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Attorney Advertising via Blogs, Websites and Social Networks: Ethical Risks

Navigating Legal Ethics and Regulations in Marketing Legal Services

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Today's faculty features:

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To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities

From: ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies¹

Re: For Comment: Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools

Date: September 20, 2010

I. Introduction

The American Bar Association's Commission on Ethics 20/20 is examining a number of legal ethics issues arising from lawyers' use of technology, including issues arising from Internet-based client development tools. The goal of this paper is to describe several issues that the Commission has identified in this context and to elicit comments on possible approaches that the Commission is currently considering. Comments received may be posted to the Commission's website and should be sent to the Commission as requested below by **December 15, 2010**.

The Commission has taken no positions about the matters addressed in this paper. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission plans to draft during the next two years.

II. Ethics Issues Arising from Lawyers' Use of Internet-Based Client Development Tools

The Internet has played an increasingly important role in lawyers' efforts to attract new clients and disseminate information about the law and legal services. Typically, these efforts have had the salutary effect of educating the public about the existence of particular legal rights and options, the availability of legal services, and the selection of specific lawyers. The Commission recognizes that the public now relies on the Internet as a major source of information in many areas, including information about legal services.

In light of these public benefits and given the First Amendment rights at stake, the Commission is seeking to address those issues that create specific and identifiable risks to the public or to prospective, current, or former clients. Proceeding from these premises, the Commission's Technology Working Group has examined ethics issues arising out of four common online methods of client development: (1) social and professional networking services (such as Facebook, LinkedIn, and Twitter), (2) blogging, (3) "pay-per-click" advertising,

¹ Members of the Working Group are: Fred S. Ury and Carole Silver (Co-Chairs), Robert E. Lutz, Herman J. Russomanno, Judith A. Miller, Carl Pierce (ABA Standing Committee on Delivery of Legal Services), Michael P. Downey (ABA Law Practice Management Section), Paula Frederick (ABA Standing Committee on Ethics and Professional Responsibility), Stephen J. Curley (ABA Litigation Section), Youshea A. Berry (ABA Young Lawyers' Division). Andrew M. Perlman serves as Reporter, and Will Hornsby, Martin Whittaker, and Sue Michmerhuizen provide counsel.

and (4) lawyer websites.¹

A. Online Social and Professional Networking Services

An increasingly common form of online client development involves the use of social and professional networking websites, such as Facebook and LinkedIn. These websites enable lawyers to create online profiles that contain personal and professional information, including information about their law practices. Depending on which website the lawyer uses, the profile (or some portion of it) can be made available either to anyone with an Internet connection, anyone who is a member of the networking site, or (if the lawyer prefers it) only some designated group of people, such as friends, family, professional colleagues, clients, or prospective clients.

Typically, lawyers can determine who has access to the profile or particular information in the profile by creating online “links” to specified individuals. (In the case of Facebook, this linking is called “friending.”) A lawyer can create these links (or “friends”) by inviting particular people to accept an electronic invitation to become connected or by accepting a similar invitation from other people. People who have linked to the lawyer’s profile (or who have become “friends” of the lawyer’s profile) can often access more information about the lawyer from the profile and receive electronic notifications when the lawyer posts new information on the profile. Lawyers can also contact specific people who have linked to their profiles, usually by generating an email through the networking site.

Another similar and popular service is offered by Twitter, which allows people to send brief information of up to 140 characters (called “tweets”) to numerous people at once. In essence, people can decide to follow particular Twitter users in order to receive their “tweets.” As is the case with other forms of social networking, lawyers can use this service to send out information about themselves to many people simultaneously.

1. Identifying the Line Between Personal Communications and Lawyer Advertising

Because lawyers frequently use these websites and services for both personal and professional reasons, the legal ethics issues in this context are more complicated than they have been for more traditional client development tools. For example, a lawyer might create a Facebook profile that is accessible to family and prospective clients at the

¹ The Commission is considering other advertising-related ethics issues that arise online but which are not addressed in this paper. For example, the Commission is examining whether Model Rule 8.5 (Choice of Law) offers an adequate means for determining which states’ ethics rules apply to Internet-based advertising. The Commission is also separately considering issues related to rankings and ratings of both lawyers and law firms as well as the emergence of third-party services that provide information about lawyers and solicits their participation in supplying that information.

same time.² The lawyer might then post professional announcements that are shared with all of those people, raising the question of whether such announcements are subject to the usual ethical restrictions on lawyer advertising and solicitation.

