

■ **BUILDING THE 21st-CENTURY LAW FIRM**



CHANGE THE RULES!

ETHICS OPINIONS HAVE TO REFLECT THE PRESENT AND FUTURE—NOT THE PAST

BY CAROLYN ELEFANT

SHUTTERSTOCK

One of the most enduring purposes behind the ABA Model Rules of Professional Conduct and corresponding state ethics standards is to protect clients and the public from “overreaching, overcharging, underrepresentation and misrepresentation.” (See *Ohralik v. Ohio State Bar*, 1978.)

More than a century after the 1908 adoption of the association’s first set of guidelines, the ABA Canons of Professional Ethics, the clients whom ethics standards protect and the lawyers governed by them have changed drastically. Yet in substance and form, ethics standards remain stagnant—and the same lofty principles that once inspired the best in lawyers will soon render us irrelevant.

ARCHAIC RULES

In substance, today’s legal ethics standards are so utterly out of sync with the lifestyle, social conventions and technology savvy of today’s consumers that they actually breed mistrust.

Imagine an encounter with an alien that hails from a planet where placing one’s hands around a new acquaintance’s throat is intended as a sign of respect. Yet without this background, you’d understandably feel distrustful and threatened if greeted by a stranger who has a firm vise around your neck. The same is true of ethics standards in the modern world: They require lawyers to act in a manner that is so alien in today’s society as to arouse suspicion. Consider the two following scenarios.

Case 1: Penny Prospect, a mom seeking a divorce, arrives at your office for a consult. You think the meeting went well, but you never hear back. It turns out your instincts weren’t wrong—Penny was leaning toward retaining you—until she viewed your profile on LinkedIn and saw a disclaimer that states: “This profile is attorney advertising.”

In a decade of using LinkedIn (including as recently as that morning when she updated her profile in anticipation of searching for a higher-paying job), she has never seen a disclaimer like

this. She knows LinkedIn’s user agreement prohibits advertising. Doesn’t this lawyer understand terms of service?

Penny’s concerns aren’t allayed when she clicks a link to the lawyer’s blog and once again sees “This blog is attorney advertising” underneath the blog caption. Penny doesn’t bother to read the posts; she assumes that if they’re advertising, they won’t be very valuable.

Penny wonders what’s wrong with this dude. He’s so caught up in promoting himself online that he won’t have time to handle her case. Ultimately, Penny heads to LegalZoom, which doesn’t have the same advertising disclaimers, and signs up for the do-it-yourself divorce package that includes attorney review.

Case 2: Noah Newbie is a recent business school graduate seeking to incorporate an online business. After the meeting, you hand him a 15-page retainer agreement and ask him to sign it and send it back with a check.

Noah leaves the office and tosses the retainer agreement into the trash can. He doesn’t understand a word of it. Plus, he’s always paid bills by credit card. He’s not sure that he still has a checkbook.

He decides to search his lawyer’s ratings online, but there’s not a client review or testimonial to be found. Because Noah always

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checks ratings before making a purchase, he's disconcerted about why he can't find any for his lawyer: Were they so bad she paid to have them removed?

Then Noah discovers a site called Avvo Answers, where he can ask questions about incorporating a business for \$39. Noah searches for a New York lawyer. When he can't find one, he discovers that several bars, including New York, have banned lawyers from doing business on Avvo. Apparently, it's unethical for the site to take a cut of the \$39 fee you pay to talk to a lawyer.

Noah doesn't get it. Isn't it a common online business model for the platform providing goods or services to take a cut of the sale? That's how Etsy and Airbnb work—heck, Uber is killing it. Noah can't believe this rule is really intended to protect clients. It's probably a way to force clients to have to trek to a stuffy, old lawyer's office and fork over \$1,000.

It looks like his mentor, who heads a successful startup, was right after all: Noah is going to have to start his corporation at Rocket Lawyer by himself. Noah sighs, thinking it was easier to find his fiancée online through a dating site than it is to hire a lawyer.

REAL RULINGS, FALSE FEARS

These aren't fantasy scenarios; they are based on actual ethics opinions. New York County Lawyers



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Association Formal Opinion 748 (2015) requires disclaimers in LinkedIn profiles. State Bar of California Formal Opinion 2016-196 treats a blog as advertising that's subject to advertising rules if the attorney makes known their availability for service. And New York State Bar Association Ethics Opinion 1132 (2017) finds Avvo Answers and similar sites to constitute unethical fee splitting, as did a 2016 advisory opinion from the South Carolina Bar.

As these examples bear out, the parade of horrors that regulators envision—fee splitting with nonlawyers injecting their interest into the attorney-client relationship, testimonials and reviews that might dupe clients into hiring an unqualified lawyer, making objective and useful information online available through a LinkedIn profile or a blog without prominently labeling it as advertising (I'm stumped to figure out what kind of harm that could ever cause)—doesn't intimidate today's clients at all.

