would be upheld by ensuring that there would be no examination of the contents of e-mail, files, or other data of practicing professionals.

Moreover, when destruction or loss of information is reasonably apprehended, a data privacy policy might allow secure copying and storage of the contents of an individual’s e-mail and files.116 Thus, for example, a disk

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115 See AAUP Report on Academic Freedom and Electronic Communications, supra note 92, at 48 (“In exigent circumstances, a faculty member’s computer access might be summarily and briefly suspended during an investigation of serious charges of abuse or misuse.”).

116 In the Fourth Amendment search and seizure context, Orin Kerr concludes that the copying of data that “interrupts the course of the data’s possession or transmission” amounts to a “seizure.” Orin S. Kerr, Fourth Amendment Seizures of Computer Data, 119 YALE L.J. 700, 703 (2010). Thus, making a disk image of a faculty member’s computer hard-drive or copying his or
image could be made of the contents of the hard-drive of a computer or a back-up tape of the contents of an e-mail account. While access to the contents of the copies must remain subject to the protective rules outlined above, this approach allows evidence to be preserved and prevents any deletion by a person trying to conceal misconduct. Again, for purposes of protecting confidentiality, the most important step is to control access to content, until an opportunity is allowed to raise an objection and until a proper review is conducted into potential confidentiality.

Beyond these formidable tools available to the university to protect its information technology systems and to address suspected misconduct, immediate and unmediated access to a practicing professional's files and e-mails cannot be permitted. And there simply is no need for the university to gain access without a fair, deliberative, and impartial process for protecting possible professional confidences.

Anticipating possible objections to the revisions proposed in this article to a university's data privacy policy, we imagine that university officials might raise the specter that the university as an employer could be held liable for failing to monitor or to quickly and secretly gain access to the communications and files of an employee who may be engaged in misconduct, such as unlawful harassment of another employee or student. Importantly, as described above, the university is empowered to cut-off an accused harasser's computer or network privileges in response to a complaint. Typically, the university will already have evidence of the misconduct, in the form of the e-mails received by the complaining party. And the university may preserve possible evidence of harassing conduct by making a secure copy of files and e-mails. But immediate intrusion into employee files and e-mails, without an opportunity for a confidentiality review, is not required by law.

The most important steps for any employer to avoid liability under employment discrimination laws, or for other wrongdoing, should be taken on the front-end, by educating employees about what is appropriate conduct and by providing clear avenues for reporting misconduct. Every university today provides mandatory anti-sexual harassment training for employees. The university should regularly and clearly explain to everyone in the community the procedures for reporting harassment. The university should have an acceptable use policy for its technology systems. If a report of misconduct is received, the university then has a duty to act on the complaint and to stop any ongoing misconduct.

her e-mails into a special folder should be done only under exigent circumstances when a real and concrete fear of loss of evidence is present. Importantly, as Kerr notes again in the Fourth Amendment context, copied data is not actually subject to a “search” until the contents are exposed. *Id.* at 711-12.
None of this means that the university has a duty to invade the privacy of its employees out of fear that there may be a bad apple in the bunch. As Matthew Finkin has written, “the bald fact is that employers have no more a duty to monitor their employees’ e-mail, to assure that untoward messages are not being communicated, than they have a duty to place hidden microphones or cameras at the water coolers to detect sexually offensive remarks or leering glances.”

In two landmark decisions a decade ago, the United States Supreme Court held that, while an employer may be held vicariously liable for the discriminatory harassment of an employee by a supervisor, the employer may present an affirmative defense “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” The Court majority described the affirmative defense as involving “proof that an employer had promulgated an anti-harassment policy with complaint procedure,” which was not even necessary as a matter of law in every case. More recently, the Court has specifically articulated the affirmative defense as involving “a readily accessible and effective policy for reporting and resolving complaints of sexual harassment.”

Because the premise that any employer is obliged to spy on employees is counter-intuitive, not surprisingly there is little case-law that directly addresses the proposition. In Blakely v. Continental Airlines Inc., the New Jersey Supreme Court held that although an employer does have a duty to investigate complaints of sexual harassment, the employer did not have a duty to monitor an employer-provided on-line discussion forum. After noting that “[g]rave privacy concerns are implicated,” the court ruled:

To repeat, employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is

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118 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998). But see Burlington Indus., 524 U.S. at 770 (Thomas, J., dissenting) (expressing the fear that vicarious liability for sexual harassment would require “extraordinary” surveillance measures “that would revolutionize the workplace in a manner incompatible with a free society”).

119 Faragher, 524 U.S. at 807.


121 751 A.2d 538, 552 (N.J. 2000).
part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace.¹²²

Likewise, in *Sigler v. Kobinsky*,¹²³ a Wisconsin appellate court agreed that an employer did not assume a duty of care to a third person for an employee’s technology-based harassment simply because the employer allowed unsupervised access to the internet. Moreover, as a matter of public policy, the court noted that imposing liability on a company for the misuse of technology by an employee would be a “limitless” expansion of liability and would “turn employers into guarantors or insurers.”¹²⁴

In sum, what little case-law does exist confirms the common-sense understanding that, while business employers may choose to monitor employee electronic communications if notice is provided, there is no legal obligation to do so. Employers who choose to accord greater dignity to their employees by guaranteeing the privacy of communications do not thereby enhance their risk of liability to others.

When a university does learn of potential misconduct by an employee, whether by complaints made by others or otherwise, the university does have a legal duty to take appropriate action. If, for example, a student or employee were to notify the university of unlawful harassment by a faculty member, the university would be obliged to investigate and redress the situation. In such a situation, of course, the complaining party typically has the offending e-mail, so obtaining documents from the accused person is not an urgent person. Likewise, if

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¹²² *Id.* at 552. As further indication that an employer has no duty to monitor or secretly gain access to employee communications and files, the National Labor Relations Board has held that an employer’s unilateral imposition of e-mail monitoring of employees in a bargaining unit is an unfair labor practice and that the employer is required to bargain with the union about monitoring of employee e-mail. Cal. Newspapers P’ship, 350 N.L.R.B. 1175 (2007).

¹²³ 762 N.W.2d 706, 710 (Wis. Ct. App. 2008).

¹²⁴ *Id.* at 711. Indeed, one court has suggested that an employer faces a greater risk of liability by undertaking computer surveillance, on the theory that the employer thereby assumes a duty to aggressively monitor employees to prevent misconduct. In *Doe v. XYC Corp.*, 887 A.2d 1156, 1160-62 (N.J. Super. Ct. App. Div. 2005), an intermediate New Jersey appellate court held that an employer could be liable to an employee’s stepdaughter whose nude pictures were uploaded on the internet because the employer failed to take action after receiving complaints that the employee was using the workplace computer to view child pornography. By adopting a policy that allowed monitoring, the employer was said to have assumed a duty to do so with reasonable care and thus was subject to liability for failing to effectively police the employee and uncover his misconduct. *Id.* at 1166-70. The *Doe* decision is doubtful authority, however, as the New Jersey Supreme Court ruled in *Blakely* that an employer is not obliged to monitor employee communications, electronic or otherwise. The *Doe* court’s suggestion that an employer who reserves the right to monitor employee computer behavior must thereafter conduct such surveillance with care has not been followed by any other court, state or federal.
the university were to learn from other employees that a faculty or staff
member had been observed viewing child pornography in his office, the
university would be required to act on those reports, notwithstanding that the
faculty or staff member’s conduct involved computer activity that had been
guaranteed to be private. But the law does not require that the university
obtain immediate and unqualified access to the contents of faculty, staff, or
student files and e-mails to comply with its legal responsibilities.

In conclusion, while an employer who is placed on notice that an employee
has engaged in misconduct has a duty to prevent further misconduct, the
employer’s duty does not include surveillance or secret access to confidential
employee communications or documents. Moreover, the implausible prospect of
liability for failing to immediately seize files and e-mail messages of faculty,
staff, or students involved in legal practice is outweighed by the concrete risk
that the university will be held liable to clients of lawyers in the law school
because the university endangered the confidentiality of professional
communications and files.