The Commission seeks to determine what guidance it should offer to lawyers regarding their use of social and professional networking sites, especially when lawyers use those sites for both personal and professional purposes. The Commission's guidance could take the form of a policy statement that could be submitted to the House of Delegates for its adoption or a white paper that explains the extent to which lawyers' use of networking sites should be considered a form of lawyer advertising. Alternatively, or in addition, the Commission could propose amendments to the Model Rules in Article 7 or their Comments in order to clarify when communications on networking sites are subject to the Rules of Professional Conduct as well as the difference between advertising and solicitations in this context. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

2. Inadvertent Lawyer-Client Relationships

A second concern arising from networking websites is that they could produce an inadvertent lawyer-client relationship. The problem is more complicated than it is for typical lawyer websites (see [Part II.D](#) below), because lawyers who use networking sites may not be able to control the flow of information from prospective clients. For example, lawyers may not be able to include disclaimers and other protections against receiving the kind of information that could trigger ethical obligations under Model Rule 1.18 (duties to prospective clients).

The Commission is considering what, if any, guidance it should offer to lawyers about how to avoid inadvertent lawyer-client relationship when using social and professional networking sites. This guidance could take the form of a policy statement that could be submitted to the House of Delegates for its adoption or a white paper that sets out certain guidelines regarding lawyers' use of networking sites. Alternatively, or in addition, the Commission could propose amendments to Model Rule 1.18 or its Comments that would clarify when communications on networking sites might trigger the obligations under that Rule. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

² Lawyers also use Internet videos, such as videos uploaded to Youtube, to reach a larger audience. Some of this content is clearly advertising material and would be regulated under the Article 7 Rules. Other content, however, has many purposes, only some of which are advertising related. For example, a lawyer might post an informational video about the law that does not expressly seek clients. As in the case with social media services more generally, the key unresolved question is the extent to which these sorts of materials are subject to the Article 7 Rules.

3. Lawyers “Friending” Judges

An increasing number of judicial ethics opinions have addressed the propriety of judges linking to (or becoming “friends” with) lawyers who appear before them. Although this issue is primarily a matter of judicial ethics, lawyers do have to consider their own jurisdiction’s approach to the judicial ethics issue. For example, if the jurisdiction places limits on the extent to which lawyers and judges can link to each other (or become “friends”) on networking sites as a matter of judicial ethics, a lawyer might facilitate a judge’s violation of those restrictions by inviting the judge to link to the lawyer’s profile or by accepting an invitation from the judge to do the same. Arguably, this could result in the lawyer’s violation of Model Rule 8.4(f), which states that a lawyer cannot knowingly assist a judge in conduct that is a violation of the rules of judicial conduct.

The Commission is considering what, if any guidance it should offer to lawyers who might want to link to judges on a social or professional networking site. The Commission’s guidance could take the form of a policy statement that could be submitted to the House of Delegates for its adoption or a white paper that sets out certain guidelines on this subject, taking into account the disparate approaches to the issue as a matter of judicial ethics. Alternatively, or in addition, the Commission could propose amendments to Model Rule 8.4(f) or its Comments that would clarify when a lawyer’s conduct in this area might violate the Rule. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

4. Gathering Information Through Networking Websites

Because networking websites often contain a vast amount of information about lawyers and non-lawyers, these websites are a potentially rich source of information for investigation purposes. For example, some lawyers now use networking websites to gather information about adverse parties and witnesses by asking those individuals for access to their profiles. The ethics issue arises when lawyers (or their investigators) make the request for access to the relevant profiles without clearly indicating the purpose for the request or by being deceptive about the request (i.e., pretexting).

The Commission is considering what, if any, guidance it should offer to lawyers who might want to gather information of this sort in various circumstances. One possibility is to encourage the ABA Standing Committee on Ethics and Professional Responsibility to produce a formal opinion concerning the implications of these investigations under Model Rules 4.2 (communications with persons represented by counsel) and 4.3 (dealing with unrepresented persons), as a Philadelphia Bar ethics opinion recently did. Phil. Bar Assoc. Prof. Guidance Comm. Opinion 2009-02.

