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Re: Ethics Issues Arising from Lawyers' Use of Internet-based Client Development Tools

Dear Ms. Vera:

I would like to thank the ABA Commission on Ethics 20/20 and its Working Group on the Implications of New Technologies for the opportunity to submit this comment in response to the Working Group's Issues Paper Concerning Lawyers' Use of Internet-Based Client-Development Tools ("Issues Paper").

I. Introduction

As the co-founder of Hellerman Baretz Communications ("HBC"), a public relations firm that assists the marketing efforts of a diverse group of law firms including some of the nation's largest, I am familiar with how today's attorneys are using—and in some cases, consciously refraining from using—Internet-based client development tools. HBC has long recognized the tremendous potential of the Internet to connect lawyers with the public, including prospective clients, and has accordingly developed substantial expertise in this area. Among other relevant work, our agency has conceived and created numerous law firm blogs, conducted private coaching with attorneys on the appropriate use of social and professional networking sites, and consulted for a networking site mentioned in the Issues Paper, JD Supra, in connection with its release of a product available on LinkedIn, the popular professional networking site.

I offer my perspective based on my firm's extensive experience with the Internet-based activities discussed in the Issues Paper, how they operate in practice, and our familiarity with current attitudes among attorneys towards the use of Internet-based client development tools.

Below, HBC offers three overarching principles that should guide the ABA's approach to the regulation of lawyers' online activity: (1) the ABA should neither prohibit nor discourage the use of Internet-based tools for client development; (2) the substance of attorney communications, not the method of communication, should remain the focus of ethics regulation; and (3) guidance from the ABA is nonetheless needed to provide certainty to lawyers who would like to responsibly participate in online networking.

This letter first explains the reasoning and import of the general principles above, and then responds to selected questions posed in the Issues Paper.

II. General Principles to Guide the ABA Approach to Lawyers' Use of Internet-Based Client Development Tools.

In 1998, Congress faced a legislative issue that required it to balance all the social utilities of Internet Service Providers (ISPs)—those who make the Internet available, and widely searchable, to the general population—against the rights of copyright holders. Some copyright holders wanted to hold ISP responsible for instances of copyright infringement that were made accessible through their services, but which the ISPs played no role in creating. Congress wisely chose a course that allowed ISPs to continue providing the incalculable benefits of Internet availability to the general population, while also clarifying that they would be subject to liability if they did not adhere to certain "safe harbor" requirements.

Here, the ABA faces a similar situation: one in which it is balancing the social good provided by Internet communications against the potential for abuse. But the ABA's task is, thankfully, easier than Congress's in passing the Digital Millennium Copyright Act, as nearly all of the tools to prevent such abuse are already at its disposal and embodied in its Model Rules of Professional Conduct ("Model Rules").

As the below explains, lawyer activity on the Internet serves a great benefit to the public, and at very little cost. The ABA's Model Rules, which prevent unprofessional conduct, are already fully applicable to lawyers' online activity, eliminating the need for the passage of complicated or costly additional Rules. The most fruitful role that the ABA can provide with respect to lawyers' Internet-based client development activity is to clarify, through Comments to its existing Model Rules, that both their permissions and prohibitions apply with full force to online communications.

III. The ABA Should Neither Prohibit Nor Discourage the Use of Internet-Based Tools for Client Development.

Any ABA action that effectively prohibits or discourages lawyers from using Internet-based tools for client development would work a disservice to the vast majority of attorneys who wish to do so responsibly, and, more importantly, the general public. Over the last two decades, the Internet has revolutionized the way people search for information—including the way they search for legal representation. As of 2009, 65% of those in need of an attorney begin their search for representation online.[1] If the ABA were to limit the availability of information about lawyers to the public on online channels, such action would eliminate (or severely curtail the effectiveness of) what has become a vital resource to those seeking representation.

Online searching is not merely a popular method through which to identify a legal representative: it is a uniquely informative one. The lack of space constraints and printing costs on the Internet allow law firm web sites, for example, to provide a wealth of data that could not be made available practically through any printed product. The depth of information on such sites—which typically include biographies of all firm attorneys and detailed information about the firm's practice areas—gives those considering legal representation from them far more complete information than can be made available through legal directories or any other existing product. Furthermore, frequently updated online content such as blog posts, articles shared through JD Supra, and informative "status updates" on networks such as LinkedIn and Facebook, give prospective clients a rich and evolving body of material upon which to assess an attorney or firm's suitability for hiring.