CONCLUSION

Looking only at the specific problem of the attorney-client privilege, to say
that university data privacy policies that fail to explicitly protect professional
confidences are a ticking time bomb, as suggested by the title of this article,
may be hyperbolic. Unlike the “Surveillance Society” that has taken hold in the
American corporate workplace,¹²⁵ most American universities remain
committed to the principle of academic freedom and encourage largely
uninhibited exploration of ideas. The educational culture itself may foster a
greater expectation of privacy in use of information technology—
notwithstanding contradictory language in a formal university data privacy
policy. If an outside challenge ever were to arise to the privacy of e-mail or
documents generated on university-owned equipment or networks in a legal
practice in a law school setting, the different mission and environment of the
typical university, as well as the expectations of clients, should bolster a
defensive claim of attorney-client privilege.

Nonetheless, the practicing lawyer’s ethical mandate goes well beyond
assuring that the privilege is preserved for that subset of confidential
information that consists of client communications. More broadly, the lawyer is
bound to protect the confidentiality of all client representation information and
to prevent any access by strangers to the attorney-client relationship. And, in

(discussing how lawyers have to “Cop[e] with the Surveillance Society”).
In this respect, university data privacy policies and practices may (and many do) endanger the security of those professional confidences.

Beyond posing some threat to the attorney-client privilege, a university data privacy policy that is tone-deaf to professional standards is disheartening. If a university policy expressly rejects expectations of privacy in electronic communications and files, it stands in direct contradiction to the basic premise of confidentiality at the heart of professional responsibility. And, to the extent that the university permits access to electronic files or communications by officials or personnel other than those professional faculty, staff, and students who are part of the legal representation, the breach of confidentiality is not merely theoretical.

As a matter of some urgency, each university should update its data privacy policies and practices so that faculty, staff, and students engaged in practice inside professional schools are able to perform their educational and professional service duties in an ethically responsible and legally mandated manner. Each university (or separate law school) data privacy policy should be revised to affirm a reasonable expectation of privacy, to restrict internal university access to confidential information, to ensure an opportunity to raise objections to external requests for information, and to instill a culture of confidentiality in information technology staff, while still including reasonable measures to protect the legitimate interests of the university.
E. David Smith:

Lawyers are already sufficiently regulated. The clients are protected from every conceivable harm that lawyers could do. Each state has sufficient regulation. We do not want any federal regulation of attorneys.

I oppose any measures to regulate attorneys at the federal level and any increase in regulation at the state level.

Thank you.

E. David Smith
SMITH & ASSOCIATES
Elizabeth Tarbert:

Dear ABA Commission on Ethics 20/20 Members:

The Commission requested comments on the issue of lawyers' use of Internet based client development tools. The Florida Bar Standing Committee on Advertising has adopted Guidelines on Social Networking Sites and Guidelines on Video Sharing Sites to provide guidance to Florida Bar members on using social media for client development. Additionally, the Florida Bar Professional Ethics Committee has adopted Florida Ethics Opinion 00-4 regarding practicing law over the Internet and Florida Ethics Opinion 07-3 regarding unilateral communications by prospective clients, including via the Internet.

Additionally, although not affiliated with The Florida Bar, Florida's Judicial Ethics Advisory Committee has adopted Florida Judicial Ethics Advisory Committee Opinion 2009-20 regarding judges "friending" lawyers via Facebook and Florida's Mediator Ethics Advisory Committee has adopted Florida Mediator Ethics Advisory Opinion 2010-001 regarding mediators "friending" lawyers via Facebook.

Thank you for the opportunity to provide this information and to be of service to the Commission. If you have any questions, please do not hesitate to contact me.

Sincerely,

Elizabeth Clark Tarbert
Ethics Counsel
The Florida Bar
Vien Ton:

Questions Concerning Online Social and Professional Networking Services

Question: Under what circumstances should the Model Rules of Professional Conduct govern a lawyer’s participation in professional and social networking sites, given that such activities often have both a personal and advertising purpose? (See Part II.A)

Reply: As the Commission has recognized, the line between personal and professional activities is blurring in the age of the social web. Social networking is becoming an increasingly important way for a lawyer to reach out to not only people in his personal network, but also his professional peers and existing as well as prospective clients. It is the intention of the lawyer that matters, not the method with which he chooses to communicate his message. While one can never truly know the lawyer’s intention, a good indication of whether a message serves an advertising purpose is the inclusion of a call to action designed to solicit the formation of an lawyer-client relationship. Without such a call to action, the risk of message dilution to the intended audience would outweigh whatever small benefits the lawyer expected to gain from the message. The Commission could provide guidance on the extent to which a call to action constitutes client solicitation and, as a consequence, falls under the rubrics of Article 7.

Question: Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers’ use of networking sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 7.2 (See Part II.A.1), 1.18 (See Part II.A.2), 8.4(f) (See Part II.A.3), 4.2, or 4.3 (See Part II.A.4), or the Comments to those Model Rules in order to explain when communications or other activities on networking sites might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission propose?

Reply: It is very difficult -- if not impossible -- to foresee what web technologies will be available in the next few years and how people will use those technologies. Twitter stands as a testament to this challenge. What is more profound is the widely-recognized premise that this is just the beginning of the social web evolution. It would be exceedingly difficult to craft and enforce rules that, when conceived, only took in consideration the then current state of technology. By the time those rules are implemented by the ABA and adopted by the state Bars, the rest of the world will have moved on. Recognizing the difficulties of keeping up with modern technologies, it would be beneficial for both the Commission and the lawyers whose interest the ABA represents to keep open a channel for communications. White papers dealing with the most pressing and current ethical issues would be an effective way for the Commission to provide guidance to lawyers who, as hard as they try, are also having a tough time keeping up with said modern technologies.

Questions for Blogging and Discussion Forums

Question: Under what circumstances should the Model Rules of Professional Conduct govern a lawyer’s participation in blogs, given that such activities often have both an advertising and non-advertising function?

Reply: Blogs present a similar challenge as social networking sites -- the delineation of
where personal and professional communications end and where advertising begins is not always clear. In addition, there is a growing trend among young professionals to use blogs as a means to communicate with their friends, professional peers, potential employers and customers. In many ways, the parties involved are better informed than before because of the increased awareness -- all made possible by blogging technologies. The legal profession is, in many instances, not dissimilar to other professions when it comes to using blogs for personal and professional ends.

The analysis proposed for determining whether a lawyer’s participation in networking sites constitutes advertising, i.e., the inclusion of a call to action designed to solicit the formation of a lawyer-client relationship, could also be applied to blog communications. Fortunately, in most cases it is easy to determine if a blog communication constitutes client solicitation by looking at the overall context and message of the blog. If that is indeed the case, then the lawyer needs to follow the rules of Article 7.

**Question:** Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers’ use of blogging? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

**Reply:** See the reply in response to the same question concerning Social and Professional Networking Services.

**Question:** Can a lawyer create online discussion boards without disclosing that the discussion boards serve a client development function? If lawyers leave comments on such discussion boards or on blogs, are those comments subject to the Model Rules of Professional Conduct? Should the Commission offer a policy statement or white paper that sets out certain guidelines regarding lawyers’ use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

**Reply:** Discussion fora are a popular way for people with common interests to gather and discuss matters that are important to them (and some other times, just for entertainment’s sake). Our experience with online fora is that if there is an ulterior motive, it usually does not take long for that motive to surface. There currently exist several ways to determine the owner of a website, one of which is to perform a Whois Lookup on the domain name. However, visitors to a forum typically do not perform this check prior to participating in it. Even so, if the forum was created solely as a client development tool, it would not serve the lawyer’s pecuniary interest until he discloses the fact that he is the person behind the forum, or that he is a practicing lawyer. Until then, potential clients wishing to engage a lawyer would not know whom to contact. When the lawyer initiates the communication, it would necessarily fall within the purview of Article 7. Therefore, the Commission should not have to amend the Model Rules specifically to address these types of forums. Finally, in our opinion, lawyers who leave comments on blogs or forums are already covered under Article 7.

