ARTICLE

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Legal Marketing Through the Decades: Pitfalls of Current Marketing Trends

Abstract. Historically, states did not place restrictions on advertising by professionals; it was not until the beginning of the twentieth century that jurisdictions began to enact prohibitions on marketing of professional services. Eventually, the U.S. Supreme Court recognized the right of professionals to advertise their services and has continued to define the right in the decades since. While lawyers have long advertised in traditional media, such as billboards and television, thanks to the exploding popularity of social media websites like Facebook and Twitter, the available platforms lawyers may use to market their services will continue to multiply.

New and creative approaches to marketing one's services have resulted in equally creative state measures to corral such marketing practices. Despite attempts to address the ethical implications of advertising in a constantly evolving digital media age, the ABA and state bar associations have failed to keep up. The focus of this Article is to review the evolution of marketing techniques utilized in the legal arena and report on disciplinary actions stemming from advertising practices found to be unethical and in violation of state rules of professional conduct. By examining cases where attorneys' marketing practices have been misleading or have resulted in the inadvertent creation of attorney–client relationships, this Article demonstrates the need for further guidance regarding online marketing of legal services.

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I. INTRODUCTION

A myriad of professionals in intense competition to provide services to prospective clients or customers have embraced expansive marketing techniques. The legal profession has experienced an increased number of newly licensed attorneys who, along with older members of the bar, are eager to capture clients capable of providing an economic return in exchange for legal expertise.[1] The expanded competitive arena has given

1. This development was initially justified as cutting consumer costs, but studies offer limited data to support the proposition that attorney advertising lessens the contingency fees charged by personal injury lawyers. *See* Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost*

rise to ethical concerns regarding certain marketing practices as well as professional concerns regarding legal representations arising from such marketing practices.

This Article examines attorneys' professional marketing practices via social and news media resulting in an attorney–client relationship and also provides examples of those marketing practices found to be unethical and in violation of state rules of professional conduct and court rules. The focus of the Article is to review marketing techniques utilized in the legal arena, both traditional methods and newly developed uses of technology, and to report on the disciplinary actions stemming from unethical practices.

Historically, there were no regulations against advertising by professionals. It was at the beginning of the twentieth century when various state jurisdictions adopted rules prohibiting professional advertising.[2] Eventually, the legal system recognized the right of professionals to advertise their services,[3] in accord with established rules regarding the uses and limitations on the rights of attorneys and their clients. It then undertook extensive inquiries concerning the limitations on the right to advertise services. Creative approaches to marketing one's services have resulted in equally creative approaches to corral such marketing practices. Despite all of the promulgated rules emanating from the legal system regarding the marketing and providing of legal services, there is very little co-professional reporting of violations of the established rules.[4]

Paradox, 65 STAN. L. REV. 633, 633 (2013) (discussing the relationship, or lack thereof, between attorney fees and marketing practices). In addition, the development has not resulted in an increased amount of legal representation for the indigent in society. *See* John J. Farmer, Jr., *To Practice Law, Apprentice First*, N.Y. TIMES (Feb. 17, 2013), http://www.nyt.com/ToPracticeLawApprenticeFirst ("Nationwide, judges decry not a surplus of lawyers, but a lack of competent representation for those who aren't rich individuals and corporations.").

2. *See, e.g.*, Robert F. Boden, *Five Years After* Bates*: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982) (discussing the history of court and academic regulation of professional advertising).

3. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 351 (1977) (holding attorney advertising is protected under the First Amendment); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976) (holding advertising by pharmacists is protected speech under the First Amendment).

4. *See* Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 506 (2012) (discussing the need for a more rigorous automatic system to report lawyer misconduct).

II. MARKETING IN THE LEGAL PROFESSION

Advertising is commercial speech usually protected by the First Amendment, so long as the speech is legitimate and not misleading.[5] The Supreme Court adequately described commercial speech and its value:

> The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[6]

A. *Supreme Court Approval of Legal Advertising*

The United States Supreme Court has addressed the issue of attorney advertisement and held that "truthful advertising of 'routine' legal services is protected by the First and Fourteenth Amendments against blanket prohibition by a state."[7] But, the Court reserved the question of "in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or 'runners.'"[8]

The Supreme Court, while acknowledging protection of free speech for legal advertisements, has held "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment."[9] However, the Court has also held a state may not "categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems."[10] Further, the Court has indicated that state bar associations can regulate the time, place, and manner of attorney advertising as long as the restriction is narrowly

5. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (holding commercial speech deserves protection and establishing a four-part test to determine whether a restriction on commercial speech is permissible).

6. Edenfield v. Fane, 507 U.S. 761, 767 (1993).

7. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 448–49 (1978).

8. *Bates*, 433 U.S. at 366.

9. *Ohralik*, 436 U.S. at 455 (upholding state regulations under First Amendment challenges).

10. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 468 (1988).

tailored to protect its substantial interest in regulating the advertising.[11] In a subsequent case, for example, the Court upheld a state bar association's regulation requiring attorneys to wait thirty days before sending direct-mail solicitations to victims of a recent accident or disaster.[12]

B. *ABA Guidelines Relating to Lawyer Advertising*

In an attempt to provide guidelines for attorneys, as well as state bar associations, the American Bar Association (ABA) has established and continues to evaluate and update the Model Rules of Professional Conduct.[13] The Model Rules prohibit lawyers from making false or misleading communications.[14]

Model Rule 7.3 specifically addresses the solicitation of clients by attorneys. Generally, lawyers may not solicit clients "by in-person, live telephone, or real-time electronic contact."[15] However, an attorney may contact other lawyers and individuals with whom the attorney has a close personal relationship.[16] Further, if a person has previously stated that they do not wish to be contacted, a lawyer is prohibited from doing so and must refrain from using coercion, duress, or harassment.[17] While the Model Rules generally prohibit solicitation, the rules do allow attorneys to advertise their services by utilizing written, recorded, or electronic communications.[18] Reasonable costs can be paid for the advertising,[19]

11. *See Bates*, 433 U.S. at 383–84 (holding "blanket suppression" of legal advertising is impermissible).

12. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 618 (1995) ("Under the 'intermediate' scrutiny framework . . . a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is 'narrowly drawn.'" (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980))); *see also* Alexander v. Cahill, 598 F.3d 79, 96 (2d Cir. 2010) (considering a case in which a New York ethics rule regarding attorney advertising was challenged and ultimately holding the regulation violated the First Amendment because the advertising at issue was not actually misleading).

13. The ABA Model Rules of Professional Conduct essentially guide states that choose to develop their own rules. *See generally* Jay D. Kreismann & Menachem Lanner, *The* Cahill *Decision: Evolution or Revolution? An Analysis of* Alexander v. Cahill *and Its Potential Effect on Attorney Advertising*, 21 GEO. J. LEGAL ETHICS 841 (2008) (discussing the history of the Model Rules of Professional Conduct).

14. MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2013). If a lawyer's communication contains a material misrepresentation about a law or fact, or omits a material fact, the communication is considered misleading under the Model Rules. *Id.*

15. *Id.* r. 7.3(a).