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[1] Vickie Hendricks, "Computing Needs: Getting More Out of Your Website," *Chicago Lawyer* (Nov. 1, 2010).

Finally, any action that prohibits or discourages the use of Internet-based client development tools would conflict with the precedent the ABA wisely set in responding to the introduction of similarly revolutionary technologies. A Comment to Model Rule 7.2, addressing the introduction of television and electronic mail, states:

> Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.

The same considerations that led to the adoption of this Comment should govern the ABA's approach to any contemplated regulation of lawyers' online presence.

A. The Substance of Attorney Communications, Not the Method of Communication, Should Remain the Focus of Ethics Regulations.

The creation of additional rules or addendums specific to content appearing on websites and/or social and professional networking accounts would mark an unnecessary and impractical departure from the existing approach of the ABA's Model Rules.

Internet-specific rules are unnecessary because the *substance* of communications, rather than the *method* of those communications, is the focus of the Model Rules. As such, the current rules already address communications transmitted over the Internet.[2] Rule 7.1, for instance, prohibits "false or misleading communication[s]" without regard to the method through which the prohibited communication is made. Similarly, Rule 7.3(c) regulates solicitations made by "written, recorded, or electronic communication[s]," which encompasses any made via the Internet. Given that the ABA's Model Rules apply without regard to the method of communication (or, where any methods of communication are specified, as in Rule 7.3(c), in broad terms that account for Internet-based activity[3]), the existing rules can be applied without modification to any hypothetical situation arising online.

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2 Nicole Black, the co-author of an ABA book on social media use, *Social Media for Lawyers: The Next Frontier* (ABA Law Practice Management Section, 2010), put the matter simply: "Ethical rules apply online and off line. . . . The rules don't change just because you're using a different medium to communicate." Rebecca Berfanger, "Social Media Presents Fine Line," *The Indiana Lawyer* (Aug. 18, 2010).

3 In addition to Rule 7.3(c), Rule 7.3(a) is the other Model Rule that applies only to a subset of communication methods, but in terms that clearly account for Internet technology. Rule 7.3(a) prohibits certain solicitations motivated primarily by pecuniary gain via "in-person, live telephone, or real-time electronic contact." There is no ambiguity that "real-time electronic contact" includes the "live chat" capability of certain social networking sites, such as Facebook.

The application of the Model Rules to specific questions in Part III, *infra*, demonstrates just how adequate they are for issues arising online.[4]

The novelty of websites, blogs, and social and professional networks—which have only recently come into being—may tempt a belief that they merit dedicated regulations. But it is worth recalling, as noted above, that television and email were once novel technologies as well, and before them the pager, telephone, and telegraph. The ABA has not found it necessary to draft revisions to the Model Rules with the introduction of each of these new communication technologies because the rules appropriately focus on what attorneys say through those channels, not which channel is being used.

In addition to being unnecessary, the exercise of drafting new regulations to address Internet-based client-development tools would be impractical. Over 200 major social networking sites are now in existence.[5] Regardless of whether that number increases or decreases, it is a virtual certainty that the features of today's robust networking platforms will change and proliferate over time. Attempting to address the universe of Internet platforms with specific Model Rules (or addendums to existing rules) will sentence the ABA to a futile, time consuming, and never-ending mission to amend the rules' language to keep pace with the networks' ever-changing natures.

B. Guidance from the ABA Is Nonetheless Necessary to Provide Certainty to Lawyers Who Would Like to Responsibly Use Internet-Based Client-Development Tools.

While social and professional networking use among lawyers is growing rapidly,[6] our encounters with dozens of attorneys, as well as anecdotal evidence from other social media specialists[7], has confirmed time and again that lawyers are reluctant to engage in social media due in large part to uncertainty regarding whether, and to what extent, their participation is permitted by state bar rules. This uncertainty benefits no one. Worse, it hampers those who have stayed away from social networks in an abundance of caution and puts them at an unfair disadvantage relative to those who are participating.

The ABA could benefit the profession with guidance that provides clarification for all, and it can do so without unnecessary amendments to its Model Rules. As noted in response to specific Issue Paper questions addressed below, HBC recommends that the ABA provide this clarifying guidance in the form of Comments to existing rules. The Comments will not only clear the way for lawyers who wish to act responsibly, but they can also clarify the existing rules' application to the online behavior of those who do not do so.