Alternatively, the Commission’s guidance could take the form of a policy statement that could be submitted to the House of Delegates for its adoption or a white paper that sets out certain guidelines on this subject. The Commission could also propose amendments to Model Rules 4.2 and 4.3 or the Comments to those Model Rules to clarify when lawyers can take advantage of the information stored on networking websites. The

Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

Summary of Questions Concerning 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.)
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?

B. Blogging and Discussion Forums

A blog is an Internet-based forum (a "web log") that offers opinions or information, sometimes on a particular issue, such as intellectual property law. The material on the blog may include the blogger's opinions about the topic, links to matters that relate to the blog's subject matter, and comments from the blog's readers. The material is usually freely available to anyone with an Internet connection. Lawyers frequently use blogs to develop or enhance a reputation as an expert in a specific area through blog posts that relate to a particular legal topic or about the law generally.

One central question concerns the extent to which lawyer-operated blogs are subject to the same ethical considerations as other forms of lawyer advertising. At one extreme are blogs that reside on a lawyer's or law firm's website and that are clearly designed to serve an advertising and marketing function. Such blogs would almost certainly have to comply with the relevant state rules of professional conduct to the same extent as the lawyer websites on which those blogs appear. ([See II.D below.](#)) At the other extreme are purely personal blogs that may contain a lawyer's thoughts about issues that have nothing to do with the lawyer's practice or about the law and contain no information about the lawyer's professional background. Such blogs do not serve any advertising or marketing function, so they typically would not trigger the Article 7 Rules.

There are many blogs, however, that fall somewhere between these two extremes. For example, some blogs are designed to create a forum for discussing particular types of legal issues with other lawyers who are knowledgeable about the same subject, but these blogs are not specifically designed for advertising purposes or to attract prospective clients. The content on these blogs would likely receive stronger First Amendment protection than blogs that are used primarily for advertising or marketing a lawyer's practice, so some of the Rules of Professional Conduct may not be applicable or may

apply to only some portion of the blog's content, such as descriptions about the lawyer's professional background. Moreover, to the extent that prospective clients use the blog, the lawyer might need to take into account how to avoid the creation of inadvertent lawyer-client relationships, such as whether to include the kinds of disclaimers that are often required when setting up a law firm's website. ([See II.D below.](#))

Closely related issues arise out of lawyer-operated discussion forums and discussion boards. For example, a lawyer might create a forum where the public can discuss a particular legal issue, a medication, or the effects of a specific medication. The lawyer might then respond to comments on the forum or encourage visitors to visit the lawyer's website to learn more information. The question is whether lawyers can create such discussion boards without clearly disclosing that the discussion boards were created by lawyers who provide services related to the subject of discussion or without disclosing the marketing-related function that the discussion boards serve. Similarly, lawyers (either the lawyers who created the forum or other lawyers who are not affiliated with the site) might post comments to legal questions and provide a link to their own websites. These comments might trigger a variety of ethics rules, including Model Rules 1.18 (duties to prospective clients), 5.5 (limitations on multijurisdictional practice) and several Article 7 Rules.

Another related issue concerns websites, such as JD Supra, which allow lawyers to upload client-related documents, such as complaints or briefs. The documents are searchable, so the public (or other lawyers) can find documents on particular subjects and identify the lawyers who either authored the documents or uploaded the documents. One issue is whether uploading documents that were not written by the uploading lawyer might mislead clients into thinking that the lawyer is an expert in a particular area when that is not, in fact, the case. Because clients can find lawyers through the site based on documents that lawyers have uploaded, there are also concerns regarding the formation of an attorney-client relationship similar to those described above in the context of social networking sites. There are also confidentiality related concerns if lawyers post documents (even publicly available documents) without getting client consent.