**Question:** When a lawyer uploads documents to websites, such as JD Supra, are those
materials and the surrounding information regarding those materials governed by the Article 7 Rules? Should the Commission offer a policy statement or white paper that sets out certain guidelines regarding lawyers’ use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.6, 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

Reply: As stated before, it would be more effective for the Commission to focus on the intention of the lawyer rather than the method with which he chooses to communicate. JD Supra and other sites like it serve great purposes, such as to educate the public and other lawyers on the latest developments of the law or to provide relevant professional writings by lawyers, with the latter giving more color to the lawyers’ professional profiles. However, as the Commission has recognized, the risk of misleading existing and prospective clients does exist. That being said, there are rules on the books that deal with this topic, e.g., Model Rule 7.1 and copyright infringement laws. While we recognize that, in certain rare cases, the clients might be misled, we urge the Commission to err on the side of allowing more information to be published rather than the opposite. With the spreading of information, a side benefit is that the public and other lawyers are better able to recognize unattributed works, which act, in and of itself, gives rise to significant consequences to the professional reputation of the lawyer who published them.

Questions Concerning Paying for Online Advertising, Referrals, and Leads

Question: Should the Commission offer guidance on whether pay-per-click and pay-per-lead arrangements comply with Model Rule 7.2(b)? If so, should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines on this subject? Alternatively, or in addition, should the Commission propose amendments to Model Rule 7.2(b) or its Comments that would clarify when a lawyer’s payment for online advertising or other new forms of referrals might violate the Rule? Or should the Commission propose more fundamental amendments to Model Rule 7.2(b) that would re-conceptualize the purpose of the Rule in light of these new forms of advertising?

Reply: Web marketing is becoming an indispensable tool for generating business in every modern industry and profession, the legal profession included. To existing and prospective clients, it would seem that the legal profession is out of touch with the modern way of conducting business development if lawyers are prevented from using web marketing altogether. As the Commission has mentioned, the public now relies on the Internet for information about legal services; and to the extent that web marketing serves the purpose of providing an important component of that information, it would have a deleterious effect to the public knowledge if lawyers were not allowed to inform the public of their existence and the services they provide.

In addition, we implore the Commission to consider the economic effects on solo and small-firm lawyers, who increasingly rely on web marketing to bring in clients. Unlike large firms, these lawyers do not have the budgets to fund a client development department whose sole mission is to generate business for them. Web marketing provides a more level playing field where solo and small-firm lawyers, in essence, outsource a major component of client development to companies that frankly are better equipped to do so. However, recognizing that the potential for client confusion might
exist, guidance from the Commission on the extent of the disclosure needed -- of the relationship between a lead generator and an attorney -- would be welcomed by the public and those lawyers who wish to comply with the spirit of the Rules.

Questions Concerning Lawyer Websites

Question: Should the Commission recommend amendments to Comment 2 of Model Rule 7.2 to clarify which types of websites are, in fact, subject to the restrictions contained in the Article 7 Rules of the Model Rules of Professional Conduct? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites? (See Part II.D.1)

Reply: A prominent feature of Web 2.0 (and beyond) is the explosion of different types of websites -- to the extent that some of them could even be called websites. Instead, we now have social graphs, social communications, communities, software as a service (SaaS), platform as a service (PaaS), cloud computing and storage, etc. As soon as there are rules defining what something is, something else that defies those rules comes into existence. At the end of the day, however, lawyers still need to communicate with existing and potential clients. It is then, the types of communications and the attorney’s intention behind those communications that should determine whether something should fall within the purview of Article 7. Guidance from the Commission regarding the types of communications, regardless of the delivery methods, that are subject to Article 7 rules, would be beneficial.

Question: Should the Commission propose amendments to Model Rule 1.18 or its Comments to clarify when communications through a website might trigger a lawyer’s ethical duties under that Rule? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites? (See Part II.D.2)

Reply: Our opinion remains that it is difficult to predict where web technologies will take the practice of law in the future. It would be more effective to offer guidance on the types of communications that Rule 1.18 covers rather than the modes of communications. Therefore, an open dialog between the Commission and lawyers who wish to integrate web communications into their client development toolset would serve both sides well. To this end, regularly updated Q&A web pages and white papers, using common day-to-day examples, would be important in keeping both lawyers and the public informed on the topic. Also, a feedback mechanism would keep the Commission informed on the latest ethical challenges that lawyers face as they increasingly conduct their practice of law over the Internet.

Question: An ABA Formal Opinion addresses issues arising from websites that contain information about the law. Should the Commission offer additional guidance in this area, such as amendments to Model Rules 4.1(a) (prohibiting false statements of material facts or law to third parties), 7.1 (prohibiting a material misrepresentation of law in advertisements), 8.4(c) (prohibiting misrepresentations), or the Comments to those rules? In addition or as an alternative, should the Commission offer any other form of guidance on this issue? (See Part II.D.3)

Reply: We are of the opinion that the Model Rules, as they currently exist, adequately protect the public in this regard. If anything, the Commission should encourage lawyers
to publish more information on their websites about their areas of knowledge. The public will stand to benefit more from the abundance of legal information than from the lack of it.

**Question:** Should the Commission clarify the extent to which lawyers can post descriptions on their websites about current or past legal matters or the identity of current or past clients? If so, what guidance should the Commission offer? Should guidance take the form of a proposed amendment to Model Rule 1.6 or its Comments? (See Part.II.D.4)

**Reply:** To the extent that the information is already publicly available through other legal channels, lawyers should not be disciplined for posting this information. However, recognizing the sensitive nature of certain types of legal matters, lawyers should respect the wishes of their clients and remove information that the clients do not want published on the lawyers' websites. It is usually in the lawyers' best self-interest, professionally and economically, to extend such courtesies to existing and prospective clients.

**Question:** With regard to all of the above questions, to what extent does the First Amendment limit the application of the Model Rules to these areas of lawyer conduct?

**Reply:** We respectfully leave the comments to this question to First Amendment scholars, except to bring the Commission's attention to the case of Alexander v. Cahill, 598 F.3d 79, (2d Cir. 2010), cert. denied, 562 U.S. ___, (2010) (No. 10-203).

As a startup company trying to build a transparent online marketplace for legal services where prospective clients can research and engage verified attorneys, we welcome feedback from the Commission, practicing attorneys and the public alike on how we can provide the best lawyer-client engagement experience possible -- while diligently following the ABA Model Rules and their States' counterparts.

Respectfully submitted,

Vien Ton  
CEO & General Counsel  
LawNovo, Inc.

November 4, 2010

Via E-Mail (to veran@staff.abanet.org)
Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street
15th Floor
Chicago, IL 60654-7598

Re: ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies

Dear Ms. Vera:

I am writing to submit a comment concerning the Commission’s study of legal ethics as it pertains to attorney use of social media and Internet-based client development tools. Though the September 20, 2010 ABA memorandum addresses a number of issues, I am confining my comments to attorney blogs.

I am not sure bar associations and disciplinary commissions truly understand how attorneys use blogs to advertise and communicate with potential referral sources or clients. In my view, blogs do not raise any new ethical considerations and do not merit any special sort of rules or guidance. Attorneys are charged to honor client confidentiality and follow other timeless rules, such as communicating with parties they know to be represented by counsel. Blogging doesn’t really change this in any meaningful way.

As an attorney who has been in private practice for 13 years, I have received advice from countless other lawyers and judges on how to market effectively. The notion of attorney marketing or advertising is, frankly, repulsive to a great many of us in the profession, but with
the sheer number of attorneys practicing and with client demands for greater responsiveness and specialization, it is critical to maintaining a profitable practice.

I have tried a great many marketing initiatives over the years, and from my experience, blogging poses the lowest risk of ethical considerations. In fact, networking or “leads” groups (like BNI) pose a significant ethical problem, in my view, but have received scant attention from disciplinary commissions. (As a point of reference, I contacted the Illinois commission’s ethics hotline, and the commission was dumbfounded on how leads groups even worked and had apparently not even considered conduct guidelines before.) Simply put, blogging has been unfairly singled out because of the medium in which it occurs.