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4 The only possible exception is the question regarding "friend" requests to Judges, discussed in Part III.A.2, *infra*.

5 "List of Social Networking Websites," Wikipedia (Dec. 15, 2010), http://en.wikipedia.org/wiki/List_of_social_networking_websites.

6 Catherine Sanders Reach, "Social Media Grows: ABA Survey Shows More Acceptance Among Lawyers," Law Technology News (August 1, 2010) (citing ABA 2010 Legal Technology Survey Report) (noting that 56% of lawyers surveyed belonged to social networks, up from 43% in 2009 and 15% in 2008).

7 *See, e.g.,* Kevin O'Keefe, "State Bar Associations Stymying Lawyers' Use of Blogs and Social Media," Real Lawyers Have Blogs (Dec. 5, 2009), http://kevin.lexblog.com/2009/12/articles/social-media-1/state-bar-associations-stymying-lawyers-use-of-blogs-and-social-media/.

III. Responses to Selected Questions

A. Online Social and Professional Networking Services

1. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer's participation in professional and social networking sites, given that such activities often have both a personal and advertising purpose? (See Part II.A above.)

No special rules are required merely because online activity, such as participation in social and professional networking sites, can have both professional and personal elements. Every day, lawyers participate in activities that cannot be categorized as either purely professional or purely social. For many, participation in civic organizations; attendance at community functions, industry conventions, and networking events; donations of time to charitable causes; and endless other activities have both a professional and personal component.

The Model Rules do not make special provisions for attorney communications in any of the above situations, and for good reason. The Model Rules, indeed, apply *wherever* an attorney is communicating with another party, regardless of whether than environment has a social component in addition to a professional one. Rule 7.3(a)'s prohibition on solicitations, for instance, applies just as firmly to an attorney's conversations on the golf course as it does to a phone call from the office.

The focus, as always, should be on the substance of the specific communication in question, and whether or not it violates any existing rule. Such an approach not only is consistent with the logic of the Model Rules, but it avoids the negative consequences attendant to taking another course—for instance, considering all statements made over a social network to be attorney advertising. Applying Article 7.2(c)'s notice provisions to all attorney statements made over a social or professional network would have the effect of: (i) discouraging lawyers from using social media altogether; (ii) diminishing the public esteem of the legal profession, given that advertising notices would be applied to communications that patently would not fit any reasonable definition of "advertising"; and (iii) diminishing the effectiveness of advertising notices where warranted, as the public would soon become immune to their impact.

2. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers' use of networking sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 7.2 (See Part II.A.1), 1.18 (See Part II.A.2), 8.4(f) (See Part II.A.3), 4.2, or 4.3 (See Part II.A.4), or the Comments to those Model Rules in order to explain when communications or other activities on networking sites might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission propose?

Model Rule 7.2: For all the reasons stated above, HBC recommends that the ABA adopt a comment to Rule 7.2, clarifying both that: (i) a lawyers' mere presence on a social or professional networking site does not amount to attorney advertising; and (ii) that communications that do amount to advertising, when made over a social or professional networking site, will be subject to all the restrictions of Article 7.

Model Rule 1.18: While lawyers may not be able to provide disclaimers prior to communication from a prospective client on social or professional networks to the same as they can in the case of contact initiated

through a website, this circumstance does not call for an amendment to Model Rule 1.18. The current Comment to the Model Rule states:

> Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

For all the reasons stated above, to ensure that a lawyer's fear of an inadvertent lawyer-client relationship alone will not prevent him or her from participating in social or professional networking, HBC recommends that the ABA adopt a Comment to Model Rule 1.18 to clarify that a lawyer's mere presence on a social or professional network alone does not give rise to any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship with any specific individual.

Model Rule 8.4(f): While HBC does not believe that sending a "friend" request to a judge could reasonably be considered "assisting" judicial conduct that violates rules of judicial conduct, it recognizes that this is one situation that the existing Model Rules do not cover. HBC takes no position on whether sending a "friend" request to a judge should be allowed or prohibited.