The Commission is considering what, if any, guidance it should offer to lawyers who operate or participate in blogs, discussion boards, and other sites (like JD Supra) when their intent is, at least in part, to develop clients. The Commission's guidance in this area could take the form of a policy statement or white paper that sets out certain guidelines regarding these Internet-based media. Alternatively, or in addition, the Commission could propose amendments to Model Rules 1.6 (duty of confidentiality), 1.18 (duties to prospective clients), 5.5 (multijurisdictional practice), 8.4 (misconduct generally), or the Article 7 Rules and their Comments that would clarify when the Model Rules of Professional Conduct cover these forms of online activities. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.³

³ There are other ethics rules that blogging might trigger, such as Model Rules 1.6 (duty of confidentiality) and 3.6 (restrictions on trial publicity), when the blogging involves a pending matter. It does not appear

Summary of Questions for 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?
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?
3. Can lawyers 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?
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?

C. Paying for Online Advertising, Referrals, and Leads

Pay-per-click advertising is a service whereby a lawyer pays a fee to a third-party each time an Internet user clicks on an advertisement that directs the user to the lawyer's

that any guidance is needed in these areas, because the Model Rules already offer clear guidance on such matters.

Similarly, some lawyers hire third-parties to ghostwrite content for a blog. If these ghostwritten blog entries suggest that a lawyer has an expertise that the lawyer does not have, the question is whether the ghostwritten entries violate Model Rule 7.1's prohibition against false or misleading advertising. This issue has arisen in the past regarding more traditional marketing, so it is not clear that this issue requires the Commission's guidance. The Commission invites comments, however, on whether any guidance is, in fact, needed in these or other blogging-related contexts not mentioned in this paper.

website. Google's AdWords program is one of the most well-known versions of this service, but some companies provide a more sophisticated service that is specifically designed to generate leads for lawyers. These more sophisticated (and sometimes more expensive) arrangements require the lawyer to pay a fee for each "lead" that the third-party generates (often called "pay-per-lead" advertising). Because the fee is paid regardless of whether a lawyer-client relationship is formed, these fees do not constitute an impermissible sharing of fees with non-lawyers. It is not clear whether these fees constitute an impermissible payment for "recommending" the lawyer's services under Model Rule 7.2(b).

The Commission invites comments on what, if any, guidance it should offer to the increasing number of lawyers who want to take advantage of pay-per-click or pay-per-lead advertising arrangements. The Commission's guidance could take the form of a policy statement that could be submitted to the House of Delegates for its approval or a white paper that sets out certain guidelines on this subject. Alternatively, or in addition, the Commission could propose amendments to Model Rule 7.2(b) or its Comments that would clarify when a lawyer's conduct in this area might violate the Rule. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

Summary of Questions Concerning Paying for Online Advertising, Referrals, and Leads

1. 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 reconceptualize the purpose of the Rule in light of these new forms of advertising?

D. Lawyer Websites

Lawyer websites can be as simple as a single webpage that contains a lawyer's contact information, or they can be as complicated as a secure portal (commonly called a virtual law office or VLO) through which lawyers conduct their entire law practice, including interacting with clients, sharing documents, and offering legal services.⁴ Typically, however, lawyers use websites to disseminate information about their practices and to educate prospective clients about their legal options.

Although websites can serve a valuable informational function, they can also give rise to several ethical concerns, including the possibility that they might:

⁴ The Commission is studying a variety of ethics issues associated with VLOs and plans to produce a separate paper about those issues.

- contain information that is either false or misleading
- produce an inadvertent attorney-client relationship
- give legal advice (as opposed to provide generalized legal information)
- reveal confidential information about current or former clients or about current or past legal matters

The American Bar Association's Committee on Ethics and Professional Responsibility is issuing a formal opinion that addresses each of these issues. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010). The URL for that Formal Opinion will be available on September 24, 2010 and will be posted to the Commission's website.

1. False or Misleading Statements on Websites

Formal Opinion 10-457 reaches the conclusion that lawyer websites have to comply with Model Rule 7.1, which prohibits false or misleading statements. This conclusion makes sense as long as a website is, in fact, being used for advertising purposes. As explained in the context of blogging above, however, it is not always clear whether a lawyer's website is being used in such a way. In some cases, for example, only a portion of a website may be serving such a purpose.

To offer more clarity, the Commission could recommend an amendment to Comment 2 of Model Rule 7.2 that would define which types of websites are subject to Article 7 of the Model Rules of Professional Conduct. The Commission invites comments on whether such an amendment is necessary or desirable and whether the Commission should propose any other changes or offer any other form of guidance regarding the applicability of the Article 7 Rules to lawyer websites.

