



PROGRAM MATERIALS

Program #3127

March 2, 2021

Blabbing, Boasting and Ghosting: The Ethics of Lawyers Writing Blogs

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Blabbing, Boasting and Ghosting: The Ethics of Lawyers Writing Blogs

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Presenter's Background

- Principal, The Law Office of William Hornsby
- Staff counsel at the American Bar Association (1988 – 2018)
- Hearing Board Chair, IL Attorney Registration and Disciplinary Commission (1990 - present)
- Adjunct Professor, Chicago Kent College of Law (2013 – 2018)

Disclaimer

- The views expressed are solely those of the presenter.
- This presentation does not constitute legal advice. Viewers are encouraged to engage their own lawyer to discuss legal matters resulting from this presentation.
- This presentation is not a solicitation for legal services and does not create an attorney-client relationship.

Questions to be examined

- Are blogs or social media posts advertisements making them subject to the states' professional responsibility rules governing advertising?
- To what extent may lawyers blog or post about potential, current or past clients?
(Confidentiality)
- May lawyers engage others to write blogs or posts under their names? (Ghostwriting)
- Can blogs or posts create an attorney-client relationship?

Some preliminary matters

- What are we talking about with blogs?
- What is a social media post?
- We will discuss the [ABA Model Rules of Professional Conduct](#), but your state rules will differ. You should consult your state rules.
- We will also look at comments to the rules and ethics opinions that interpret the rules.
- We are sometimes in uncharted waters. Some issues discussed here lack definitive answers. The policies are always behind the technology.
- Most ethics rules were adopted before blogging or social media existed. You may have to fit a square peg into a round hole.

...Preliminary Matters

- The state ad rules are rarely enforced. They are used more so for prophylactic purposes.
- But, when the rules are enforced, only the lawyer is subject to discipline, not the consultant or a ghostwriter.
- There are risks beyond enforcement, including
 - The need to revisit/revise the marketing plan
 - The risk of disgorgement
- The confidentiality rules are more likely to be enforced. They go to a core value.

Do the rules apply to blogging and social media?

- NYSBA Social Media Ethics Guidelines
- FL Handbook on Lawyer Advertising and Solicitation
- No source goes to the contrary

NYSBA Social Media Ethics Guidelines

- “If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.”

FL Handbook on Lawyer Advertising

- “Florida’s lawyer advertising rules apply to all forms of communication seeking legal employment in any print or electronic form, including... social networking...”

Are Blogs and Social Media Posts Advertisements?

- Are they commercial speech?
- Constitutional Standard: Does it beckon business or propose a commercial transaction?
- *Texans Against Censorship v State Bar of Texas*
- *Stern v Bluestone*
- *Hunter v Virginia State Bar*
- *Holtzman v Turza*
- California Ethics Opinion 2012 186
- California Ethics Opinion 2016 196
- Content vs. Intent
- Direct vs. Implicit

Texans Against Censorship

- Some judges should be appointed and some elected. Members of the Texas Supreme Court, Texas Court of Criminal Appeals and appellate courts should be chosen by the Governor and confirmed by the Senate. Appointed judges should seek voter approval every two years. State district judges should be elected in non-partisan elections. A constitutional amendment will be required to change the current judicial selection process. Let Me Know Your Thoughts! Paid for by Jim S. Adler, Attorney Concerned About Judicial Reform. (Not Board Certified by the Texas Board of Legal Specialization.)

Although Adler admitted that he hoped to generate business by publishing it, the advertisement itself cannot be said to propose a commercial transaction. It appears obvious that anyone reading this advertisement, without knowledge that Adler published it with the specific intent of obtaining clients, would not likely think it was published for the purpose of obtaining professional employment. At most, the advertisement suggests that "Jim S. Adler, attorney," would like to hear what subscribers of the *Pasadena Citizen* think about reforming the judicial selection process in Texas. Accordingly, Adler's advertisement must be understood to be noncommercial speech, and neither the state bar, nor any other governmental body, may regulate such speech, except in extraordinary circumstances.

Stern v. Bluestone

We conclude that **Bluestone's** "Attorney Malpractice Report" fits the FCC's framework for an "informational message," and thus the 14 faxes are not "unsolicited advertisement[s]" within the meaning of the TCPA. In these reports, **Bluestone** furnished information about attorney malpractice lawsuits; the substantive content varied from issue to issue; and the reports did not promote commercial products. To the extent that **Bluestone** may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, "[a]n incidental advertisement" of his services, which "does not convert the entire communication into an advertisement" (*id.*).

Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. [Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 \(1983\)](#). "The combination of all these characteristics, however, provides strong support for the . . . conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public. *Id.* at 67-68 (emphasis in original).

Hunter v. State Bar of Virginia

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform **Hunter's** otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." [Fox, 492 U.S. at 474-75](#). Indeed, unlike situations and topics where the subject matter is inherently, inextricably intertwined, **Hunter** chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." [Bolger, 463 U.S. at 68](#). When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

Holtzman v. Turza

- Rejection of “incidental advertisement”
- “That 75% of the page is not an ad does not detract from the fact that the fax contained an advertisement.”

California Formal Opinion 2012 186

In the past month, Attorney has posted the following remarks on her profile page:

“Case finally over. Unanimous verdict! Celebrating tonight.”

“Another great victory in court today! My client is delighted. Who wants to be next?”

“Won a million dollar verdict. Tell your friends and check out my website.”

“Won another personal injury case. Call me for a free consultation.”

“Just published an article on wage and hour breaks. Let me know if you would like a copy.”

California Formal Opinion 2016 196

- Does the blog explicitly or implicitly offer the lawyer's services?
- Is the blog integrated into a firm's website that offers legal services?
- Is it a "stand-alone" blog that directly or implicitly "expresses the attorney's availability for employment"?
- Is it a "stand-alone" blog that discusses non-legal issues, but includes "extensive and/or detailed professional identification announcing the attorney's availability."

Assume the blog/post is an advertisement, then what?

- Compliance with rules
- Rule 7.1 – Communications concerning a lawyer's services
- Rule 7.2 – Specific Rules
- Rule 7.3 – Solicitation
- Prior Rule 7.4 - Specialization
- No two states have an identical set of rules
- Which states' rules apply?

Rule 7.1 – The Cornerstone Rule

- A false or misleading communication *about the lawyer or the lawyer's services...*
- A material misrepresentation of fact or law...
- An omission

Rule 7.2 – Housekeeping Rules

- ABA Model Rule requires that the communication includes the name and contact information of a lawyer who is responsible for its content.
 - Easy for a blog
 - Hard for a social media post
- State rules tend to impose additional obligations.

Rule 7.3 - Solicitation

- Communication directed to a specific person offering legal services.
 - Need to be cautious about give-and-take within the comments to a blog or social media platform

Rule 7.4 - Specialization

- Now found within ABA Model Rule 7.2, but still under Rule 7.4 of vast majority of states.
- Widely varies among the states
 - ABA MR only addresses communicating “certification of specialty”.
 - Some states address use of terms “specializing in” and “expert”.

California Formal Opinion 2001 155

- They [California lawyers] can choose to use their web site to advertise in multiple jurisdictions. This is not necessarily inappropriate, *but it requires that they assure themselves that they are complying with any applicable rules of the different jurisdictions involved*, including rules governing the unauthorized practice of law (assuming that there is no inconsistency in the applicable rules that would make this impossible). Alternatively, they can take steps to make clear that they are not advertising in other jurisdictions.

Confidentiality

- Prospective Clients – Rule 1.18
- Current Clients – Rule 1.6
- ABA Formal Opinion 480 on blogging
- Past Clients – Rule 1.9
- ABA Formal Opinion 479 Re “generally known information”
- Anonymizing the information does not work

Rule 1.18 - Duties to Prospective Client

- Prospective client is one who consults with a lawyer about the possibility of forming an attorney-client relationship.
- Even if no attorney-client relationship is created, the lawyer must treat information learned as if the prospective client is a former client.

Rule 1.6 – Confidentiality

- A lawyer shall not reveal information relating to the representation of a client, unless the client give informed consent, except..
 - The exceptions are not applicable to blogging.
 - Informed consent requires the lawyer to explain the risks of and alternatives to the course of conduct.

ABA Formal Opinion 480

- Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information obtained in a public record, unless authorized by a provision of the Model Rules.

**BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

KRISTINE ANN PESHEK,

Commission No. 09 CH 89

Attorney-Respondent,

FILED - August 25, 2009

No. 6201779.

COMPLAINT

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Lea S. Black, pursuant to Supreme Court Rule 753(b), complains of Respondent Kristine Ann Peshek, who was licensed to practice law in Illinois on November 9, 1989, and alleges that Respondent has engaged in the following conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute:

Count I

(Publishing client confidences or secrets on the Internet)

1. At all times alleged in this complaint, Respondent was an assistant public defender in Winnebago County, Illinois. In the course of her duties, she had access to information about clients that would otherwise be confidential or secret.

https://www.iardc.org/09CH0089CM.html

dupage lawyer blogs

File Edit View Favorites Tools Help

★ Favorites

Switching to House Calls - Ma... BEFORE THE HEARING B...