The blog I maintain is www.non-competes.com. I write on a very specific area of the law and provide case, news and legislative updates. I invite you to visit my site. In view of what I consider to be a heightened sense of paranoia over blogging ethics, I have posted disclaimers and notices on the right-hand column of my blog. You will see that I have a section on website user “Comments”, a specific policy on E-Mails, and what potential clients must consider if they seek to engage my services. I’ll hazard to guess that this prophylactic information is far more extensive than what most prospective clients obtain when they first meet an attorney or run into a social acquaintance who happens to be a lawyer and provides them some “informal advice.”

Since I started my blog at the end of 2008, I have received about 56,000 visitors to my site. I have made numerous contacts with other young legal professionals who practice in different states and have referred potential clients to them. These other attorneys are among the best and brightest I have met in my 13 years of practice, and the relationships I have formed have been incredibly valuable. My blog has enabled me to gain a substantial amount of credibility with judges and adversaries because they know I am knowledgeable about my particular practice area. This, in turn, leads to better and more cost-effective client service.

I also have obtained dozens of new clients who are readers of my website. By and large, these clients are the most well-informed and prepared that I have had in my legal career. They understand, because of my website, that they cannot obtain legal advice without a specific client engagement letter and they know that any discussion of legal fees has to take place at the earliest possible time. These clients appreciate the fact that I am comfortable discussing attorney fees, which is a subject most lawyers are scared to even broach with a client directly. Though I have not run any numbers, I suspect that many users of my website have gained a great deal of background information on the law without engaging me. I consider this a public service, which benefits an unknown number of people. Based on the e-mails I have received (at least one per day) from other lawyers and clients who never hire me, I am confident that I don’t even realize the benefit my blog serves.

I think it would be fundamentally unfair for any commission or bar association to over-regulate the use of attorney blogs. Anyone who misuses social media or Internet-based tools is subject to discipline under the existing matrix of rules. Regulating blogs won’t preempt potential ethical problems. It will deter attorneys from building their practice areas and from developing tools from which clients gain great benefit.
I hope you consider this comment, and I remain available to discuss with you at any time. Thank you.

Very truly yours,

Clingen Callow & McLean, LLC

By: ____________________________

Kenneth J. Vanko

KJV:acb
Please remember as these issues are deliberated that the rules and the technical systems have to work not only for large firms with big business or governmental clients, but for solo and small firm practitioners with ordinary people as clients. The available resources, the economics involved, and the technical sophistication of the people (both attorneys and clients) and their systems are quite different. What is reasonable and practical for a large law firm representing a major corporation, both attorney and client with in-house IT staff, and both with huge budgets may be out of the question for a solo in a small town representing an individual or local small business, both using gmail and off the shelf computers.

The ethical rules are going to be (one assumes) the same in both contexts, but the practical realities are worlds apart. It would be a major blow to a small firm, already operating without the physical, financial, and personnel resources of the large firms, to face rules that effectively prevented them from using basic technology to communicate with their clients and to market.

Easy use of e-mail, voice mail, texting, cell phone calls is important to these lawyers, who are often (because there is no army at the office when they are on the move) communicating on the run and trying to manage their practices without much (or even any) office support staff, and no fat in the budget at all (biglaw rates not being available in this world).

David Verlander
McLeod Verlander
Attorneys at Law
Richard Vetstein:

Please accept my comments on the Commission on Ethics 20/20 regarding the ABA’s consideration of ethical rules governing online marketing for attorneys.

I started my own small law firm in May 1999 after practicing for 12 years in big and medium size firm settings. One of the first marketing strategies I employed was to start a law blog, The Massachusetts Real Estate Law Blog, found at www.massrealestatelawblog.com. My blog’s traffic and readership has grown exponentially since starting, now averaging over 35,000 monthly page views and more importantly generating over $100,000 in client referral income. Lawyers in my office write the majority of articles, and often we have guest articles by folks in the mortgage and real estate business. I’ve received hundreds of comments and compliments on the blog from readers, i.e., consumers of legal services. I’m also proud to say that several reporters from the Associated Press, Wall Street Journal, Boston Globe, and Massachusetts Lawyers Weekly are among my subscribers. These reporters often call on me for commentary regarding current real estate issues.

I am also a huge proponent of social media for marketing, linking my blog to Linkedin, Facebook, and Twitter. Without a huge marketing budget, social media enables a small firm lawyer like myself to compete for clients against firms with much more significant marketing resources.

With that background, my concerns with the ABA’s possible attempt to regulate attorneys’ online activities are as follows:

- The ABA’s proposed actions will cause a chilling effect on a lawyer’s right to commercial free speech.
- The consumer will suffer because there will be less information to find about attorneys, FAQs and articles about the law, and how lawyers can help them.
- Ethics burdens on marketing will unfairly hurt solos, GPs and lawyers in small and mid-sized firms like me, which heavily use online marketing. The ethics rules will not affect BigLaw firms that have hundreds of thousands of dollars to spend on costly offline marketing initiatives.

Aside from common sense, we don’t need any more regulation or ethical constraints on our First Amendment right to sell our services. What we do need is the ABA to recognize that social media and online marketing should be encouraged and comprehensive teaching on how to use the technology effectively and smartly without getting yourself into trouble.

We all went to college and law school. Can’t we be trusted to use social media in an appropriate manner? Or are lawyers perceived by their very own leadership as that incompetent?

Thank you, Richard Vetstein
Rebecca Weinstein:

Comments Re: "Lawyers’ Use of Internet Based Client Development Tools."

To ABA Commission on Ethics 20/20:

In reading your memo it strikes me that your concerns and prospective action come a little late in the game. There are now millions of posts by lawyers, hundreds of thousands of websites, thousands of blog, etc. posted on the internet – which cannot be removed. Requiring lawyers to use the same precautions (i.e. disclaimers) as they would in any other form of advertising or communication seems reasonable. Beyond that you are dealing with a train that has already left the station.

Furthermore, it is a fact, and a necessary course of action, that the legal profession must adapt to technology with the rest of business. The internet permits the vast majority of lawyers, who are not partners in big law firms, to have a reasonable opportunity to make a living practicing law. We do not want a monopoly on law practice – which some might argue we already do to a certain extent. Law schools are graduating thousands of new lawyers a year. Firms are downsizing. There is significant research that women lawyers are passed over for partnerships because of issues such as maternity leave and child rearing (whether legal, or not). Fewer associates are being hired, and even fewer have job security with potential partnerships. Layoffs are staggering. Lawyers, once salaried associates with benefits, are now contract workers being hired per job. Practicing law is no longer, by any stretch of the imagination, a secure profession. Dispute the fact that the time and money invested is substantial. Some are even considering (the ABA included) that prospective law students take another route and current ones drop out – as it is far too risky to get into the business. This is not what we want for the profession, or the image of the profession.

Acknowledging the concerns the ABA has had and still has about advertising, tying the hands of lawyers for the sake of an image that is not even recognized by the general public, seems counterproductive, to say the least. Frankly, the public does not think more highly of lawyers because they refrain from promoting their services. If anything it makes finding the right lawyer much more difficult. One might argue that some advertising as gone too far. It is ironic that certain types of personal injury television commercials (for instance) are permitted – despite the potential tarnish to the image of the legal profession – and we are debating the ethics of providing useful information to prospective clients on forums, etc.

The internet is an opportunity to level the playing field for lawyers, and to bolster the reputation of the profession – by providing substantive and genuinely helpful information to the public - as well as offering prospective clients the opportunity to actually get to know a lawyer before hiring them. For most average people, hiring a lawyer is a mystery. They might as well throw a dart at the phonebook. How does this serve the profession or the image of the profession?

I am not suggesting the internet become a free-for-all for lawyers to market themselves without restraint. But the ABA should tread lightly. Since it is already too late to curtail the activity in any substantial way, perhaps it is more prudent to address problematic issues as they arise, rather than put a stranglehold on the most important tool in business today.
In addition to the internet changing the way lawyers market and advertise it is changing how they do business. “Virtual lawyers” are becoming more common and new alternatives for hiring lawyers are available.