Most of today's clients have seamlessly, thoroughly integrated social media and “sharing-economy” platforms, as well as online payments and content-based marketing, as part of their daily lives. They've acclimated to the cultures of each online universe they inhabit and grown adept at distinguishing between causal informational websites and biographical profiles, and chatty personal exchanges and paid advertising. So when lawyers can't conform their conduct to these mores, they're first viewed with suspicion or annoyance and, ultimately, ignored.

OUTDATED, UNAVAILABLE

There are at least two problems with how ethics opinions are issued and circulated. First, with technology changing so rapidly and bar committees short-staffed, regulators can't keep pace. By the time they issue an opinion, it might already be outdated, as was the case when a New York opinion banned lawyers from listing “specializations” on their LinkedIn pages only to have the site eliminate the specialization category by the time the ethics opinion was issued.

The second problem is that the legal ethics opinions that govern lawyer conduct may be inaccessible to lawyers. Opinions in my home state of Maryland are only available to state bar members unless some news outlet publishes them. And in states where such opinions are freely available, online search tools can be primitive, if they exist at all.

Meanwhile, most commercial research services do not have a complete library of ethics opinions, so lawyers who want to summarize current ethics rules on a certain issue might have to visit two or three sources.

As a result, just as legal ethics have made lawyers

irrelevant to clients, the challenges in accessing and researching ethics opinions have made legal ethics irrelevant to lawyers.

NEEDED CHANGES

What can be altered to make lawyers and legal ethics more relevant in today's fast-changing world? Here are a few suggestions:

View ethics in context.

In issuing ethics rules that govern social media, online advertising and novel business platforms, regulators must do so in the context of how clients currently use and understand these activities.

When regulators consider their work, they must evaluate whether a particular online activity would deceive or otherwise harm a reasonable consumer well-versed in using that platform in other contexts, rather than whether it might mislead a client who stepped out of the 18th century.

Second, regulators must recognize that client protection goes beyond merely preventing the harm that might result from a specific situation. Instead, they also must evaluate whether the harm of banning a particular activity outweighs the harm of allowing it. For example, although there's always a possibility that an online review might be deceptive, given that most of today's clients rarely make a purchase without reviewing a provider's ratings and testimonials online, the low risk of harm that might flow from lawyers posting deceptive online reviews is readily outweighed by the harm to clients deprived of a source of information they've grown accustomed to in other industries.

Have hands-on experience. On my blog, MyShingle, I would never review an online product unless I first viewed a demo and then experimented with the technology. The same principle should apply to regulators: Before passing ethics judgment on LinkedIn, Avvo Answers, Facebook or any of the many online platforms in existence today, they should have a minimum of 10 hours of hands-on experience using and testing the product.

Not only would this hands-on experience lead to more accurate descriptions of a particular

technology in an ethics decision, but most likely it would show regulators that the platform is relatively benign.

Move toward uniform rules. As lawyers do business across the internet, uniform regulation is more important than ever. Most obviously, creating consistency across all 50 states would help those lawyers caught in the crosshairs of conflicting jurisdictions. But consistent rules benefit clients, too.

Because lawyer profiles on LinkedIn or Avvo Answers are visible in all 50 states, a client who lives in a more restrictive jurisdiction where a disclaimer is required may begin to think that their lawyer is inferior when compared to other lawyers living where disclaimers are not necessary.

The most significant benefit of uniform rules is that regulators could collaborate on one set of rules and ethics opinions, rather than 50. This is essentially what happens today, albeit less efficiently: One state addresses a new technology issue, and then two or three dozen other bars write pretty much the same

thing. Why not stop the charade of state independent oversight of ethics and encourage regulators from all 50 states to work on one set of rules?

Make rulings freely available. For legal ethics to play a relevant part in regulating lawyer conduct, the rules and ethics opinions interpreting them must be accessible and searchable. This means regulators must remove their ethics opinions from behind the pay wall and place them where they're available to all lawyers.

As we march through the 21st century, the goal of protecting clients remains as important as it has always been. But to be able to protect clients, we lawyers must first ensure that we remain relevant. ■

Carolyn Elephant is an energy and eminent domain attorney based in Washington, D.C. She says blogging at MyShingle "has given me a bird's-eye view of the changes that have been roaring through the legal profession and an opportunity to chronicle and speak on these trends."

This is the last Building the 21st-Century Law Firm article in our 12-month series, but it's certainly not the last time we'll cover the topic. Check the *ABA Journal* and ABAJournal.com for future stories on how to establish and grow your law firm.