2. Inadvertent Lawyer-Client Relationships

ABA Formal Opinion 10-457 also addresses the possibility that, by enabling communications between prospective clients and lawyers, websites could produce inadvertent lawyer-client relationships. The opinion also speaks to the related concern that website-based communications could trigger a lawyer's duties to prospective clients under Model Rule 1.18. According to the opinion, a number of factors determine whether these obligations arise, such as whether the website invites prospective clients to submit information through the website and whether the website contains properly placed and appropriately worded disclaimers regarding the effect of sending information through the website.

The Commission is considering whether it should offer additional guidance in this area, including whether it should 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. The Commission welcomes input into whether such amendments are necessary or desirable and whether the Commission should propose any other changes or offer any other form of guidance regarding the applicability of Model Rule 1.18 to lawyer websites.

3. Giving Legal Advice

The ABA Formal Opinion concludes that, when lawyers post information about the law on their websites, they must ensure that the information does not mislead the public about the meaning of the law or leave the public with the impression that the information can substitute for legal advice. For example, if lawyers post information about a particular legal doctrine, they must ensure that the information remains current and includes appropriate disclaimers, such as the extent to which the information applies to particular jurisdictions and that it should not be understood to substitute for legal advice from a lawyer after considering the facts of a particular legal matter.

The Commission is considering whether it should offer additional guidance in this area, including whether it should propose 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. The Commission welcomes input into whether such amendments are necessary or desirable and whether the Commission should propose any other changes or offer any other form of guidance regarding the applicability of those Model Rules to the information contained on lawyer websites.

4. Confidential Information on Websites

A fourth issue concerns information that appears on websites about current or past legal matters or the identity of current or past clients. ABA Formal Opinion 10-457 explains that, ordinarily, lawyers must obtain client consent before posting such information on their websites:

Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the client or former clients give informed consent, as required by Rules 1.6 (current clients) and 1.9 (former clients). Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.

Not all states have adopted this approach. For example, Minnesota's version of Rule 1.6 ordinarily permits a lawyer to disclose this type of information on a website. Minn. R. Prof. C. 1.6(b)(2) (permitting disclosure of information if it is "not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client"). The Commission welcomes

input into whether the current approach to this issue as reflected in Model Rule 1.6 and the ABA Formal Opinion is appropriate or whether a limited exception (such as the exception reflected in the Minnesota rule) should be proposed.

Summary of Questions Concerning 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](#))
2. 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](#))
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](#))
4. 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](#))
5. 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?

III. Conclusion

The Internet has raised fundamental questions about the extent to which the Model Rules of Professional Conduct can and should apply to lawyers' use of online client development tools. One of the Commission's goals has been to identify these areas of uncertainty and to offer proposals to clarify lawyers' ethical obligations consistent with lawyers' freedom of expression under the First Amendment. To that end, the Commission invites comments on the questions and issues posed in this paper.

Responses to these questions or comments on any related issues should be directed by **December 15, 2010**, to:

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Comments received may be posted to the Commission's website.

Select Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this sample bibliography. The Commission welcomes recommendations for additional resources that address the issues in this paper.

Relevant Cases:

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“You Can Tweet But You Can’t Hide:
Social Networking for Lawyers”
By Devika Kewalramani

06-30-10

Today, almost everyone belongs to at least one online social network. Some people enjoy browsing Facebook for profiles, pictures and status updates of friends, or friends of friends. Others prefer Twittering, whether to express their own thoughts or to follow the thoughts and activities of others. Despite the vast number of social networking participants, few people consider the potential consequences of their online behavior. In fact, many would argue that what they say and do outside the office in their private lives is clearly beyond the scope of their professional responsibilities.

For lawyers, however, the harsh reality is that the line dividing their professional and personal lives is indistinct. A lawyer's online activity outside the workplace regarding dealings with judges, opposing counsel and clients can lead to ethical violations resulting in professional discipline, not to mention embarrassment, humiliation and reputational injury.

Did You Know...