A new service BidsFromLawyers.com (www.bidsfromlawyers.com) is a service free to potential clients where those clients can post legal work that needs to be performed, and lawyers can bid on the jobs, providing a work prospective summary and competitive bid price. Clients also review and rate the lawyers they work with, providing the community with a more objective view of the lawyer’s performance – rather than handpicked testimonials or pure advertising. Certainly sites like BidsFromLawyers.com will advertise, and whether they do will be outside the scope of the ABA’s ethical rules. In fact, this kind of service essentially does the advertising for the lawyer – getting around much of the concerns the ABA has mentioned (for better or worse). The ABA informs that it will be addressing lawyer ranking services in future opinions. This will be interesting, but if the rankings are done by private companies (not law firms) and clients, which is the trend, the ABA is unlikely to have much power or influence over the practice.

The bottom line is that law practice is changing, and must change. Of course people will always need lawyers, even if marketing and advertising restrictions on the internet are rigid. But one would assume the ABA does not want to inadvertently create a big firm monopoly, where small firms and private practitioners simply cannot access clients because without a big firm reputation and history, the internet is the primary way to reach out, and it is restricted.

Attached is a draft white paper on Social Media Marketing for lawyers that I am working on (precisely the issue you are concerned with). I can only provide it in the state it is currently in. I would be happy to provide you with the completed paper when it is finished.

Thank you very much for your consideration.

Rebecca Weinstein, Esq.
Director of Lawyer Division
Social Media Marketing for Lawyers

What is Social Media Marketing (SMM) and why do lawyers need to use these tools in the current legal climate? The growth of “social media,” such as facebook, twitter, blogging, and rating products and services on the internet, has impacted the way people and organizations communicate. SMM programs use these tools and center on efforts to create content that attracts attention and encourages readers to share. This is particularly useful for lawyers, as it focuses advertising on issues. It permits lawyers to provide something valuable to the community and in doing so foster self-promotion.

The business of practicing law is changing. Though there are many reasons for this, an important one is simply greater competition, the number of practicing lawyers increasing each year. Also, with the pervasive use of the internet average people are far more knowledgeable, or at least believe that they are, and are more inclined to scrutinize practitioners rather than trust based merely on a lawyer’s status. Lawyers are also now reviewed and ranked on hundreds of websites. Regardless of whether these reviews and ranks are an accurate reflection of a lawyer’s performance and abilities, they are taken seriously by potential clients and impact hiring decisions, for better or worse.

The Lawyer Pool is Changing

The number of people taking the Law School Admissions Test rose 20 percent between 2008 and 2010, and between 1995 and 1997 the number of ABA-accredited law schools increased by 11%. Yet in 2009 the Bureau of Statistics reports that there were 22,200 job cuts in the legal sector. According to legal consulting firm Hildebrandt Baker Robbins almost 27 percent of the 65,000 non-partner lawyer jobs in the nation’s top 200 law firms, or 17,500 people, could be

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eliminated or shifted to lower-paying assignments in the next five to seven years\(^4\). Big “white-shoe” law firms have typically made up 28 percent of recent law school grads' employment, but they have slashed their associate programs in 2009 and 2010, rescinding offers to thousands and deferring the start dates of thousands more.

Those who do land jobs with big firms have starting salaries of around $160,000. But the majority of entry level lawyer jobs pay between $40,000 and $60,000, with these lawyers carrying well over $100,000 in law school debt - calculating approximately 60 percent of the paycheck going toward student loans\(^5\). Between 1975 and 1995 the inflation-adjusted average income of 75% of U.S. lawyers dropped\(^6\).

Clearly, if you haven’t felt the crunch as a lawyer, you are in the minority and the odds are, you will. The image of the fat-cat lawyer is largely the product of movies and television. But everyday lawyers have to assume part of the blame. The wealthy elitist image has been cultivated by firms that want to appear powerful to impress clients. It brings in wealth and justifies high fees. Unfortunately, for all but that minority of lawyers who actually represent the wealthy and are able to maintain high fees, it does the profession a disservice. Most legal clients are average people and average businesses who are intimidated by this image and find lawyers inaccessible, or worse.

**Lawyer Reputations**

Hardly a scientific poll, but one blogger on Yahoo Answers responds to the question “Why do people hate lawyers? Is it because they are considered corrupt?”

> Lawyers are parasites on all of society. I have seen good quality industry put into bankruptcy by lawyers filing bogus suits -- just to line their pockets. Even Jesus did not like Lawyers. They operate like tape worms to bring down the standard of living of all societies while producing nothing and lining their own pockets!

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Even if this perspective is a bit extreme, the point is taken. Lawyers are not beloved and this does nothing positive for the pursuit of engendering loyal trusting clients or engaging new ones.

The notion that lawyers are stuffed shirts with superior attitudes, and that they are corrupt, are two contradictory yet equally prevalent perspectives on lawyers. The former with a long history perpetuated by the profession as a whole, and the later most likely a more modern interpretation resulting from tort injury television commercials, and then supported politically by those who support tort reform. Outside influences notwithstanding, these perceptions are largely the progeny of lawyers themselves -- in large part because of the attitudes of lawyers toward advertising, and what we now call marketing.

Legal Advertising

The controversy over legal advertising in the U.S. goes back 100 years. Before the Canons of Professional Ethics were published by the American Bar Association (ABA) in 1908, advertising within the legal profession was common. The ABA believed that lawyer advertising was unprofessional and shined a negative light on the profession of law -- and with the drafting of the Canons, legal profession advertising became almost non-existent. In 1972 a battle began over this ban, and in 1976 the Supreme Court essentially lifted the ban based on trade and commerce laws and freedom of speech. States were still permitted to regulate for true and misleading information, but the tide had changed. This led to a boon on advertising, mostly on television by tort lawyers advertising their services for slip and fall cases, medical malpractice, and against the pharmaceutical industry.

The battle over legal advertising continues today, though clearly change has been dramatic. Despite complex regulation in every state and ABA standards that attempt to maintain a certain image and “ethical standard” for the profession, simple common sense applications and disclaimers make advertising permissible and increasingly prevalent. Frankly, given the state of oversaturation of the market as described above, legal advertising is all but mandatory for a successful practice. And with advances in technology most lawyers at least market themselves with websites. Though website marketing is now hardly sufficient and some lawyers are expanding their internet and information technology presence in other forms, notably Social Media Marketing -- currently the gold standard of online marketing and perhaps a new requirement for all online marketing.

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The Internet and Social Media Marketing

SMM is a recent addition to organizational integrated marketing communications plans. With the emergence of Web 2.0, the internet provides a set of tools that allow people to build social and business connections, share information, and collaborate on projects online. The growth of “social media” has impacted the way organizations communicate. SMM programs usually center on efforts to create content that attracts attention and encourages readers to share it with their social networks. A corporate message spreads from user to user and presumably resonates because it is coming from a trusted source, as opposed to the brand or company itself.

Social media has become a platform that is easily accessible to anyone with internet access, opening doors for organizations to increase their brand awareness and facilitate conversations with the customer. Additionally, social media serves as a relatively inexpensive platform for organizations to implement marketing campaigns. Organizations can receive direct feedback from their customers and targeted markets.

This is particularly useful for lawyers, as it focuses advertising on issues, rather than on the law firm explicitly. It permits lawyers to provide something valuable to the community and in doing so foster self-promotion. It is perhaps the antithesis of the tort-law television advertising we have become familiar with. Rather than boast about jackpot winnings, express disdain for potential defendants, or implicitly compare legal prowess, it engages the community in a positive and productive fashion which fosters trust and demonstrates concern without distastefully aggressive tactics. It also permits lawyers to prove their value through information and interaction, rather than a self satisfied proclamation -- combating both the public perceptions that lawyers are inaccessible and sleazy. Of course, this is only true if SMM is done right.

Search Engine Optimization

Many, if not most, lawyers and law firms now have websites to market their services. Generally websites are built by website designers or marketing firms that incorporate website design into a marketing package. Behind the scenes website builders use tools to aid in the visibility of the website -- meaning optimizing the ranking of the website on search engines, increasing links to the website from other online sources, and maximizing the success of search-ability through keywords, etc. Until recently the primary focus for obtaining website visibility was Search Engine Optimization (SEO).

