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Blogging & The Constitution

Posted by **Gyi Tsakalakis** on November 12, 2010

In the wake of the ABA's recent call for comments on lawyers' use of internet based client development tools, the legal blogosphere has been buzzing with discussions of the future of web technologies for legal professionals:

- What is the ABA Commission on Ethics 20/20 considering re law blogs?
- Announcing the MyShingle ABA Ethics 20/20 Portal
- RED ALERT: The ABA Wants to Regulate Online Lawyer Marketing
- ABA's Ethics 2020 Committee and the "Red Alert" Phenomenon
- A Message From The Marketers: The Truth Hurts, Us.
- ABA Prez Discusses Social Media, Civics and More

Just to name a few... (Please feel free to add yours)

And there are concerns that the risks and benefits of lawyers' uses of web technologies, including social media, are not being fairly portrayed. Which prompted this comment by Scott Greenfield:

> "By the way, one aspect of this discussion that requires some serious refinement is that we talk about blogs as if they're all the same, knowing full well that their not. **Some are completely non-commcercial speech, while others are flagrantly commercial, and there's a full spectrum in between.** Any discussion of whether blogs are covered by ethical regulations (and they are, as is everything lawyers do, which doesn't make them prohibited but merely covered) needs to specify what we're talking about. What we really need is a more precise choice of words to describe the spectrum of blogs.
>
> Maybe, with better definition, we might find that we have greater agreement than it appears."

Which caused me to start thinking about the nebulous world or commercial and non-commercial speech.

Now, I am not a constitutional law scholar. I am not a practicing lawyer. I am certainly not qualified (nor interested in) writing usable and effective rules to govern how legal professionals use the web. It is my opinion that each legal professional should make an informed decision about how they choose to interact online. That being said, I am very interested (both financially and intellectually) in some of the issues related to the use of the web by lawyers. So here are some observations and opinions.

In my VERY limited understanding of Supreme Court speech jurisprudence and classifications, it is my opinion that the Court has been vague at best and contradictory at worst on these issues.

First, it is my view that James Madison never intended that the degree of protection afforded speech be subject matter dependent. Second, it seems rare that an expression is **"related solely to the economic interests of the speaker and its audience."** *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY, 447 US 557 -*

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Supreme Court 1980, citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U. S. 748, 762 (1976); Bates v. State Bar of Arizona 433 U. S. 350, 363-364 (1977); Friedman v. Rogers, 440 U. S. 1, 11 (1979).

While the cynic in me cries, "all expression relates to the economic interests of the speaker", my experience tells me that most cases include a mixture of both.

On the other hand, I agree that, **"Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."** *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY, 447 US 557 - Supreme Court 1980, citing Bates v. State Bar of Arizona, supra, at 374.*

Nonetheless, even working within the Court's framework, it seems to me that as long as lawyers aren't making misleading statements on their websites and blog, even their most unbecoming "ad blogs" are protected:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be **no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.** The government **may ban forms of communication more likely to deceive the public than to inform it,** Friedman v. Rogers, supra, at 13, 15-16; Ohralik v. Ohio State Bar Assn., supra, at 464-465, or 564*564 commercial speech related to illegal activity, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U. S. 376, 388 (1973).[6]
> If the **communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.** The State must assert a **substantial interest** to be achieved by restrictions on commercial speech. Moreover, the**regulatory technique must be in proportion to that interest**. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the **restriction must directly advance the state interest involved;** the regulation may not be sustained if it provides only **ineffective or remote support for the government's purpose.** Second, if the governmental interest could be served as well by a **more limited restriction on commercial speech, the excessive restrictions cannot survive.**

And so, it would seem to me, that so long as bloggers, including lawyer bloggers, including lawyer bloggers that advertise their services (even those that do it distastefully), do not mislead their audience, any restrictions on what they write must be crafted to directly advance the state's purpose (protecting the public from misleading lawyer advertising) and must do so in a way that is as least restrictive as is conceivable.

In the end, the discussion always returns to a very difficult question: **Is the article, web page, or blog post, likely to mislead a reasonable reader?** Good luck with that one.
I have yet to witness the flood of complaints by legal services consumers of the harms they suffered by being misled by their lawyer's website or blog (although with all those creative lawyers out there, I have no doubt that they will eventually arrive). Most of the legal malpractice cases, with which I am familiar, involve careless, or downright criminal, activities.

On the other hand, there should be, and there are, several protections against lawyers misleading the public. And they apply with equal force whether the speech is in person, on the radio, on TV, or on the Internet.

In my experience working with lawyers, I have reviewed a lot of law firm websites and legal blogs. I have seen the good, the bad, the ugly, and the deplorable. Despite my personal perspective on such advertising, as well as, my disagreement with much of the Supreme Court's jurisprudence on "levels of protected speech", even under the Court's framework, lawyers have a right to blog, even commercially. Whether that is effective or not is an entirely different matter.

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Should bar associations choose to invest the resources necessary to promulgate the least restrictive proportionate rules to prevent lawyers from publishing misleading information online, as well as, an efficient and effective enforcement mechanism, I wish them luck.

So far, most of the recent and proposed changes that I have seen, are unlikely to pass muster. But then again, I'm just a slimy legal marketer.

Which raises another questions, is this article commercial speech?

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