4. On or about March 14, 2008, Respondent represented a college student in relation to allegations that he possessed a controlled substance. On March 14, 2008, Respondent published the following entry on her blog:

#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

5. Respondent knew or should have known that information contained in her March 14, 2008 blog, as described in paragraph four, above, was confidential, or that it had been gained in the professional relationship and the revelation of it would be embarrassing or detrimental to her client.

6. On or about March 28, 2008, Respondent represented a diabetic client in relation to his drug charges. On March 28, 2008, Respondent published the following entry on her blog:

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

7. Respondent knew or should have known that the information contained in her March 28, 2008 blog was confidential, or that it had been gained in the professional relationship and its revelation would be embarrassing or detrimental to "Dennis."

8. On or about April 9, 2008, Respondent represented a woman in relation to allegations that she had violated the terms of a previous order of probation. On April 9, 2008, Respondent published the following entry on her blog:

"Laura" was a middle aged woman with 7 children, 2 of them still adolescents. She was a traditional housewife. Her husband, a recovering alcoholic, worked. She stayed at home, and home schooled her child

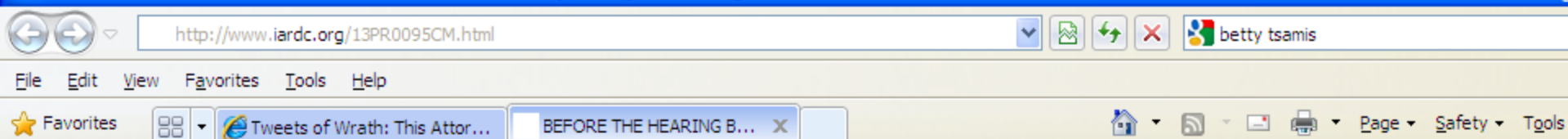
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BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:

BETTY TSAMIS,

Attorney-Respondent,

No.6288664.

Commission No. 2013PR00095

FILED --- August 26, 2013

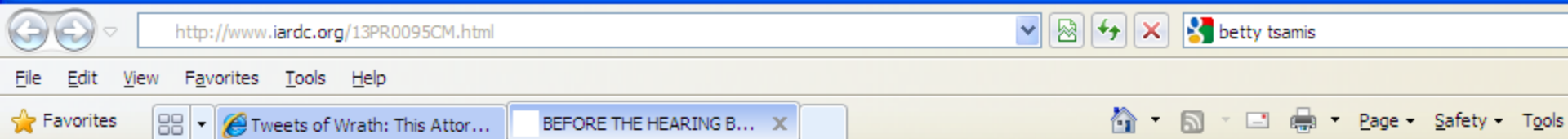
COMPLAINT

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Gina M. Abbateamarco, pursuant to Supreme Court Rule 753(b), complains of Respondent, Betty Tsamis, who was licensed to practice law in Illinois on May 4, 2006, and alleges that Respondent has engaged in the following conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute and which subjects Respondent to discipline pursuant to Supreme Court Rule 770:

COUNT I

(Conversion of \$2,057.54 from Kris Klimek's settlement proceeds)

1. On January 17, 2011, Kris Klimek ("Klimek") was involved in an incident in which she was injured as a result of an accident on the premises of Malibu Condominiums in Chicago, Illinois. As a result of the incident, Klimek sustained various injuries and incurred medical expenses.
2. On or about February 27, 2011, Respondent agreed to represent Klimek in a claim against Malibu East Condo Association and Sudler & Company (Management company) relating to the January 17, 2011 incident. At that time, Respondent and Klimek agreed that Respondent's receipt of a fee would be contingent upon Respondent recovering a settlement or award on behalf of Klimek, and that Respondent would receive as her fee an amount equal to one-third of any such recovery, plus costs.



18. Between February 7, 2013 and February 8, 2013, Respondent contacted Rinehart by email and requested that Rinehart remove the February 5, 2013 posting about her on AVVO. Rinehart responded that he refused to remove the posting unless he received a copy of his files and a full refund of the \$1,500 he had paid.

19. Sometime between February 5, 2013 and April 10, 2013, AVVO removed Rinehart's posting from its online client reviews of Respondent.

20. On or about April 10, 2013, Rinehart posted a second client review of Respondent on AVVO. In the April 10, 2013 posting, Rinehart stated that "I paid Tsamis \$1500 to help me secure unemployment while she knew full well that a law in Illinois would prevent me from obtaining unemployment benefits."