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SEO is the process of improving the visibility of a website or a web page in search engines via the "natural" or un-paid ("organic" or "algorithmic") search results. As an Internet marketing strategy, SEO considers how search engines work and what people search for. Optimizing a website may involve editing its content and HTML and associated coding to both increase its relevance to specific keywords and to remove barriers to the indexing activities of search engines. Promoting a site to increase the number of backlinks, or inbound links, is another SEO tactic.

Though this is arguably no longer the gold standard, it is still the primary focus of most website builders. The internet moves fast, often much faster than the learning curve of people implementing tools.

In the broadest sense, SEO is nothing more than the process of improving the volume or quality of traffic to a website or a web page from search engines, using natural or un-paid search results. This is contrast to other forms of search engine marketing which generate traffic through direct-paid methods like PPC [pay per click] advertising and paid placements. The problem is that many SEO agencies continue to market and implement old SEO methods that are largely ineffective, generate junk traffic, damage online reputations, are often slow to achieve results and are very expensive.

This is bad news for SEO companies that raked in huge profits in the past, but it’s actually good news for both consumers and companies that do business on the web. When SEO was dominant, search engines directed us to pages that didn’t necessarily offer what we needed. But the game is changing and more relevant results are now delivered by search engines.

Social Media Marketing

In comes Social Media Marketing. Today most website builders will incorporate some SMM into the web design. This is usually in the form of incorporating a facebook and twitter page. Some of the more sophisticated legal websites will include blogs and video.

The best way to generate high-volume quality traffic for your website is to implement a comprehensive online visibility strategy using a wide variety of methods. Today’s preferred methods include strategies such as posting useful comments on third-party blogs and forums, encouraging customers to write positive online reviews, engaging consumers in feedback discussions.
forums, producing compelling videos, placing well-written articles on quality sites, blogging, and much more.

Case Studies on Lawyers and SMM

Frankly, lawyers are not on the SMM cutting edge, though some have begun to test the waters.

Migra & Co

A typical example of SMM used by lawyers is Migra & Co\(^{11}\), a UK firm that specializes in immigration issues. Their website is pleasing and informative. It is well designed to offer substantial information without being overwhelming or confusing. The SMM components incorporated are a blog, a LinkedIn business profile, and press releases which appear under their news headings. This is a prime example of the legal community recognizing that the internet is a valuable tool and that SMM has potential. However, Migra has not yet reached its potential, as acknowledged in an email discussion with Monika Jablecka, Managing Director.

From [my] experience I know that with the on-line presence, effective SEO, financial resources and dedication it is possible to generate substantial amounts of business through online enquires. Only in the last couple of years the UK based immigration consultancies started investing their money in an on-line advertising campaigns and social media. At Migra & Co we try lean towards the on-line media as it has much widespread reach and seem more effective in the long run. We have noticed a significant increase in the number of on-line generated enquires through advertising on Google, participating in online forums or writing immigration related articles, which will hopefully allow further growth.

The Justice Room

The Justice Room is a more aggressive and comprehensive legal SMM project. The Justice Room was created by Defense Investigation Specialist Jay Jacome, who began the project in order to have a source of answers to the questions his clients ask him day-to-day. Concerned with criminal matters, divorces, disputes, driving infractions, and other predicaments clients find themselves in, they had no convenient resource for answers. Mr. Jacome, having experience with online marketing and video production, pulled together a group of Florida attorneys to educate the public on various legal subjects, and in turn have an opportunity to market their practices through podcasts, videocasts, blogs, questions and answers, and other tools to engage potential client interest. Using provocative titles such as “5th Amendment Right Made Simple – SHUT UP!,” lawyers educate the public on issues of particular concern. The Justice room incorporates many popular SMM tools: facebook, twitter, YouTube, StumbleUpon, iTunes, and

RSS feeds. In a 2010 interview Jay Jacome states “the site is a resource to gather information to help educate you on legal matters.”

Mr. Jacome believes that what makes The Justice Room a stand out from other blog and videocast sites is the quality of the production. “Programs” are professionally recorded using skilled video and audio engineers. Again, Jacome feels the upside of this is that the high quality lends itself to educational and trustworthy programming. The attorneys presenting on their topics appear highly competent and offer valuable information as a public service. The downside is these videos are expensive and time consuming to produce.

Both audio podcasts and videos are coupled with transcripts, to aid in cataloging by search engines. New content is added regularly, and Mr. Jacome points out that in social media doing something once is hardly worth doing; repetition of processes and unique content is critical. Jacome expresses he is “quite proud of how the internet rankings of the participating lawyers improve,” and he uses this information to help convince skeptical lawyers to participate. Once they do participate they learn the value of SMM. Jacome points out how important it is to “put a face with the information. People respond to the connection between the information and the person. Videos are better than podcasts for that reason. People trust who they can see.” So it is worth it to make the highest quality video, even if development is a more complex process.

The Justice room is a good start and has the right idea. However it is narrow in scope -- only focusing on a local Florida area. It also does not exploit the less costly and more interactive areas of SMM, such as discussion groups that highlight the social nature of Social Media Marketing.

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14 Jacome, J. (personal communication, November 5, 2010).
Orrick, Herrington & Sutcliffe

A different use of SMM is by the law firm Orrick, Herrington & Sutcliffe which hired marketing firm Greenfield/Belser Ltd. to design a branding strategy. According to the Greenfield/Belser website:

We developed [an] idea for a video game that was to be emailed to students during the recruiting season. We coded the game entirely in Flash so the final product was highly compressed. The game was organized around issues we know from research are important to students. Players gained points by catching falling objects in different settings. Scores could be emailed to Orrick and the firm would respond with sweatshirts, T-shirts and other gifts to the student.15

This example of SMM is interesting because the law firm was willing to incorporate a lighter attitude to attract attention. Humor, fun, and entertainment are integral parts of SMM. Social Media Marketing is social. This game engaged the prospective students in a way a brochure or website never could. Whatever else it accomplished, no doubt it got the firm noticed and gave the impression that students might enjoy their time at this law firm, an essential factor in any

decision to commit. Apply this to attracting clients and the firm appears less intimidating, the lawyers more “human,” and there is a suggestion the legal process will be less painful for the client. A sense of humor does not have to detract from the prestige of the firm or the appearance of competence of the lawyers. Lawyers are people too.

The Volokh Conspiracy

Most law related SMM is not actually produced by law firms marketing to clients, but rather by legal academics and lawyers concerned with specific issues. Blogs (or Blawgs) and podcasts are very popular in the legal community. While these can be excellent tools in the SMM arsenal, the most prolific uses are not, yet, for marketing purposes.

The Volokh Conspiracy\textsuperscript{16} is a blawg which mostly covers United States legal and political issues, generally from a libertarian or conservative perspective. One of the most widely read

\footnotesize{\textsuperscript{16} The Volokh Conspiracy. http://www.volokh.com.}
legal publications in the United States, The Volokh Conspiracy has roughly one million page views each month. This group blog has more than a dozen contributors, most of whom are law professors, and all of whom sign their names to their posts. In 2006, Technorati rated his blog as the 100th most popular worldwide. The Volokh Consiracy was founded by attorney Eugene Volokh, professor of free speech law, criminal law, tort law, religious freedom law, and church-state relations law at UCLA School of Law.

Although this is not an example of SMM from lawyers to clients, it does demonstrate the power of substantive information on the internet. Not all one million page views per month are by lawyers. People in the general public interested in these issues read The Volokh Conspiracy. The lawyers who post blogs are highly respected and appreciated for their writing. Though these essays may at times be a bit “high brow” compared to some SMM, substantial and informative content is very relevant to typical SMM. SMM is not advertising, it is an exchange with other people on the internet. It can be many things: entertaining, comical, informative, and quite serious. The subject matter and content depend entirely on the audience one wishes to reach.
A different style of blawg is Bitter Lawyer \(^\text{17}\), a legal humor and news blog targeted at disgruntled lawyers. The site features a webshow titled “Living the Dream” which follows a bumbling fictional junior associate at a large law firm. Accompanying blog posts describe the real-life inspirations behind each “webisode.” Bitter Lawyer is also known for its notable interviews with celebrities and others who are former lawyers and now successful in another profession. Creator of the site Rick Eid is executive producer of the CBS series *The Ex List*. He has also been a producer and writer for numerous law oriented television dramas. He is a former law partner at Manatt, Phelps & Phillip. Bitter Lawyer was ranked in the ABA Journal Blawg 100 in the "Lighter Fare" category, calling the blog "a category killer for legal humor websites." In 2010 Bitter Lawyer won a Webby for best legal website.

