

RED ALERT: The ABA Wants to Regulate Online Lawyer Marketing

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The ABA is quietly gathering support to choke off lawyer marketing on the Internet by having the ABA Commission on Ethics 2020 Working Group distribute an “Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools.” Visit www.abanet.org/cpr/issuepaper.pdf for a copy.

Please join me in marshalling lawyers to stop this effort by the ABA to burden lawyer marketing on the internet with unneeded ethics obstacles. Lawyer marketing needs *less regulation*, not more stifling ethics rules. **Act now, because the comment period ends on December 15.**

The ABA Commission on Ethics is trying to gather support to subject the following marketing initiatives to the ethics rules:

- Online social networking (Facebook, LinkedIn & Twitter)
- Blogging
- Facebook and LinkedIn profiles
- Pay per click advertising
- Gathering information through networking websites
- Discussion forums
- JD Supra document uploads
- Lawyer websites
- Use of case histories on law firm websites

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 – all of which use the Model Rules of Professional Conduct to restrict these forms of online activities. However, the commission says it may also form a policy statement for a vote to the ABA House of Delegates or propose amendments to the Model Rules in Article 7 on lawyer advertising.

Of course, the ABA enacts model rules and has no enforcement powers. However, many states adopt the model rules, and some like Florida, Iowa, Connecticut, New York and Texas have individually promulgated draconian rules against lawyer marketing.

In my opinion, the ethics boards should keep their hands *off* the internet. We don't need more regulation, we need *less*. It is sufficient for the ethics rules to state that a lawyer may not make a false or misleading statement online; that's enough. The commission's activities are a waste of time and a threat to the public and the profession. The ethics police should focus on lawyers who steal from client trust accounts, not bring disciplinary actions against lawyers for their Facebook pages or what a lawyer said in a Twitter message.

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 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.

The comment period is open until December 15, 2010, and I urge you and everyone who favors online business development to write the ABA in opposition to taking any action.

Pro-marketing lawyers must rally

Ethics regulations always start innocently enough, with a committee saying they are merely seeking input. However, the ABA document inquires whether it should draft a policy for the House of Delegates to enact. It sounds neutral enough until you realize that it's really a campaign to generate support for new online ethics rules.

Unless lawyers and those in the legal marketing community express their views, the comments will all be to *increase* the ethics burdens on online lawyer marketing. Remember that most state bars won't give CLE credit for any program on marketing. Some states forbid testimonials on lawyer websites, others forbid listing representative matters. Lawyer marketing has been so heavily burdened with ethics rules in Iowa and Florida that it's nearly impossible to do anything at all.

This committee "issues paper" is laying the groundwork for ethics rules to govern what documents a lawyer can upload on JD Supra, or what a lawyer can say in a LinkedIn profile. The result will be an even larger toxic hash of ethics rules against web-based lawyer marketing.

If we don't speak up now, all these issues the committee raises will turn into a Model Rule, which most states will put into reality.

Comments from leading attorneys

"I agree with your assessment that the ABA should stay out, or even better, come up with a statement that makes some sense," said Tucson, AZ, attorney **Jeff Lantz**.

"The additional regulations would impede the provision of real, valuable information, as attorneys will fear that they may inadvertently do something wrong that might constitute an ethical violation if new regulations are adopted. In the absence of this information, the non-legal sources noted above will become the de-facto source for legal information on the Internet – not a good result for anyone," Lantz said.

Echoing his concern, Traverse City, MI, lawyer **Enrico Schafer** said, "Lawyers are already barred from false and deceptive advertising. Whether that occurs in a newspaper advertisement, TV commercial, radio commercial or otherwise, the principle stays the same. The problem I see here is that any attempt to 'guide' lawyers in the internet space is fraught with danger. The truth is that the internet has been the great equalizer for consumers. Everyday people can now research their lawyer, law firm and legal issues online. They now have the ability, for the first time in history, to be well

informed about legal services. **Blogs are not the problem. They are the salvation which consumers have been waiting for.**”

“State bar regulations are hurting both the public and the legal profession. Anyone at the MyLegal conference heard the visceral reaction to the Virginia regulations. Anyone in Florida who has a website that requires multiple disclaimers before seeing anything beyond the homepage. I could go on,” said **Conrad Saam**, Senior Marketing Manager for Avvo in Seattle, WA.

