

ABA COMMISSION PROPOSES GUIDANCE ON USING NEW TECHNOLOGY IN MARKETING

Attorneys must take care to avoid ethical pitfalls when using social networking, lead generators, and emerging technologies to market their practices. A recent ABA proposal to make changes to the Model Rules of Professional Conduct may provide helpful clarity and guidance for attorneys who use these tools.

Specifically, the American Bar Association Commission on Ethics 20/20 (the Commission) recently released its Initial Draft Proposal – Technology and Advertising [PDF] (the Proposal). The Proposal outlines changes to Rules 1.18 (Duties to Prospective Client), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) to clarify how the rules apply to lawyers' use of client development tools such as interactive websites, lead generators, and social media.

"[N]o new restrictions are necessary in this area, but that lawyers would benefit from more guidance on how to use new client development tools in a manner that is consistent with the profession's core values," the Commission explains in its accompanying press release [PDF]. This may be the case, but ABA Section of Litigation leaders warn that Internet marketing may create ethical traps for unwary attorneys.

"REASONABLE EXPECTATIONS" TEST A KEY CHANGE TO ANALYSIS OF PROSPECTIVE CLIENT RELATIONSHIP

Rule 1.18 currently defines "prospective client" as one who "discusses" with a lawyer the possibility of forming a client-lawyer relationship. The Commission proposes changing the definition to one who "communicates" with a lawyer about the possibility and has "a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship."

The Proposal adds a new Comment 3 warning that, if a lawyer's website encourages a visitor to submit a personal inquiry but fails to have an adequate disclaimer, someone who submits personal information may become a prospective client. The Proposal lists factors to determine when someone who initiates electronic communication with a lawyer has "reasonable expectation" that the lawyer is "willing to consider" forming a relationship.

These new factors include "whether the person . . . encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; [and] whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed." The intent is for these amendments to "give lawyers more guidance on how to avoid creating unintended client lawyer relationships," says the Commission's Proposal.

This is a "key change," says Paul E. Lehner, Chicago, cochair of the ABA Section of Litigation's Solo and Small Firm Committee. "A lawyer who wants direct interchange with prospective clients must have a clear and understandable disclaimer" on any interactive website, he cautions.

"The more interactive your website gets, the more it begins to look like a traditional attorney-client relationship," adds John C. Martin, Chicago, cochair of the Section of Litigation's Ethics and Professionalism Committee. In Martin's view, the proposed changes "allow the lawyer to defeat the [inadvertent] formation of an attorney-client relationship" with a specific disclaimer on an interactive website.

ADVERTISING RULE ADJUSTS TO WEB-BASED MARKETING

At present, Rule 7.2(b) prohibits giving anything of value in exchange for a "recommendation" but allows paying reasonable charges for advertising. The Commission believes that change is appropriate in light of new Internet-based marketing tools such as Legal Match and Groupon because such services blur the line between permissible advertising and impermissible paid recommendations.

The Commission recommends retaining the prohibition against paying non-lawyers for recommendations but adding a definition of "recommendation" to clarify this line. Specifically, a "recommendation" would be a communication that "endorses or vouches for a lawyer's credentials, abilities or qualities." Internet-based lead generation and pop-up ads are permissible under the revised Rule so long as they are not "recommendations" under the new definition "and any payment is consistent with Rule 1.5(e)(division of fees) and Rule 5.4 (professional independence of the lawyer)."

As an example of a permissible new marketing tool, the Commission's Proposal cites a law firm promotion in which people were eligible for prizes for posting their photographs, wearing free firm t-shirts, on Facebook. "[W]earing the t-shirts could not reasonably be understood as a 'recommendation' under the new definition, says the Commission.

WILL CLARITY ON "SOLICITATION" INCREASE SOCIAL NETWORKING BY LAWYERS?

Rule 7.3 regulates contact with potential or, if amended, "prospective" clients. The new Comment 1 adds a definition of "solicitation" under which, the Commission's Proposal explains, "[R]esponses to requests for information and advertisements that are not directed to specific people are not 'solicitations.'" An edit to Comment 3 would clarify that email and other electronic communications that do not involve "real-time contact" are permissible.

"This is a serious attempt to grapple with the obvious problem of Internet advertising," Martin says. He adds, "It may not address the broader issues of social media."

Even under the proposed revisions, "I'm still hesitant to use social media" for client development, says Damian E. Thomas, Miami, cochair of the Section's Solo and Small Firm Committee. "You'd have to have someone dedicated to monitoring comments on your Facebook page, and small firms don't have the resources to do that."

Loren Kieve, San Francisco, cochair of the Section's Attorney-Client Privilege Task Force, is also reticent about using social media for client development despite the possible rule changes. "My [legal marketing] consultant says I should be 'Twittering' and 'Facebooking,' but at this point I'm just not comfortable with it."

THE BOTTOM LINE: REVIEW YOUR FIRM'S WEBSITE!

"It's critical for the professional ethical guidelines to stay abreast of the extraordinary changes in our communications," says Lehner. "None of us knows where this brave new world is heading, but [the Commission's Proposal] is a good step in that direction."

Lerner advises reviewing one's interactive Internet website to, "[m]ake sure that it conforms to the new rules. This is an area that cannot be neglected."

Martin, a solo practitioner, also finds the proposed guidance helpful but notes, "there is no 'one-size-fits-all' solution." His advice? "Update your website," he says, before adding, "[You can be sure] I'll be reviewing my disclaimers" with an eye on the new rules.

The Commission is accepting comments until August 31, 2011. It expects to submit the final version to the ABA House of Delegates in May 2012 for the House of Delegates' deliberation at the August 2012 ABA Annual Meeting.

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