\(\text{Page 12 of 19}\)

average citizens didn’t have so many disputes. Lawyers have a role in perpetuating any litigious society, but they are not the cause. The point is, self-deprecation is a useful and appropriate tool if employed with a good hearted sense of humor. Of course smart choices about what is funny, and what is insulting, is required.

**Lawyers.com**

Perhaps the most pervasive use of SMM by lawyers is incorporating blogging as well as question and answer forums into big lawyer marketing websites, such as Lawyers.com\(^\text{18}\), a partnership with LexisNexis. Lawyers.com is among the most used law related websites, with traffic of more than 2.26 million views per month and increasing steadily at 12% per year. Lawyers.com provides various SMM related features, such as:

- Understand Your Legal Issue (general information about thousands of legal issues).
- Discuss Your Legal Issue/Ask a Lawyer (discussion forums on legal issues).
- Legal Help & Resources.
- Law Blog (tens of thousands of blog posts with thousands of bloggers).

Though Lawyers.com does get a great deal of traffic, there are so many lawyers blogging and otherwise participating, that no lawyer is a standout. It is a sea of legal names, advice, and opinions. Useful to the public if they are seeking a variety of thoughts on a matter, but not focused enough to be a truly effective marketing tool for most lawyers or law firms. The idea of SMM is to get noticed. Big is not always better. Social Media Marketing is about social interaction, in other words personal interaction, not merely online presence. Sites like this are to some degree an easy way out for lawyers who wish to engage in SMM but don’t wish to put in the energy to develop a truly effective strategy. Ironically, using such a site can be just as time consuming as more individualized SMM if you want to get noticed. That’s not to say participating at Lawyers.com or the like is pointless. It is a good start and there is indeed a level of traffic one is highly unlikely to achieve independently. Lawyers.com is an excellent tool in an arsenal of SMM techniques, but it should not be the only tool.

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Nolocast.com

Alternative legal services also use SMM; in fact they are in the forefront of the legal SMM arena because unlike many of the SMM applications by lawyers, these alternative services direct their marketing to the customer, their clients, as opposed to other lawyers.

Nolo Press is a premier provider of legal do-it-yourself materials, general information texts, and online legal tools for the general public. Nolo Press podcasts are designed for the lay person and deal with a variety of legal topics of interest to the general public. Nolo has produced 114 podcasts to date on legal topics for the general public. Nolocast.com has approximately 9,000 page views per month. This does not reflect listeners through iTunes or subscribers to the RSS feed.

Podcasts are a good SMM marketing tool, though podcasts alone are probably not sufficient to draw substantial traffic. For one thing search engines have difficulty recognizing audio and therefore podcasts do not increase internet rankings particularly well. Also, people need a reason

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to be driven to your podcasts. In this case Nolo Press is one of the primary publishers of do-it-yourself legal texts, software, and forms. The podcasts appear to be more of a courtesy to customers than a marketing tool. Perhaps they give customers a taste of the Nolo product as a promotion. The importance of these podcasts in the context of SMM is that good content is essential. Nolo produces substantive and highly useful podcasts that will leave the customer wanting more, which translates into book sales. Nolo provides a good educational resource through podcast development.

LegalZoom

Perhaps the most comprehensive use of SMM, and a stand out among law related sites, is LegalZoom. According to their website, LegalZoom is “an easy-to-use, online service that helps people create their own legal documents.”

Whatever their success as a company, their success at using SMM is unparalleled in the legal community. It’s not so much that they use novel or highly creative SMM tools, but rather, what tools they do use, they use well. They are a prime example of how SMM does not require expensive marketing firms or technology gurus. With the free tools that are already out there, SMM has the potential to reach a mass audience, simply by engaging it. LegalZoom capitalizes on the potential of SMM, and essentially guides the client to do their marketing for them. Not only does this build a ground swell and exponential growth, real customers not edited for television are trustworthy. When genuine clients speak, unedited or manipulated by advertising slogans and promotions, all of the image problems discussed above (i.e. the lawyer as fat-cat or ambulance chaser) fall away. And with individualized adjustments, there is nothing LegalZoom does that any lawyer or law firm can’t do, practically speaking or ethically.

Among the tools LegalZoom uses successfully is facebook. Unlike typical law related sites with a hundred facebook “friends,” LegalZoom has over 10,000. They manage this by having useful
and ongoing conversations about issues that concern their clients. It is a free exchange of ideas with LegalZoom directing, but welcoming and encouraging participation. A relaxed and entertaining environment is inviting and unintimidating. With all of their SMM outlets connected, they direct facebook posts to twitter and videos to YouTube. They produce a blog, and newsletter, offer promotional deals like “refer a friend,” initiate fun contests (such as posting Halloween costumes on facebook), and overall build a community. The operative word in Social Media Marketing is not marketing, it’s social.

LegalZoom also ties all of its SMM to traditional television marketing. Their TV commercials are the stories of actual customers who sent in videos of businesses, services, or inventions for which they used LegalZoom to perform legal work. Homemade videos are sent in by clients and the best stories are made into professionally produced mainstream commercials, using the actual clients, not actors. Both the original homemade videos and television commercials are posted on the LegalZoom YouTube site. Not only is this brilliant marketing for LegalZoom, it is a lifetime
opportunity for the client, who stars in a national television commercial featuring their business, service, or invention.

Although the SMM tools LegalZoom uses are free or inexpensive, they put a great deal of time into their SMM campaigns. New content is added daily. Their facebook and twitter pages have a regular stream posts and interaction. It is clear, however, the more a community is built and others participate, the less LegalZoom has to do to keep the flow of conversation going. This is of course the goal of SMM, to engage enough people in a campaign that the community essentially runs it. Started in 2001, LegalZoom did not build its community overnight. What they did do was have the vision to recognize an opportunity. Though hundreds of internet-based legal form websites have emerged during the last 10 years, LegalZoom claims it has delivered over 1,000,000 wills to consumers, and that it is the largest incorporation company in the country. They provide access on their website to thousands of pages of free legal information on hundreds of subjects and they rely on informed consumers to do part of the work, often called
co-production\textsuperscript{21}. LegalZoom is widely considered the number one provider of online legal services, and considering their reliance on SMM, it is clear it is a tool that works for them.

Randy Wilson:

Natalia Vera
Senior Research Paralegal
Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street, 15th Floor
Chicago, IL 60654-7598

RE: Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools
12/15/2010

Dear Ms. Vera:

As a member of the California State Bar, I am writing to insist that the ABA Commission on Ethics 20/20, I have the following comments to make regarding Lawyers use of Internet Based Client Development Tools. I have also been providing approved CLE courses on social networking and attorney ethics. Here are some of the key areas where I think attorneys need guidance.

1. Receiving recommendations/testimonials on LinkedIn, AVVO, Yelp and related client feedback websites. Given the requirement in many states to provide a disclaimer that the recommendation doesn’t guarantee a positive outcome in future cases, this is problematic if the recommendation is from a third party as the attorney doesn’t necessarily know or approve of the testimonials. Yet often these are solicited from attorneys to clients. How should attorneys handle these situations? If they have to approve the message before it is posted, should they include disclaimer language? If they don’t approve it, then they don’t owe an ethical duty to the public?

2. Disclaimers I: In the recent Lawyer Website publication 10-457, there is a discussion of how disclaimers should be “properly” placed on the attorney website. It would be useful if the ABA provided both “adequate” and “inadequate” placement examples for attorneys to place various disclaimers. As the publication points out there are several potential disclaimers related to attorney websites and depending on context, they may need to be place in different part of the websites and pages.