One Florida lawyer never envisioned when he left the courtroom after a challenging day and went home to blog about it, he would face professional repercussions. On a blog created by a criminal defense lawyers' group in Broward County, Fla., the lawyer referred to the judge presiding over his case as an "evil witch." The Florida Bar issued a reprimand to the lawyer and ordered him to pay a \$1,250 fine for posting the comment.¹

What are the odds of being "followed" and found out in this manner? When lawyers take the courtroom, boardroom and war room back to their home computers, they may not realize the magnitude of the risks they are taking. Unless lawyers begin to pay attention to these issues in their day-to-day practice of law, adverse professional ramifications will become increasingly prevalent.

Consider just how easy it is to get trapped in a lie by posting online. A judge in the Texas District Court in Galveston County was approached by a young lawyer in her courtroom who requested a trial delay because of a death in her family. The judge granted the delay, but later discovered through her own online investigation on the lawyer's Facebook page that, while there was a funeral in the family, the lawyer spent most of her "grieving period" posting pictures of herself partying. When the requested extension was up, the lawyer asked for additional time to prepare for trial. The judge denied the request and disclosed her online investigation of the lawyer. The judge also reported the lawyer's indiscretion to her law firm.² Although the lawyer

was never formally sanctioned by the Texas State Bar, her employment was terminated soon after the incident.

Bar Ethics Committees React

State bar ethics committees around the country are beginning to take notice of the ethical implications of judges and lawyers engaging in online social networking. In January 2009, the New York State Advisory Committee on Judicial Ethics issued an opinion, advising judges to exercise appropriate discretion in using social networking and to "stay abreast of features or any such service as new developments may impact his or her duties under the Rules [Rules of the Chief Administrator of the Courts Governing Judicial Conduct]." ³ In April 2009, a judge in North Carolina was reprimanded for communicating ex-parte with a lawyer via Facebook regarding a pending trial in which the lawyer was representing one of the parties. ⁴ In November 2009, the Florida Judicial Ethics Advisory Committee issued a formal opinion advising judges against "friending" or communicating with lawyers via social networking if they appear before the judges in court. ⁵ The committee noted that allowing such activity would produce a public record suggesting that certain lawyers, by virtue of being "friends" with judges online, wield influence over them, thereby creating a presumption of impropriety.

While the current focus of bar ethics committees appears to be on judicial conduct, similar ethics or advisory opinions might be on the way for lawyers. This could be because the bench and the bar are closely related and judges and lawyers are generally held to comparable ethical standards. Note, the Florida Bar Examiners are considering conducting an investigation of each bar applicant on social networking Web sites as part of their evaluation of bar admission applicants. ⁶ By including investigation of applicants' social networking activities in the bar admission process, the Florida Bar Examiners will make it difficult for applicants to sweep under the rug any improper online activities that would otherwise escape scrutiny by admissions authorities.

Applicable Ethics Rules

A review of the New York Rules of Professional Conduct (NY Rules) reveals that comments about judges could run afoul of at least two rules: Rules 8.2(a) and 8.4(h). Rule 8.2(a) prohibits a lawyer from making "a false statement of fact concerning the qualifications, conduct or integrity of a judge." Rule 8.4(h) operates as a "catch all" provision, prohibiting lawyers from "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer." While many lawyers might think that blowing off steam is hardly conduct that "adversely reflects on the lawyer's fitness," in reality, that is exactly the type of behavior that the ethics rules prohibit. It is highly unlikely that a lawyer would have thought it was proper to call a judge an "evil witch" in her courtroom. Why then did the lawyer think nothing of going home and creating a lasting record of the comment for the world to see?

In connection with communications with judges, it goes without saying that lawyers are prohibited from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). Engaging in such conduct could indicate a lack of judgment which in turn reflects adversely on the fitness to practice law. Rule 8.4(h). In addition, in New York, there is a specific statute which deals with penalties for "deceit upon the court." New York Judiciary Law, §487.

Additionally, law students and out-of state lawyers seeking admission to the New York Bar should remember that Rule 8.1(a), which governs admission to the bar, provides that a lawyer is subject to discipline if, in connection with an application to the bar, he or she has made or failed to correct a false statement of material fact or has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Best Practices

Online social networks have become essential career building tools. Blogging, Tweeting and Facebooking are everyday activities, especially for younger lawyers. So, how can lawyers properly meet their ethical obligations while participating in various online activities?