Model Rules 4.2 and 4.3: For all the reasons stated above, HBC recommends that the ABA does not amend the language of these rules, but rather clarifies through a Comment that when interacting online, lawyers and their representatives are fully subject to the limitations on dealing with third parties, both represented and unrepresented, and that a "friend" request or other action that gives an attorney or his or her representative access to a third party's profile, will be considered a communication.

B. Blogging and Discussion Forums

1. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer's participation in blogs, given that such activities often have both an advertising and non-advertising function?

As with participation in social and professional networking sites (see Part II.A.1., *supra*), the fact that a blog may have an advertising and non-advertising function should not require the creation of a new rule. The focus should remain on whether the communication in question—in this case, an individual blog post—amounts to advertising, and, if so, whether it has adhered to the requirements of Article 7.

For the reasons given above, HBC recommends that the ABA provide clarity through a "safe harbor" Comment provision stating that if a conspicuous, general notice on the blog adheres to the advertising restrictions, all blog content shall be deemed in compliance with Article 7.

2. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers' use of blogging? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

Model Rules 1.18 and 7.2: For all the reasons stated above, HBC recommends that the ABA adopt a Comment clarifying that all Model Rules, including 1.18 and 7.2, apply to content on blogs to the same extent as they would if the blog content were distributed via print or other means.

4. When a lawyer uploads documents to websites, such as JD Supra, are those materials and the surrounding information regarding those materials governed by the Article 7 Rules? Should the Commission offer a policy statement or white paper that sets out certain guidelines regarding lawyers' use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.6, 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?

The publication of articles and other writings is an age-old client development tool used by attorneys. The relevant analysis should focus not on the identity of the distributor (e.g., JD Supra, *Harvard Law Review*, or the *New York State Bar Journal*), but rather on the content of the communication. Written materials uploaded to JD Supra or other professional or social networking sites should not, merely because they have been uploaded to the Internet, trigger any particular existing Model Rules, nor do they call for the creation of new rules specific to JD Supra or any other particular social or professional networking site.

For all the reasons stated above, HBC recommends that the ABA adopt a Comment clarifying that all Model Rules, including 1.6, 1.18 and 7.2, apply to material uploaded to JD Supra and similar sites to the same extent as they would if the material were distributed via other means.

D. Lawyer Websites

1. Should the Commission recommend amendments to Comment 2 of Model Rule 7.2 to clarify which types of websites are, in fact, subject to the restrictions contained in the Article 7 Rules of the Model Rules of Professional Conduct? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites? (See Part II.D.1)

The existence of a law firm website, in and of itself, should not be considered advertising that triggers the restrictions of Model Rule 7.1. or other limitations in Article 7. As the Issue Paper recognizes, it is quite possible for a website to exist without including advertising content or serving an advertising purpose. A further factor suggesting that websites should not be understood as advertising without more is the fact that they are not "pushed out" to an audience, as content generally understood to be advertising typically is. Instead, visitors locate law firm websites and choose to visit them.

HBC recommends that the ABA only consider websites to be subject to the restrictions of Article 7 if it meets a definition of "advertising" as generally understood in the culture. The ABA could provide clarification on this question through a Comment that details a list of characteristics that will be considered in classifying a website as advertising.

3. An ABA Formal Opinion addresses issues arising from websites that contain information about the law. Should the Commission offer additional guidance in this area, such as amendments to Model Rules 4.1(a) (prohibiting false statements of material facts or law to third parties), 7.1 (prohibiting a material misrepresentation of law in advertisements), 8.4(c)

> (prohibiting misrepresentations), or the Comments to those rules? In addition or as an alternative, should the Commission offer any other form of guidance on this issue? (See Part II.D.3)

There is nothing about the publication of written material online that makes it more difficult to discern whether Model Rules 4.1(a), 7.1, or 8.4(c) have been violated with respect to a given writing. As such, and in accordance with its other responses, HBC recommends that the ABA apply those rules to online content in the same manner as it would to printed writings. If the ABA felt it necessary, HBC would recommend that the ABA adopt a Comment clarifying that all Model Rules, including 4.1(a), 7.1, and 8.4(c), apply to material published online to the same extent that they do to printed materials.

IV. Conclusion

HBC appreciates the effort that the Working Group has dedicated to this important effort. I hope that our perspective is helpful to you in clearing a path for lawyers to use Internet-based tools for client development in a responsible manner, benefitting both the profession and the public.

Very Truly Yours,

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