16. *Id.*

17. *Id.* r. 7.3(b).

18. *Id.* r. 7.2(a).

and all communications must contain the name and address of the lawyer or law firm.[20] Finally, Model Rule 8.4(e) provides a lawyer may not "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."[21]

When combined, these rules govern the marketing of services by attorneys as every state except California has adopted the Model Rules in some form.[22] The rules are not completely clear when it comes to the use of social media by attorneys to market their services.[23] The ABA acknowledges many attorneys use social media as a marketing tool and recognizes the need for guidance in areas such as confidentiality and client development.[24] In 2010, the ABA issued a formal opinion regarding lawyer websites and the prohibition against misleading information on these websites.[25] However, because of the lack of ABA clarification in the Model Rules, state bar associations have been forced to lead the way.[26]

C. *The Use of Social Media*

It has become readily apparent that people are linked globally through the use of social media. The use of social media has fostered rave-type

19. *Id.* r. 7.2(b)(1).

20. *Id.* r. 7.2(c).

21. *Id.* r. 8.4(e).

22. *About the Model Rules*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited May 10, 2016).

23. *See* Kelcey Nichols, *Client Confidentiality, Professional Privilege and Online Communication: Potential Implications of the* Barton *Decision*, 3 SHIDLER J.L. COM. & TECH. 10, ¶ 14 (2007) (addressing the dearth of state regulation regarding online communication).

24. *See* ABA Comm. on Ethics 20/20, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (providing guidance to attorneys regarding the use of technology and the duty of client confidentiality).

25. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, at 1 (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf.

26. In 1996, Texas became the first state to implement an attorney Internet advertising rule. *See* Mitchel L. Winick, Debra Thomas Graves & Christy Crase, *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH. L. REV. 1487, 1489–90 (1996) ("In fact, the Texas Bar may be the first professional association of any type to establish specific rules regulating Internet publication and use of home pages on the World Wide Web."); *see also* Christopher Hurld, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827, 840–42 (2004) (examining attempts by the ABA to address Internet-related advertising, asserting "the simple addition of the phrase 'electronic communication' [in Model Rules 7.1–7.3] to the previously existing list of regulated media once again ignores the fundamental nature of the Internet").

parties,[27] revolutions,[28] and marriages.[29] The use of technology as a form of communication is intertwined with every aspect of the lives of many people, particularly young people.[30] Social media platforms, such as Twitter, Facebook, LinkedIn, Pinterest, Google+, and blog forums, have fundamentally changed the way people and businesses communicate and conduct their research.[31] Social media is also commonly used by businesses to advertise goods and services.[32] Advertising professional legal services, however, invite certain caveats.[33]

Prior to the onset of multiple social media platforms, lawyers advertised in the Yellow Pages, billboards, bus posters, and television.[34] These traditional methods of advertising cannot change without much effort and are considered passive, i.e., providing little interaction with viewers.[35] Because of the widespread use of social media, lawyers are now using these platforms as professional marketing tools.[36] "Social networking sites

27. Jillian Sederholm, *Michigan House Party Advertised on Social Media Draws 2,000 People*, NBC NEWS (Aug. 5, 2014, 8:03 PM), http://www.nbcnews.com/news/us-news/michigan-house-party-advertised-social-media-draws-2-000-people-n173351.

28. *See* Kentaro Toyama, *Twitter: It Won't Start a Revolution, but It Can Feed One*, ATLANTIC (Jan. 31, 2011), http://www.theatlantic.com/technology/archive/2011/01/twitter-it-wont-start-a-revolution-but-it-can-feed-one/70530 ("It's not so much that tweeting foments rebellion, but that in our age, all rebellions are tweeted.").

29. There are numerous online dating companies. For a few examples, see EHARMONY, http://www.eharmony.com (last visited Apr. 23, 2016); MATCH.COM, http://www.match.com (last visited May 10, 2016); and OKCUPID, http://www.okcupid.com (last visited May 10, 2016).

30. Simon Chester & Daniel Del Gobbo, *How Should Law Firms Approach Social Media?*, 38 L. PRAC., Jan.–Feb. 2012, at 28 (discussing four social media platforms lawyers should use).

31. *See* Nicola A. Boothe-Perry, *The "Friend"ly Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL'Y 127, 130–31 (2013) (examining different types of social media and use statistics in-depth).

32. *See, e.g.*, Chang Zhou, *Consumers as Marketers: An Analysis of the Facebook "Like" Feature as an Endorsement*, 41 W. ST. U. L. REV. 115, 115–16, 118 (2013) (describing how businesses use social media platforms to reach their targeted markets in a more direct manner as opposed to traditional advertising).

33. *See* Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 313–22 (2011) (discussing the need for ethical social media marketing practices).

34. *See generally* Thomas B. Metzloff & Jeffrey M. Smith, *The Future of Attorney Advertising and the Interaction Between Marketing and Liability*, 37 MERCER L. REV. 599 (1986) (examining types of advertising challenged in courts).

35. Graham H. Ryan, *What Went Wrong with the World Wide Web: The Crossroads of Emerging Internet Technologies and Attorney Advertising in Louisiana*, 71 LA. L. REV. 749, 753–54 (2011) (characterizing traditional forms of advertising as passive due to their inability to be directed towards particular individuals).

36. *See* Elizabeth Colvin, *The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility*, 92 U. DET. MERCY L. REV. 1, 4 (2015) ("According to a 2012

allow lawyers to quickly and easily create image and text-based advertisements that redirect users to a law firm website or a page contained within that social network."[37] Some commentators have considered the use of various forms of social media by attorneys as revolutionary for the profession;[38] others have stated "engagement with social media has become a functional imperative for all law firms."[39] One court has indicated that there was no communication made in confidence in an online Facebook communication between an attorney and a potential client.[40] Virtual law practice has been defined by the ABA "as one that offers to its clients a secure client portal, as part of the law firm's web site, where the clients can log in with a user name and password, and interact with their attorney, as well as consume other online legal services."[41] The specifics of the virtual law practice, other than advertising and the storage of client information in the cloud, are not the focus of this Article.

Some state bar associations have provided some guidelines for their members. For example, the New York State Bar Association, Commercial and Federal Litigation Section, issued social media guidelines in 2015 concerning attorney advertising and the use of social media with clients.[42] The Texas Young Lawyers Association created a pocket guide to assist its members in the use of social media.[43] The State Bar of California issued several ethics opinions on the topic of social media, in addition to creating online programs.[44]

poll, nearly 85% of U.S. law firms use social media for marketing purposes.").

37. Ryan, *supra* note 35, at 759.

38. *See* Metzloff & Smith, *supra* note 34, at 622 ("With respect to the nature of legal practice, the decade-long transition has resulted in a significant increase in attorney communications of a self-serving variety with persons in the preclient formation stage . . . .").