21. On or about April 11, 2013, Respondent posted a reply to Rinehart's April 10, 2013 client review. In that reply Respondent stated that:

"This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. [*sic*] When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [*sic*]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about."

22. By stating in her April 11, 2013 AVVO posting that Rinehart beat up a female coworker, Respondent revealed information that she had obtained from Rinehart about the termination of his employment. Respondent's statements in the posting were designed to intimidate and embarrass Rinehart and to keep him from providing additional information about her on the AVVO website.

23. By reason of the conduct described above, Respondent has engaged in the following misconduct:

- a. revealing information relating to the representation of a client without the client's informed consent, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (2010);
- b. using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, in violation of Rule 4.4 of the Illinois Rules of Professional Conduct (2010); and

Rule 1.9 – Duties to Former Clients

- A lawyer who formerly represented a client... shall not thereafter use information relating to the representation to the disadvantage of the client except... when the information has become generally known...

ABA Formal Opinion 479

- The “generally known” exception to the duty of former-client confidentiality is limited.
- Information is not “generally known” simply because it has been discussed in open court or is available in court records, libraries or other public depositories of information.

Ghostwriting

- What is ghostwriting –
 - Think in terms of a scale from editing to composing
 - Degree of input
 - Byline or no byline
- Is it an ad?
 - Does Rule 7.1 apply
 - What is the content of the blog?
- Is it a misrepresentation?
 - Does Rule 8.4 apply?

MR 7.1

- A false or misleading communication *about the lawyer or the lawyer's services...*
- A material misrepresentation of fact or law...
- An omission

MR 8.4(c) - Misconduct

- It is misconduct to engage in conduct involving
 - Dishonesty
 - Fraud
 - Deceit
 - Misrepresentation

The Attorney-Client Relationship

- Risk when there is a give-and-take exchange
- A simple standard:
 - The person believes you are are their lawyer and
 - There is a reasonable basis for that belief
- The role of the disclaimer is to undermine the reasonable basis for the belief the person may have that there is that you are their lawyer.

Takeaways

- Try to avoid a blog or communication that could be considered an advertisement. Is it commercial speech?
- Avoid content that explicitly or implicitly advances the lawyer's services;
- Have a stand-alone site for the blog. Do not connect the blog to a firm website that is promoting the lawyer's services;
- Regardless of the content of the post, avoid extensive or detailed information about the lawyer's availability to provide legal services.
- If the blog is an advertisement, make sure to follow the states' "ad rules."

Takeaways

- Avoid any confidential information about the representations of clients, past or present.
- This includes information about the representation for current clients and information that is not otherwise widely known about past matters;
- Understand that anonymizing the information or turning it into a hypothetical is not an end-around;
- However, you may blog about confidential information if the client gives informed consent for you to do so.

Takeaways

- Lawyers who use ghostwriters for blogs should consider:
- Whether the posts may be considered advertisements, and comply with the state ad rules if they are;
- Avoid a situation where the conduct of using a ghostwriter could be considered a misrepresentation.
 - What is the input of the lawyer and the ghostwriter?
 - Is it apparent from the context the lawyer did not write the post?
 - Is the blog bylined?

Takeaways

- Lawyers who blog or post on social media should avoid the risk of creating an attorney-client relationship.
- Avoid posts or comments directed to a specific individual or addressing a specific fact-based circumstance;
- Include a clear and conspicuous disclaimer that no attorney-client relationship is formed unless and until there is a formal agreement for representation.
- The disclaimer should make it unreasonable for a potential client to believe you are their lawyer.

Resources

- ABA Model Rules of Professional Conduct -
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/
- NYSBA Social Media Ethics Guidelines -
<https://nysba.org/app/uploads/2020/02/NYSBA-Social-Media-Ethics-Guidelines-Final-6-20-19.pdf>

Resources

- Florida Handbook on Lawyer Advertising - <https://www-media.floridabar.org/uploads/2020/08/Handbook-2020-8-19-20-ADA-Compliant.pdf>
- *Texans Against Censorship v State Bar of Texas*, 888 F. Supp. 1328 (E.D. TX 1995)
- *Stern v Bluestone*, 47 A.D.3rd 546 (NY App Div 2008)
- *Hunter v Virginia State Bar*, 786 F. Supp2d 1187 (2011)

Resources

- *Holtzman v. Turza*, No. 11-3188 (2013)
- California Formal Ethics Opinion 2012 186
- California Formal Ethics Opinion 2016 196
- California Formal Ethics Opinion 2001 155
- ABA Formal Ethics Opinion 479
- ABA Formal Ethics Opinion 480