The best way for lawyers to avoid any adverse exposure from online activity is to adopt some good old-fashioned common sense:

- Be careful, what you "say" online "stays" online: even if you delete a post or comment, chances are it is stored somewhere.
- Educate yourself about the Web sites you use and the privacy settings you choose: try to limit the reach of your online conversations.
- Think before you post, toast or roast: if you would not brag about yourself or tell a person to his face what you think about him, don't do it online.
- Avoid unintended audiences who can produce unexpected consequences: social networking often encompasses people you never intended to meet, some of whom can create unpleasant outcomes if you are unwary.
- Don't let your voice be distorted: you may think you are saying one thing but the person reading your blog or comment may interpret it differently.
- Use your judgment: in certain situations, instead of posting a blog or comment that all your "friends" will see, consider calling a friend or, saying nothing at all.

Social Networking 101 Four of the most popular online social networks

	Twitter	Facebook	MySpace	LinkedIn
What It Is	Twitter enables users to exchange news and opinions. Members join and locate other members they are interested in interacting with.	Facebook allows each user to set up their own account to create a personal profile and a network of friends with whom to share information, pictures and interests.	Similar to Facebook, MySpace is premised on the creation of user profile pages, allowing users to share information on a more informal basis than Facebook.	LinkedIn is a professional social network that allows registered users to maintain a list of business people (referred to as "Connections") they know and trust.

How It Works	Users type in short messages or status updates that can be read by people (your “followers”) following them, as does anyone else who comes across them in a search.	Attached to each user’s profile is a “wall” on which the user’s “friends” can post messages, pictures, videos and/or links to internet sites. A “friend” is someone who views a user’s profile and communicates with the user via Facebook. To become someone’s friend, find their name in the Facebook database and send a request through Facebook to the user’s e-mail address. Upon receiving the request, the user can either accept or deny it. If accepted, the new “friend” can view details about the user, depending on the user’s privacy preferences.	Profile information includes “About Me,” “Who I’d Like to Meet,” “Interests” and “Details.” Under “Details,” users can post their education, employment history, etc. Profiles also contain a blog with standard fields for content and media. MySpace also supports uploading images and videos.	Users can invite anyone to become a “Connection.” Contact networks are built up of direct connections and connections of their connections. LinkedIn allows users to research companies where they are interested in working. “LinkedIn Answers” allows users to ask questions for the community to answer. “LinkedIn Groups” allows users to establish new business relationships by joining alumni, industry, etc.
Security Settings	A Twitter profile is public by default. If a user is hesitant to have strangers read his updates, he can limit it to approved followers and keep his updates out of reach.	Facebook affords users broad control over the public availability of the information published on their profiles. A user with intermediate security settings may block his pictures posted on Facebook from being viewed by anyone other than his “friends” but might allow all users to view his walls or profiles. A user opting for strict security settings can “hide” his profile on Facebook to preclude other users from finding his name in the Facebook database when trying to send a “friend” request.	Like Facebook, MySpace offers different levels of privacy to users depending on how a user sets his privacy settings. By default, MySpace pages are public and can be found and accessed by a Google search of a person’s name.	LinkedIn allows users to review and edit personal information through a user’s personal profile page. Users can choose what information to make available to search engines. However, certain LinkedIn services require it to make a user’s information available to third parties. Users can change their settings to control visibility and accessibility of their profiles.

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Endnotes:

¹ *Fla. Bar v. Conway*, 996 So.2d 213 (Fla. 2008); John Schwartz, "A Legal Battle: Online Attitude vs. Rules of Bar," New York Times (Sept. 13, 2009).

² John Schwartz, "A Legal Battle: Online Attitude vs. Rules of Bar," New York Times (Sept. 13, 2009).

³ New York State Advisory Committee on Judicial Ethics, Formal Opinion No. 08-176 (Jan. 29, 2009).

⁴ *In re Terry*, N.C. Judicial Stds. Comm., Inq. No. 08-234 (April 1, 2009).

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⁶ Jan Pudlow, "On Facebook? FBBE May Be Planning a Visit," The Florida Bar News (Sept. 1, 2009) available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/d288355844fc8c728525761900652232?OpenDocument>.

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