39. Chester & Del Gobbo, *supra* note 30, at 28.

40. Kaiser v. Gallup, Inc., No. 8:13CV218, 2014 WL 3109165, at *1–2 (D. Neb. July 8, 2014).

41. Richard Granat, *2010 ABA Legal Technology Survey Report on E-Lawyering: Questionable Data*, E-LAWYERING BLOG (July 4, 2010), http://www.elawyeringredux.com/2010/07/articles/virtual-law-firms/2010-aba-legal-technology-survey-report-on-e-lawyering-questionable-data.

42. SOC. MEDIA COMM., N.Y. STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES (2015), http://www.nysba.org/socialmediaguidelines.

43. TEX. YOUNG LAWYERS ASS'N, TYLA POCKET GUIDE: SOCIAL MEDIA 101 (2013), http://www.tyla.org/tyla/assets/File/Social%20Media101%20booklet.pdf; *see also* Arden Ward, *Social Media 101*, 76 TEX. B.J. 956, 957 (2013) (quoting TYLA President Kristy Blanchard, who explained that the pocket guide, which "covers the do's and don'ts of social media," was necessary because advertising on social media presented "a lot more opportunity now to do something wrong").

44. *Social Media: Ethics Opinions*, STATE BAR OF CAL., http://ethics.calbar.ca.gov/Ethics/EthicsTechnologyResources/SocialMedia.aspx (last visited Apr. 23, 2016).

III. MARKETING TECHNIQUES LEADING TO THE ESTABLISHMENT OF AN ATTORNEY–CLIENT RELATIONSHIP

Marketing techniques can lead to an attorney–client relationship, thus giving rise to the professional duty of confidentiality.[45] Surveys, questionnaires, online interactive communications, and use of social media have given rise to new rules, new interpretations of old rules, and new advice from state bar associations.[46] The caveat is that many of these devices allow for the receipt of confidential information protected under the obligation of fiduciary duty or an attorney–client relationship.[47]

Under the Model Rules, a prospective client is a person who "consults with a lawyer about the possibility of forming a client–lawyer relationship."[48] Generally, state law determines the creation of the attorney–client relationship.[49]

The attorney–client privilege arises where the following criteria have been met:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[50]

An attorney–client relationship is established when a lawyer either

45. Colvin, *supra* note 36, at 5 (suggesting the information-sharing nature of social media and the need to maintain confidentiality within the attorney–client privilege are in direct conflict).

46. Jayne Navarre, *Social Media and Legal Ethics—No New Restrictions, Just Clarification*, VIRTUALMARKETINGOFFICER BLOG (July 19, 2011), http://www.virtualmarketingofficer.com/2011/07/19/social-media-and-legal-ethics-no-new-restrictions-just-clarification (discussing proposed modifications to the Model Rules and the use of social media to advertise services).

47. John Gergacz, *Using the Internet to Attract Clients and the Attorney–Client Privilege*, 33 RUTGERS COMPUTER & TECH. L.J. 17, 22 (2005). A distinction must be made between the broader duty of confidentiality, which covers information relating to the representation of a client (Model Rule 1.6), and the attorney–client privilege, which is limited to situations when counsel and client communicate confidentially regarding legal advice. *See* MARGARET RAYMOND & EMILY HUGHES, THE LAW AND ETHICS OF LAW PRACTICE 213 (2d ed. 2015) (discussing this distinction).

48. MODEL RULES OF PROF'L CONDUCT r. 1.18(a) (AM. BAR ASS'N 2013).

49. Hopper v. Frank, 16 F.3d 92, 95 (5th Cir. 1994).

50. *Id.* at 358–59; *see also* Coorstek, Inc. v. Reiber, No. 08-cv-01133-KMT-CBS, 2010 WL 1332845, at *9–11 (D. Colo. Apr. 5, 2010) (expounding on the criteria necessary for attorney–client privilege to apply).

manifests consent to represent the client in some way or fails to provide clear statements to manifest a lack of consent.[51] Formal letters or contracts do not need to be executed between the parties to establish an attorney–client relationship.[52] Thus, casual social media contact could suffice to establish the relationship.[53] Some believe that disclaimers should be clearly used to notify the potential client that an attorney–client relationship does not exist merely because a prospective client reads a blog, posts a comment on a lawyer's website, or engages in other types of one-sided online communication with an attorney.[54] The ABA suggests both care and restraint for those lawyers building a social media presence to attract clients.[55] Lawyers may intentionally or unintentionally disclose client information on social media sites, causing a breach of the duty of confidentiality.[56] A 2010 ABA ethics opinion suggests a lawyer or law firm with a legal website must manage invited viewer inquiries and be mindful that such inquiries could create an attorney–client relationship.[57]

In *Barton v. United States District Court*,[58] a law firm posted a questionnaire online to gather information from prospective clients for a potential class action lawsuit against the manufacturer of a prescription anti-depressant.[59] Questionnaire responses were sought from individuals

51. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALBANY L. REV. 113, 120 (2009).

52. *Id.*

53. *See* Thomas Roe Frazer II, *Social Media: From Discovery to Marketing—A Primer for Lawyers*, 36 AM. J. TRIAL ADVOC. 539, 564 (2013) (explaining how "an unintended attorney–client cyber relationship" could result from "[h]aving a conversation via social media and offering legal advice").

54. *See* David Hricik, *To Whom It May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, 16 PROF'L LAW., no. 3, 2005, at 1, 4–5 (concluding a law firm's disclaimer against the creation of an attorney–client relationship is valid when the layperson takes affirmative steps to acknowledge such disclaimers and providing "click wraps" as an example (citing Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87, 97 (2009))); *see also* Bennett, *supra* note 51, at 121 ("[C]ommentators suggest that Web sites inviting potential clients to communicate with lawyers should disclaim the existence of an attorney[–]client relationship.").

55. *See With Social Media, Restraint Is Recommended*, YOURABA (May 2013), http://www.americanbar.org/content/newsletter/publications/youraba/201305article06.html (advising attorneys to limit communication with potential clients when using social media and to speak in general terms so as to avoid the inadvertent formation of a lawyer–client relationship).

56. *Cf.* Wendy L. Patrick, *With "Friends" Like These: Social Networking and Lawyering Don't Always Mix*, CAL. B.J. (June 2010), http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=38 (asserting messages posted by prospective clients on a lawyer's Facebook page can be viewed by non-essential parties and are likely to render the subject of the communications public knowledge in the context of the attorney–client privilege).

57. *See generally* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (providing guidance for lawyers who use websites to communicate with potential clients).