3. Disclaimers II: On many attorney and even large law firm websites, you will find a separate page that spells out all the potential disclaimer that related to the attorney and the website. The ABA should make clear that these disclaimer pages aren’t sufficient because they aren’t contextual to what web visitors to seeing or doing on the website and that they are unlikely to click on the disclaimer page before undertaking some action that they should be made aware of the attorney(s)’ attempt to limit their liability.

4. Confidentiality of client identities. This is a fuzzy area right now that requires attorneys to sort through questions about whether to “friend” or “connect” with clients or prospective clients. For example, a client may seek invitations to
connect with their attorney not completely aware that by doing so they could be consenting making the link between themselves and this attorney public. Attorneys may accept the request without thinking about the implications. If a client later believes their confidentiality was violated, this seems a very gray area. I would like to see a requirement that the attorney ask the client to acknowledge that in order to connect with the attorney, that they agree in a some form of writing to waiving their right to the confidentiality of their identity as being represented by that attorney.

5. Question of legal specialization: I think the ABA should provide clear guidance to attorneys including their information on LinkedIn and similar sites which ask attorneys to include their “specialties” as to whether this violates state bar rules about stating specialization without having gotten the required certification.

I look forward to further discussions about the brave new world of attorneys and the ethical use of social networking.

Very truly yours,

Randy

Randall L. Wilson
California Attorney
#173606
February 16, 2011

Natalia Vera  
Senior Research Paralegal  
Commission on Ethics 20/20  
ABA Center for Professional Responsibility  
321 North Clark Street, 15th Floor  
Chicago, IL 60654-7598

RE: ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies

To the ABA Commission on Ethics 20/20:

My name is Tina Wong. I am not a lawyer, nor am I associated with any legal firm. I am, however, an experienced business strategist and social media consultant. I have also been a software consultant for more than 15 years. My purpose in writing to you is in response to some of the testimony and comments presented regarding the Working Group on the Implications of New Technologies.

I attended the testimony hearings in October, by invitation of one of the ABA’s staff who knows that I have a special focus in social media and data privacy, having been both involved in launching the U.S. Air Force’s internal portal and having been both the Product Manager and the Global Marketing Director for a cloud-based HR solution. With these experiences at hand, I feel that it is important for an “outsider” to the legal profession to provide some additional information that may not have been considered and be presented without a bias to personal business agendas of how it may affect a particular legal firm’s business.

Of the testimony presented, there are three areas that glared of biased information or lacked complete definition: Data privacy; Firewalls and Security; and Best Practices.

Data Privacy

Data privacy should be on every person’s mind. The military advises its users to regard sensitive information as if it were your own. Some of the persons who presented
testimony in October mentioned that it was not their responsibility to lock a computer or put away their computer when leaving a room. However, I would guess that they use their computer for confidential communication and document filing and sharing than they do paper. So, in that sense, the computer contains more confidential information than the physical files one carries. That being the case, then the parallel would be that if one does not lock a computer when walking away, then it is the same as to leave a set of files out in the open.

Part of the military’s security training includes guidelines and practices for using a computer and telephone. Everyday work tools. Every person on a military base, be they active duty, civilian or contracting consultant is trained that when you leave your computer, you lock your computer, so no one has access to your computer. This isn’t just to protect the data that is available, but that it protects the user of the computer so that another person cannot use their computer for malicious activity that is tagged to the computer owner’s logon credentials. So data privacy is a two-fold responsibility: for the data you are protecting and yourself as the user/owner of the data.

In Europe, the Article 29 Data Protection Working Party is the body that has been defining the software industry’s guidelines for data privacy. As the Product Manager for a global Human Resources product that was delivered via the cloud, it was my responsibility to understand the international parameters for data security. The Working Party describes three levels of data stewardship:

- Who owns the data
- Who manages the data
- Who uses the data

Article 7 of the D.R. Directive (European Union Data Retention Directive 2006/24/EC) specifies the following data security principles that must be followed, as a minimum:

“(a) the retained data shall be of the same quality and subject to the same security and protection as those data on the network;

(b) the data shall be subject to appropriate technical and organizational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorized or unlawful storage, processing, access or disclosure;

(c) the data shall be subject to appropriate technical and organizational measures to ensure that they can be accessed by specially authorized personnel only; and

(d) the data, except those that have been accessed and preserved, shall be destroyed at the end of the period of retention.”

I don’t mean to reduce the legal profession’s stewardship of data privacy, and while I understand that too many regulations can be counter-productive, I would like to suggest that where some of the October participants asked where Best Practices can be identified for guidance, their comments sounded more like filibustering than solution-seeking. So, as someone who has helped several thousand customers, including Fortune 500 companies and the U.S. Government, I would like to suggest the Commission consider the government’s model of data security as a starting point. Private and public sector companies are in the same boat with their data and internal-only information with the addition of young associates who think that social media allow them to publish confidential information. For some companies, a policy procedure is not enough, but to provide guidelines, policies and reprimanding procedures.

**Firewalls and Security**

The most disturbing testimony that I, as an IT consultant, heard in October was professional after professional commenting that they are not security professionals and should not be held responsible nor should their firm – large or small – be required to put firewalls in place.

A firewall is like the ability to lock your front door and the doors within your home. I doubt any person leaves their home without locking their front door or looks to make sure the garage door closes before pulling out of their driveway. In that same sense, a firewall ensures that no one can enter your computer network without a key; and when they leave, the key locks the network door behind them. If anyone has set up a wireless router at home, more than likely they have set up a firewall to protect their network from being tapped into by either someone wanting to use their bandwidth or to hack into their personal information on their home computer. If anyone has children, it would behoove the homeowner to not put up a firewall to protect from child predators. So, the conversation of mea culpa to understanding what a firewall is, is simply a foolish and careless view of using a computer.

The other aspect of the testimony that was jarring was that the representatives, who presented themselves as lawyers, not IT professionals, used that profession as an excuse for not having a firewall in place. However, just as a lawyer would probably not install his or her own locks in a door, rather to call the locksmith, it would be the same logic to call either an IT consultant or rely on their IT network personnel to do due diligence in selecting and setting up a firewall. A firewall and security should be on every network, be it your home or office. To do without is simply asking for someone to walk in your door without locking it. So to deflect the responsibility that a lawyer does not understand the

breaches.com/2010/07/19/art_29_data_protection_working_party_reports_on_implementazione_of_data_retention_directive/
technical aspects of a firewall is a flimsy excuse for not engaging a professional IT person, be it on staff or contract, to protect not only the data of the clients, but also the data required for everyday work.

Another way to consider a firewall is not only to deter hackers from extracting data, but to consider it as insurance or an ounce of prevention to avoid someone hacking into the firm’s files and resulting in loss of productive and billable work time. It is a far less expensive investment to put in a firewall and virus scanners than to lose your email, client files and communications for even a half day…or more.

**Best Practices**

The question of where to find Best Practices for data security and social media policies was asked in October. As with many of my clients, I advise to not only look within your industry, but also in industries with similar needs and pain points and industries that seem completely opposite to yours. For the legal industry where data privacy and confidentiality are high, similar industries would be government, defense, healthcare and human resources. Industries that would seem to have opposite requirements might include advertising, libraries and retail. By looking at a variety of industries both similar and different, you can then evaluate what sections of policies, Best Practices, case studies and crisis most match your needs and pain points.

With most customers, even when comparing competitors’ Best Practices and policies, most customers will glean some information from existing competitive information; add some guidelines from other industries and modify additional policies to fit their and their constituents’ needs.

There is no singular Best Practice that can be applied to all situations in all industries or even to span one industry. However, that should not be used as a deterrent or avoidance to establish Best Practices, guidelines and policies. It is true, however, that with the speed of technology, some of these benchmarks are moving targets as technology changes and as the “bad guys” find ways to circumvent acceptable practices.

Thank you very much for your time and allowing me to contribute to your consideration to the Ethics 20/20 initiative. I hope that my input provides valuable feedback for your deliberation.

Respectfully,
Tina Jade Wong
Marketing & Social Media Strategy Consultant