“My personal opinion is that the rules insult the intelligence of every human being whom the ABA assumes can’t think for him/herself. The realistic side of me knows it will take centuries for governing bodies like the ABA and state bar associations to see the light and remove or revise the barriers we’ve been fighting for quite a while,” said marketing consultant **Nancy Myrland** of Indianapolis, IN.

“What might begin to make even more impact is if attorneys-turned-marketers speak out, if attorneys speak out, and if members of the public speak out to remind the powers that be that these are tools they need, want, trust and know how to maneuver without the typical overbearing oversight legal governing bodies around the country seem to want to impose,” she added.

“The ABA is not the real enemy here. Sure, they have too much time on their hands and perhaps are looking for solutions when no problem really exists. However, the real enemy are the regulators in a handful of states who are clueless about the realities of practicing law and marketing a practice. Florida is Exhibit A. But there are others (e.g. CT, NY, TX),” said **Roy Ginsburg**, an attorney in Minnetonka, MN,

“For those of you who are considering comments to the ABA or having your clients make comments to the ABA, you may want to consider a factor. The ABA believes it has been perceived as unfriendly or of little use to small firms and solos. The ABA dues scale has recently revised to accommodate and attract these practitioners and I have received more than one survey which appears to be directed to me as a small firm practitioner,” said **Craig A. Stokes**, a lawyer in Miami and San Antonio

“It is no secret in this forum that the internet is an equalizer between smaller and larger

firms. Will smaller firms be more impacted by the regulatory push? My perception is yes. For years before the Bates decision and afterward, larger firms always had the advantage of direct pitches for business to potential institutional clients in the form of invitations to weekend hunting outings, invitations to golf, etc. that were never subject to the anti-promotion actions of the ABA and the state bars. The ABA and the regulators seemed and still seem to be far more concerned about regulating the small firms seeking to establish themselves either on the web, or in the Yellow Pages. From what I can observe, I am wondering if the ABA is yet again doing the bidding of larger firms to the expense of smaller firms which need the web and twitter and LinkedIn and Facebook to get their presence before the public. I see this effort as potentially the ABA again serving its larger firm constituency," he added.

"If you are considering a comment to the ABA or having your clients contact it regarding this initiative, you might consider framing the issue as one of the ABA again favoring its large institutional firm base and giving short shrift to solos and small firms," Stokes said.

"I get nervous when the ABA starts sticking its nose too deeply into an issue. How many times has the ABA started out saying it just wants to offer "guidance," only for it to then decide to take on the role of Big Brother. The ABA just can't get over being a bureaucracy. It loves to regulate and to lay down hard-and-fast rules. It may start down this road with the best of intentions, but who knows where it will end up. Plus, as Staff Counsel, ABA Division for Legal Services, Will Hornsby advises, *these new tools don't need new rules*. When lawyers ask me what they need to know about ethics and social media, I give a two-word answer: 'Common sense,'" said Massachusetts lawyer **Bob Ambrogi**.

"If I trusted that the ABA could engage in a constructive consideration and discussion of these issues for the betterment of the profession, I'd say go for it. But I'm just not sure I trust the ABA to do that. Rather than be a partner in exploring this issue, it may try to take ownership of it," Ambrogi added.

For further discussion on this topic, please go to the existing 350-member CMO Forum on LinkedIn. Simply to go <http://www.linkedin.com/groups?mostPopular=&qid=1026487> and join.

When you post a message to twitter, please use the Twitter hashtag of #ABAREGS