58. Barton v. U.S. Dist. Court, 410 F.3d 1104 (9th Cir. 2005).

59. *Id.* at 1106.

who used the drug, as well as from "loved ones" of people who used the anti-depressant.[60] The questionnaire sought extensive information about the use of the drug and symptoms the user experienced.[61] For the filled-out questionnaire to be emailed to the law firm, the respondent had to check a "yes" box.[62] The "yes" box had a statement that acknowledged the questionnaire did not constitute a request for legal advice and that submission of the questionnaire would not create an attorney–client relationship.[63] The district court concluded that a potential client who read the disclaimer and checked the "yes" box containing the disclaimer waived any privilege that would arise from an attorney–client relationship.[64] The district court recognized California law regarding attorney–client privilege applied to pre-employment communications with an attorney by a prospective client wishing to retain the particular attorney.[65] However, on appeal, the Ninth Circuit indicated the proper viewpoint for examining the disclaimer was from the perspective of the potential client:[66]

> The questionnaire is ambiguous, but the plaintiffs should not be penalized for the law firm's ambiguity. It is their privilege, not any right of the lawyers, that is at stake. A layman seeing the law firm's [I]nternet material would likely think he was being solicited as a potential client. In all likelihood, a very high proportion of questionnaire submitters completed the questionnaire "with a view to retention of" the law firm, and thus submitted them "in the course of an attorney-client relationship."[67]

The court further stated, "The changes in law and technology that allow lawyers to solicit clients on the [I]nternet and receive communications from thousands of potential clients cheaply and quickly do not change the applicable principles."[68] Thus, the Ninth Circuit concluded the information in the questionnaire should have remained confidential.[69]

60. *Id.* at 1107.

61. *Id.*

62. *Id.*

63. *Id.* (internal quotation marks omitted).

64. *Id.* at 1108.

65. *Id.*

66. *See id.* at 1111 (indicating the creation of an attorney–client privilege is dependent on the prospective client's intentions).

67. *Id.* at 1110 (internal citations omitted).

68. Barton v. U.S. Dist. Court, 410 F.3d 1104, 1112 (9th Cir. 2005).

69. *Id.* at 1112. "Neither the word 'confidentiality' nor the substance of a disclaimer of confidentiality can be found in the online questionnaire . . . . [T]he vagueness and ambiguity of the law firm's prose does not amount to a waiver of confidentiality by the client.". Id. at 1110.

The court's decision in this case left open the possibility that a clear disclaimer, written in such a way that an average reader would understand, might preclude the establishment of the attorney–client relationship through the use of an online survey or questionnaire.[70] Note that, in this case, despite the language of the disclaimer (which stated that the questionnaire did not constitute a request for legal advice and did not form an attorney–client relationship), the court found that those who completed the survey entered into a fiduciary relationship with the lawyer as "potential clients." In other words, the disclaimer appeared to preclude a fiduciary, attorney–client relationship, but the court still found one.

IV. ETHICAL CONCERNS OF CURRENT MARKETING TECHNIQUES

Certain marketing techniques can raise ethical concerns. Some professional advertisements may be silly and humorous to catch the attention of the consuming public. Some may also be downright deceitful to mislead the consuming public. It is the function of ethicists operating within the parameters of the legal system to sort out the distinction between various techniques and to prevent harm to the laypersons who seek legal advice by relying on a particular marketing technique.

A. *Misleading or Deceptive Statements Made by the Attorney or Others on Their Behalf*

Humorous advertisements are sometimes used simply to promote the names of law firms or attorneys. As an example, the law firm of Alexander & Catalano LLC ran commercials that "often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name," and the commercials referred to the firm as "heavy hitters," "portray[ed] its attorneys as giants towering over downtown buildings, depict[ed] its attorneys counseling space aliens concerning an insurance dispute, and represent[ed] its attorneys running as fast as blurs to reach a client in distress."[71] Other lawyers promote their names by using humorous advertisements, portraying minor paper cuts or an interruption of computer games as injuries not worthy of a legal

70. *See* Nichols, *supra* note 23, ¶ 20 ("*Barton* left open the possibility that a clear disclaimer, written in 'plain English,' may avoid the formation of an attorney[–]client relationship." (citing *Barton*, 410 F.3d at 1111)).

71. Alexander v. Cahill, 634 F. Supp. 2d 239, 243 (N.D.N.Y. 2007), *aff'd in part, rev'd in part*, 598 F.3d 79, 96 (2d Cir. 2010); Kreismann & Lanner, *supra* note 13, at 842–43 (quoting *Cahill*, 634 F. Supp. 2d at 243).

pursuit.[72] These techniques and similar approaches, as set forth below, should be undertaken with a certain degree of caution, as such constant exposure of an attorney's name to the public may give rise to the status of a public figure[73] or limited public figure,[74] thereby lessening legal protections afforded in claims of defamation and invasion of privacy. The four-part *Central Hudson* test is often a basis of analysis when issues regarding attorney advertising arise.[75] The test involves examining whether (1) the commercial speech concerns a lawful activity and is not misleading; (2) the government interest asserted to justify the regulation is substantial; (3) the regulation "directly advances" that government interest; and (4) the regulation is no more extensive than necessary to serve that state interest.[76]

Courts have stated, "[B]ecause of the value inherent in truthful, relevant information, a state may ban only false, deceptive, or misleading commercial speech."[77] "However, a state may restrict commercial speech that is not false, deceptive, or misleading upon a showing that the restriction 'directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.'"[78] Consequently, self-laudatory statements or advertisements that characterize an attorney as a "super lawyer," "best lawyer," "highest

72. *See* Martha Neil, *Funny Lawyer Ads No Joke in NY*, A.B.A. J. (Dec. 4, 2007, 11:50 AM), http://www.abajournal.com/news/article/funny_lawyer_ads_no_joke ("Law firm ads that show attorneys towering over skyscrapers and offering legal advice to space aliens obviously aren't meant to be taken seriously.").

73. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293–94 (1964) (requiring proof of actual malice in defamation cases involving public officials); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (defining public figures as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention"); Curtis Publ'g Co. v Butts, 388 U.S. 130, 155 (1967) (explaining public figures are individuals who, by position or activity, "command[] sufficient continuing public interest and ha[ve] sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and faclacies' of the defamatory statements" (quoting Whitney v. California, 274 U.S 357, 377 (1927) (Brandeis, J., dissenting))).

74. *See* Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1029–30 (1996) ("Of the three categories of public figures recognized by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, by far the most frequently recognized is the voluntary limited public figure. To attain this stature, plaintiffs must have injected themselves into a public controversy 'in order to influence the resolution of the issues involved.'" (citing *Gertz*, 418 U.S. at 345)).

75. Cen. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y., 447 U.S. 557 (1980).

76. *Id.* at 464–68.

77. *E.g.*, Mason v. Fla. Bar, 208 F.3d 952, 955 (11th Cir. 2000) (citing Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994)).

78. *Id.*

rating," or other forms of hyperbole, though having raised concerns among state bar associations, have not resulted in blanket restrictions.[79] Still, some state bar associations[80] have adopted rules prohibiting the use of characterizations, such as "expert," "certified," or "specialist," unless the attorney has received such titles[81] or has issued a disclaimer that such specialties are not recognized by the state.[82] The Model Rules provide that an attorney cannot list a specialization unless such a specialization has been approved by the state or the ABA and the certifying organization has been clearly identified.[83] Some state bar associations have established attorney advertising commissions that require approval of advertisements prior to use.[84]

Statements made by an attorney during the course of the advertising campaign, either in social media or in print form, may be misleading. In an attempt to provide guidelines, the ABA has established, and continues to evaluate and update, the Model Rules of Professional Conduct.[85] Model Rule of Professional Conduct 7.1 defines misleading and states: "A lawyer shall not make a false or misleading communication about the

79. *See id.* at 959 (holding the Florida Bar rule prohibiting "statements made by lawyers in advertisements or written communications that are 'self laudatory' . . . . impermissibly curtails non-misleading commercial speech"); Alexander v. Cahill, 634 F. Supp. 2d 239, 249 (N.D.N.Y. 2010) (finding the use of nicknames, moniker, and mottos are permitted), *aff'd in part, rev'd in part*, 598 F.3d 79, 96 (2d Cir. 2010); *see also* Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 215–16 (5th Cir. 2011) (upholding restriction on advertisements that "promise results" because they are deceptive, and reviewing five other "potentially deceptive" restrictions); Allen, Allen, Allen, & Allen v. Williams, 254 F. Supp. 2d 614, 627–29 (E.D. Va. 2003) (enjoining Virginia State Bar from restricting law firm from advertising its placement in a book titled *The Best Lawyers in America*).

80. *See* ILL. SUP. CT. R. PROF'L CONDUCT r. 7.4(c) (2009) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer . . . ."); N.Y. R. PROF'L CONDUCT r. 7.4(a), *reprinted in* 19B N.Y. JUD. LAW APP. 615 (Consol. 2014) (restricting use of "specialist" in attorney advertisements); State Bar of Ariz. Comm. on Rules of Ethics & Prof'l Responsibility, Formal Op. 97-04 (1997) (prohibiting law firms from using tradenames on websites).

81. Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebook and Blogging*, 28 TOURO L. REV. 149, 159 (2012).

82. In view of the U.S. Supreme Court decision in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Illinois State Bar Association issued an advisory opinion clarifying its rules so as to allow the Illinois Supreme Court to certify bar members of the Capital Litigation Trial Bar. *Hearing Set for New Rules on Death Penalty Litigation*, ISBA B. NEWS (Jan. 18, 2000), http://webarchives.isba.org/association/1-18a.htm.

83. MODEL RULES OF PROF'L CONDUCT r. 7.4 (AM. BAR ASS'N 2013).

84. Texas and Kentucky, for example, have such advertising commissions in place. KY. SUP. CT. R. 3.130(7.03); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.07, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR. R. art. X, § 9).

85. *E.g.*, MODEL RULES r. 7.1.

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."[86]

Popular television programs depict some lawyers that use humorous advertising and engage in activities that border on criminal to obtain new clients.[87] Josh Zepps of *HuffPost Live* interviewed four personal injury attorneys regarding their unusual marketing practices, which illustrated not only the humor of the advertising but also the potential for the advertising to mislead the public.[88] Recently, a Michigan attorney—who had once complained to the state's courts regarding a denial of his free speech[89]—filed a lawsuit because someone posted a parody of him on Twitter.[90] The creator of the Twitter account used Todd Levitt 2.0 as the name on the account, with the username @levittlawyer, and included the plaintiff's picture and marketing materials.[91] The plaintiff alleged that the defendant's impersonation of him caused damages.[92] The defendant argued the Twitter account was a "parody designed to make light of the plaintiff's marketing strategy, which included referring to himself as a 'bad ass' attorney."[93] The Michigan Circuit Court held the Twitter account of the defendant was a parody and, therefore, was protected under the First Amendment.[94] The case gained national attention.[95] When reviewing the many advertisements and self-promotional programs of the plaintiff–

86. *Id.*

87. For examples of two such programs, see *Better Call Saul* (AMC television broadcast 2015–present) and *Breaking Bad* (AMC television broadcast 2008–2013).

88. Ryan Buxtan, *Introducing 4 Real-Life Lawyers Who Would Fit Right in on 'Better Call Saul'*, HUFFPOST LIVE (Feb. 27, 2015, 4:34 PM), http://www.huffingtonpost.com/2015/02/27/real-life-better-call-saul_n_6771998.html (discussing notable lawyer adverting campaigns and taglines, "Hit Happens," "Better Call Todd," "Badass Lawyer," "It's Hammer Time," and "An Attorney that Rocks").

89. Levitt v. Collins, No. 241212, 2004 WL 512276, at *1 (Mich. Ct. App. Mar. 16, 2004) (per curiam) ("Plaintiff Todd L. Levitt[] . . . challenges as restrictive of his constitutional rights to freedom of expression, the cable access policies . . . enforced by defendants . . . .").

90. Levitt v. Felton, No. 14-11644-NZ, 2015 WL 5728236, at *1 (Mich. Cir. Ct. Feb. 19, 2015).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at *2–3.

95. *Cf.* Eugene Volokh, *'Badass Lawyer' Todd Levitt Loses Libel Lawsuit over @levittlawyer Parody Twitter Feed*, WASH. POST (Feb. 20, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/20/badass-lawyer-todd-levitt-loses-libel-lawsuit-over-levittlawyer-parody-twitter-feed (providing a detailed summary of Todd Levitt's libel suit).

attorney,[96] it is very possible for a viewer to perceive the plaintiff–attorney acted as a university attorney for university students, thereby misleading the viewers as to his relationship with the university itself.[97]

As a result of the plaintiff–attorney's conduct during and subsequent to the litigation, attorney Gordon Bloem reported Mr. Levitt's conduct to the Attorney Grievance Commission; a request was filed pursuant to Rule 8.3(a) of the Michigan Rules of Professional Conduct[98] setting forth a myriad of marketing techniques[99] that allegedly amounted to violations of Rules 6.5(a),[100] 7.1(a)–(b),[101] and 8.4(d).[102] Exhibits were also attached

96. *See Todd Levitt*, LEVITT L. SEMINARS, http://levittlawseminars.com/about (last visited May 10, 2016) (offering programs to help attorneys "brand and grow a law practice after school").

97. To illustrate the possible confusion, the student-edited newspaper *CM Life* ran an article implying that the attorney was associated with the university's legal department. *See* Ben Solis, *Notorious CMU College Lawyer Todd Levitt Filming Pitch for Reality Show*, CENT. MICH. LIFE (Mar. 27, 2014, 11:58 PM), http://www.cm-life.com/article/2014/03/notorious-cmu-college-lawyer-todd-levitt-filming-pitch-for-reality-show (emphasizing contact and proximity between the lawyer and university).

98. Ben Solis, *Levitt Files Civil Libel Lawsuit Against Morning Sun Newspaper*, CENT. MICH. LIFE (Apr. 23, 2015), http://www.cm-life.com/article/2015/04/levitt-files-civil-libel-lawsuit-against-morning-sun-newspaper. Michigan Rule 8.3(a) provides:

> A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.

MICH. R. PROF'L CONDUCT r. 8.3(a) (2015).

99. Levitt's marketing techniques included posting on Twitter. *See Image of Todd Levitt Twitter Feed*, IMGUR, https://imgur.com/gallery/pAal1/new (last visited Apr. 23, 2016).

100. MICH. R. PROF'L CONDUCT r. 6.5(a) (2015). Michigan Rule 6.5(a) reads:

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

Id.

101. *Id.* r. 7.1. Michigan Rule 7.1 reads:

> A lawyer may, on the lawyer's own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer's law firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive. A communication shall not: (a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading; (b) be likely to create an unjustified expectation about results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law . . . .

Id.

102. *Id.* r. 8.4(d) ("It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official . . . .").

to support the investigatory request.[103] Subsequently, the plaintiff–attorney from the original lawsuit filed a second legal action against the local newspaper that reported on the original suit, the attorney representing the original defendant, the original defendant's father, and other certain "John and/or Jane Does."[104] News of this second lawsuit also went national.[105] This is an ongoing legal saga.

In another case, *Hunter v. Virginia State Bar*,[106] the Supreme Court of Virginia determined an attorney's blog was commercial speech because it promoted an economic activity—the marketing of the attorney's services.[107] The blog titled, *This Week in Richmond Criminal Defense*, contained many legal issues and cases: mostly cases in which the attorney had achieved favorable results for many of his clients.[108] The blog entries did not contain a disclaimer of any kind.[109] The Virginia State Bar charged him with violating ethical rules because the advertising was misleading to readers and detrimental to past clients.[110] The Supreme Court of Virginia agreed with the State Bar that the blog was misleading and likely detrimental to past clients, and that the particular disclaimer proposed by the circuit court was insufficient because it did not fully address the requirements of Rule 7.2.[111]

More recently, on September 11, 2014, the State Bar Court of California suspended Svitlana E. Sangary, a lawyer who had engaged in deceptive advertising,[112] holding she violated state rules of professional conduct

103. *See* Martha Neil, *After Losing Lawsuit over Parody Twitter Account, Lawyer Sues Opposing Counsel and Newspaper*, A.B.A. J. (Apr. 24, 2015, 12:05 PM), http://www.abajournal.com/news/article/after_losing_libel_lawsuit_over_parody_twitter_account_lawyer_sues_opposing (quoting Bloem: "I am . . . also being sued because I followed through on my duty to report Mr. Levitt's unethical behavior to the attorney grievance commission."); *see also* Lisa Yanick-Jonaitis, *Mt. Pleasant Attorney Sues CMU Student over Parody Twitter Account*, MORNING SUN (June 25, 2014), http://www.themorningsun.com/general-news/20140625/mt-pleasant-attorney-sues-cmu-student-over-parody-twitter-account (recounting the history of the case providing links to court filings).

104. Complaint at *2–3, Levitt v. Dig. First Media, No. 15-12317-NZ (Mich. Cir. Ct. Apr. 23, 2015).

105. For a few examples of news covering the lawsuit, see Neil, *supra* note 103; and Justin Glawe, *A Wannabe Reality TV Lawyer Is Suing a Guy Who Mocked Him on Twitter*, VICE (June 25, 2014), http://www.vice.com/read/a-wannabe-reality-tv-star-lawyer-is-suing-a-guy-who-mocked-him-on-twitter.

106. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611 (Va. 2013).

107. *See id.* at 617–18 (noting although the blog was political commentary it was also evidently commercial speech).

108. *Id.* at 613.

109. *Id.*

110. *Id.* at 614.

111. *Id.* at 613–14.

112. *See In re* Sangary, No. 13-O-13838-DFM, at 16 (Cal. State Bar Ct. Sept. 11, 2014)

regarding deceptive advertising, among other violations.[113] The lawyer had a page on her website called "Publicity" in which she had several photos of herself with various high-profile political figures and celebrities in the entertainment field.[114] Expert testimony demonstrated she used technology to alter the images to make it appear she was originally in the pictures when, in fact, she was not.[115] The photos were meant to imply that the lawyer was popular and both politically and socially connected, which were all presented as part of her advertising.[116] The court found this behavior to be misleading to prospective clients:

> [A]ttorney communications or solicitations shall not contain any matter ["]in a manner or format which is false, deceptive, or which tends to confuse, deceive[,] or mislead the public.["] By posting and maintaining several images on her website falsely depicting Respondent posing with various public figures, when in fact Respondent was not actually photographed in the company of those public figures, Respondent communicated an advertisement or solicitation directed to the general public that was false and deceptive . . . .[117]

In summary, state bar associations have become increasingly vigilant in reviewing professional advertisements for unethical and misleading content.

B. *Professional Marketing Practices Resulting in Professional Misconduct and Sanctions*

The incentive to market a professional name and area of expertise can often blind an attorney to the consequences of professional misconduct. Such was the case of John (Jack) L. Coté, a Michigan attorney whose outrageous use of the media for his own personal gain resulted in findings of misconduct in violation of the Michigan Rules of Professional Conduct.[118]

(recommending a two-year suspension).

113. *See id.* at 1 (finding culpability for failing to adhere to rules regarding deceptive advertising, prompt return of client files and for failing to cooperate during a disciplinary investigation).

114. *Id.* at 7.

115. *See id.* (finding many, if not all, of the photos were created by superimposing images of Sangary into original celebrity photos).

116. *See id.* (finding the altered photos were misleading and used to advertise and solicit future work).

117. *Id.* at 7–8 (quoting CAL. R. PROF'L CONDUCT r. 1-400(D)(2) (Deering 2014)).

118. Order Affirming Hearing Panel of Suspension of 45 Days and Vacating Conditions, Grievance Adm'r v. Coté, No. 07-83-GA (Mich. Att'y Discipline Bd. Jan. 28, 2009).

Coté, who promoted himself as a maritime lawyer,[119] made contact with the parents of a missing boat passenger both by telephone[120] and through a letter bearing his professional letterhead.[121] He offered his services to the parents on a pro bono basis but, just days later, requested $7,500 in compensation for his previous services and quoted further services at a rate of $275 per hour.[122] In response, the clients immediately sent a letter formally terminating all further representation by him.[123] The clients' letter demanded he discontinue his "flagrant pursuit of [his] own financial and publicity interests while violating ethical rules."[124] Coté then embarked on a bombastic self-advertising venture in the media.[125] Subsequently, the Michigan State Attorney Grievance Commission notified Coté of a grievance against him regarding his confidential disclosures of the boating case to the media.[126] Coté disregarded the grievance and repeatedly expounded highly speculative, unsubstantiated, and inflammatory information about the matter to newspapers, magazines, national and international television, and numerous other media outlets.[127] Because of this egregious conduct, the Michigan Attorney Grievance Commission filed a formal complaint against Coté.[128]

An Attorney Grievance Commission hearing panel, composed of three distinguished attorneys, was convened, and three day-long hearings resulted in three separate decisions on the matter.[129] The hearing panel applied Michigan Rule of Professional Conduct 1.9, which provides an attorney shall not use information obtained from a former client to the disadvantage of that former client.[130]

The first hearing concerned Coté's vigorous denial that an attorney–

119. Findings of Kent County Hearing Panel No. 1 Regarding Attorney–Client Relationship at 2, Grievance Adm'r v. Coté, No. 07-83-GA (Mich. Att'y Discipline Bd. Sept. 12, 2007) [hereinafter Findings Regarding Attorney–Client Relationship].

120. Findings of Kent County Hearing Panel No. 1 Regarding Attorney Misconduct at 2, Grievance Adm'r v. Coté, No. 07-83-GA (Mich. Att'y Discipline Bd. Jan. 16, 2008) [hereinafter Findings Regarding Attorney Misconduct].

121. Findings Regarding Attorney–Client Relationship, *supra* note 119, at 2.

122. Findings Regarding Attorney Misconduct, *supra* note 120, at 22.

123. Findings Regarding Attorney–Client Relationship, *supra* note 119, at 3.

124. Opinion of Kent County Hearing Panel No. 1 Regarding Sanctions for Attorney Misconduct at 12, Grievance Adm'r v. Coté, No. 07-83-GA (Mich. Att'y Discipline Bd. June 25, 2008) (alteration in original) [hereinafter Opinion Regarding Sanctions for Attorney Misconduct].

125. Findings Regarding Attorney Misconduct, *supra* note 120, at 3–5.

126. Opinion Regarding Sanctions for Attorney Misconduct, *supra* note 124, at 5, 12.

127. *Id.*; Findings Regarding Attorney Misconduct, *supra* note 120, at 5–6.

128. Opinion Regarding Sanctions for Attorney Misconduct, *supra* note 126, at 1–2.

129. *Id.*

130. Findings Regarding Attorney Misconduct, *supra* note 120, at 6.

client relationship existed. In the first decision, the hearing panel found

> an attorney[–]client relationship existed between the [former clients] and Mr. Cot[é] for the time period he was acting on their behalf. . . . . [A]n attorney[–]client relationship may be implied from the conduct of the parties, despite the fact that a formal agreement was never reached and despite the fact that the parties never clearly articulated what their expectations may have been in this regard. . . . Unfortunately, in this case, Mr. Cot[é] volunteered his "services" to the [former clients] pro bono[] and then proceeded to act on their behalf in a most delicate and complex investigation[,] which, if not purely legal, certainly had legal overtones and potential legal ramifications depending on the evidence.[131]

The second hearing concerned the alleged attorney misconduct[132] and resulted in a lengthy decision in which the panel unanimously held Coté committed violations of the Michigan Rules of Professional Conduct[133] and the Michigan Court Rules.[134] The panel found Coté spoke to several media outlets on numerous dates.[135] The hearing panel stated, "[T]he story was no longer reported as a mystery with or without theories abounding, but it was now reported [by Coté] as an unsolved mystery with [his former clients' son] being a suspect."[136]

The hearing panel provided a legal analysis of Michigan Rule 1.9(c)[137] and noted the rule does not require that there be disclosure or use of attorney–client confidences.[138] The decision of the hearing panel in the second hearing was that John L. Coté violated Rule 1.9(c).[139] The panel found he was

> an individual who had been closely involved in the investigation, was recognized as an attorney and expert in the areas of admiralty and maritime

131. Findings Regarding Attorney–Client Relationship, *supra* note 119, at 4.

132. Findings Regarding Attorney Misconduct, *supra* note 120, at 1. It is important to note, as of this date, no sanctions were brought against any of the journalists, attorneys, or media legal departments for apparent ethical violations.

133. Findings Regarding Attorney Misconduct, *supra* note 120, at 1. For the Model Rule counterparts, see MODEL RULES OF PROF'L CONDUCT r. 1.9, 8.4(a).

134. Findings Regarding Attorney Misconduct, *supra* note 120, at 1.

135. *Id.* at 3–5. The media outlets included, among others, the *Detroit News*, *Dateline NBC*, *Grand Rapids Press*, *Hour Magazine*, *On the Record with Greta Van Susteren*, and *Rita Crosby Live* and *Direct*. *Id.*

136. *Id.* at 5.

137. *Id.* at 6 ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . use information relating to the representation to disadvantage the former client." (citing MICH. R. PROF'L CONDUCT r. 1.9(c)(1) (2015))).

138. *Id.* at 6–7.

139. *Id.* at 24.

> law[,] and was therefore cloaked with authority. . . . He used information known to him due to his "insider's status" to formulate and publicize his opinion that foul play was likely. . . . Accordingly, given the evidence summarized above, the panel concludes that [Coté] did violate MRPC 1.9(c)(1) and (2) . . . by using and revealing information related to the representation which was not generally known to the disadvantage of the client.[140]

The hearing panel also presented its legal analysis of Michigan Court Rule 9.104(A)(3), which states conduct "that is contrary to justice, ethics, honesty or good morals" are "misconduct and grounds for discipline, whether or not occurring in the course of an attorney–client relationship."[141] In this regard, the hearing panel found

> the manner in which [Coté] conducted himself[,] almost from the moment he became involved in this tragic affair[,] undermines basic tenets of honesty and justice that should serve as the underpinnings of our legal system and profession.
>
> . . . .
>
> Respondent used the information and evidence that he had garnered through his pro bono representation to further his own interests, without regard for the impact of his actions on his former clients. . . . [H]e implicitly accused his former clients . . . of engaging in some sort of cover-up . . . .
>
> . . . .
>
> Justice requires that parents grieving the tragic loss of a child can depend on their attorney not to publically accuse their child of involvement in his girlfriend's murder.
>
> Honesty demands that [Coté] . . . admit that there was in fact an attorney[–]client relationship . . . .
>
> Instead, contrary to justice and honesty, [Coté] engaged (and through his unrepentant defense of the grievance, continues to engage) in conduct that is unbecoming of someone . . . within the Bar Association.[142]

The third hearing concerned the sanctions to be imposed for misconduct.[143] The hearing panel relied on the ABA Standards for imposing lawyer sanctions.[144] Those standards provide penalties for misconduct[145] and allow for the use of mitigating and aggravating

140. *Id.* at 12–13.
141. *Id.* at 19 (quoting MICH. CT. RULES § 9.104(A)(3) (1985)).
142. *Id.* at 21–23.
143. Opinion Regarding Sanctions for Attorney Misconduct, *supra* note 124, at 13.
144. *Id.* at 8.
145. *Id.* (quoting ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 4.2 (1992)).

circumstances.[146] The hearing panel, in summarizing its findings, applied the standards and stated the following:

> [R]ather than heed his putative clients' wishes, Mr. Coté—in direct contravention of those wishes and with full knowledge of the pendency of a grievance to which he had already filed an answer but which was still pending before the ABD—went through with public appearances on a nationally-broadcast (and repeatedly re-broadcast) television show . . . . Under these facts, there can be no doubt that Mr. Coté's conduct was intentional[] and was undertaken with conscious disregard for his putative clients' understanding and belief that an attorney–client relationship had been established.[147]

The hearing panel concluded Coté's breach of trust and harmful and unsubstantiated allegations made against their deceased son damaged the clients.[148] The hearing panel looked at aggravating factors and found the following: Coté's conduct was undertaken to market his name and reputation for personal aggrandizement; he repeatedly ignored cease and desist orders and continued his media circus; he intentionally provided false and untrue statements and assertions; he refused to acknowledge the wrongful nature of his conduct and instead attempted to insulate himself from liability; and he inflicted grave harm to his vulnerable and grieving clients.[149] The hearing panel, in summarizing its findings, stated:

> Because of his failure to heed the many warning signs that were placed in his path; because of the extreme and continuing trauma that his actions have caused to the [grieving clients]; because of his conscious disregard for this disciplinary system in which he has served and practiced for decades; and because our profession simply cannot tolerate the threat to the public if attorneys are allowed to placed their own self-interest above the express wishes of their clients, this panel concludes that a suspension of Respondent John L. Cote's license to practice laws is necessary and appropriate.[150]

Professors should assign this case and the decisions reached therein, along with similar attorney–ethics cases[151] and discussions of other professionals' potential ethical violations,[152] to every law school ethics class.

146. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.1–9.3 (1992) (outlining the mitigating and aggravating factors that may be considered when imposing sanctions).

147. Opinion Regarding Sanctions for Attorney Misconduct, *supra* note 124, at 13.

148. *Id.* at 13–14.

149. *Id.* at 15–16.

150. *Id.* at 20.

151. For a far less egregious violation of the Professional Conduct Rule 1.9(c), which resulted

C. *Online Communications Resulting in Professional Misconduct and Sanctions*

In one Georgia case, an attorney's client posted negative comments on three different consumer–complaint websites after the attorney handled a divorce for the client.[153] The Georgia attorney, Margaret Skinner, responded to the negative comments in a post that contained confidential information about her former client that was obtained in the course of her representation of the client.[154] Skinner's response identified the former client by name, identified the client's employer, stated the amount of fees paid by the client, stated the legal representation was for a divorce, stated the county where the divorce had been filed, and stated the client's relationship status.[155]

The client filed a grievance against the attorney with the State Bar of Georgia, and the bar made a formal complaint against the attorney.[156] Prior to a hearing on the complaint, Skinner admitted her violation, and the special master for the disciplinary board recommended "the mildest form of public discipline authorized" for improperly disclosing her former client's confidential information.[157] In this case of first impression,[158] the Georgia court rejected the recommended voluntary discipline and remanded the matter for further factual details.[159] After conducting an evidentiary hearing, the special master determined Skinner violated the rules and recommended a public reprimand and training on law office management as the appropriate discipline.[160] The Supreme Court of Georgia finally agreed with the findings and recommendations of the

in a reprimand, see *In re Anonymous*, 932 N.E.2d 671 (Ind. 2010) (per curiam).

152. Rule 8.4 of the Michigan Rules of Professional Conduct states: "[I]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, *knowingly assist* or induced another to do so, or do so through the acts of another . . . ." MICH. R. PROF'L CONDUCT r. 8.4 (2015) (emphasis added). The legal departments of the myriad of media outlets, along with journalist–attorneys, such as Greta Van Susteren, were alerted to the fact that Coté addressed matters that related to and worked to the disadvantage of the former clients. *See, e.g.*, Findings Regarding Attorney Misconduct, *supra* note 120, at 21–23 (detailing some of Mr. Coté's media appearances).

153. *In re* Skinner (*Skinner II*), 758 S.E.2d 788, 789 (Ga. 2014) (per curiam). This case came before the Supreme Court of Georgia a year earlier in *In re Skinner* (*Skinner I*), 740 S.E.2d 171 (Ga. 2013) (per curiam).

154. *Skinner II*, 758 S.E.2d at 789.

155. *Id.*

156. *Id.* at 788 (listing alleged violations of Georgia Rules of Professional Conduct 1.3, 1.4, 1.6, and 1.16).

157. *Skinner I*, 740 S.E.2d at 173.

158. *Id.*

159. *Skinner II*, 758 S.E.2d at 788.

160. *Id.* at 789–90.

special master because Skinner's improper disclosures did not appear to "threaten[] substantial harm to the interests of the client."[161] Not everyone outside the Georgia court agreed with the sanctions, however.[162]

In a factually similar case, *In re Disciplinary Proceedings Against Peshek*,[163] an attorney who practiced in both Illinois and Wisconsin received reciprocal sixty-day suspensions of her licenses by the respective state supreme courts.[164] Peshek, a former public defender, published a blog related to her legal practice that contained statements about former clients and judges.[165] The Wisconsin Supreme Court noted Peshek's blogging was a mechanism to cope with the stress that followed an event in which a client punched her in the face in open court, resulting in "a concussion and other physical injuries."[166] The Illinois Supreme Court found her in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct due to her disclosure of several clients' confidential information.[167] The Wisconsin Supreme Court imposed reciprocal discipline pursuant to its court rules.[168]

In an earlier case, an Oregon attorney was suspended for ninety days for violating the Oregon Professional Rules of Conduct.[169] The Oregon Attorney Disciplinary Board suspended the attorney for writing an email that was sent to the entire Oregon State Bar's Workers Compensation Section group listserv that consisted of 275 members.[170] The email contained both personal and medical information about a client whom the attorney described as "'difficult' and . . . unwilling to accept a 'very fair' offer"' from an insurer.[171] She also indicated the client was seeking a new attorney and the purpose of the email was to provide the information to

161. *Id.* at 790.

162. *See* Samson Habte, *Reprimand Is Not Enough When Lawyer Uses Private Info to Counter Client's Barbs*, BLOOMBERG BNA (Mar. 27, 2013), http://www.bna.com/reprimand-not-enough-n17179873072 (calling for Skinner to receive a stiffer punishment than a reprimand for her disclosure of a former client's confidential information).

163. Office of Lawyer Regulation v. Peshek (*In re* Disciplinary Proceedings Against Peshek), 2011 WI 47, 334 Wis. 2d 373, 798 N.W.2d 879.

164. *Id.* at ¶¶ 2–3.

165. *Id.* at ¶ 3.

166. *Id.* at ¶ 6.

167. *Id.* at ¶ 10.

168. *Id.* at ¶ 11.

169. *See In re* Quillinan, 20 DB Rptr. 288, 288 (Or. 2006) (violating both Rule 1.6(a) and Rule 1.9(c)(1) for revealing information about a former client and using it to the client's disadvantage).

170. *Id.* at 289.

171. *Id.*

attorneys should the client contact any of them.[172] The Oregon Supreme Court issued the ninety-day suspension because the attorney knowingly revealed information about a client, which was not permitted under the rules to be disclosed, and the disclosure likely caused potential harm to the client.[173]

V. CONCLUSION

The ABA should amend the Model Rules to include more details regarding the use of social media, blogs, websites, and other forms of technology by lawyers to market their services to prospective clients. More detail is necessary to guide lawyers in selecting methods and platforms of advertising to avoid misleading advertising and the creation of an attorney–client relationship if that relationship's creation is not intended through the platform but at some later time. The ABA should sponsor workshops, both online and in person, to educate attorneys on the use of available technology to market their legal services. Manuals would also be helpful.

Because potential clients often rely on the Internet to find legal professionals, attorneys should use available technology to market their services. However, attorneys must pay close attention to details, use clear and understandable disclaimers, not use information protected by the attorney–client relationship, and maintain the overall integrity of the legal profession.

172. *Id.* at 290.
173. *Id.* at 291.