

Not Your Father's Social Media and Ethics Presentation OR Ethical Social Media Use in Three Easy Steps

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Many presenters on social media focus on the ethical risks that improper social media use creates for lawyers. From their point of view social media is a dangerous legal ethics trap waiting to be sprung on the unwary lawyer. But it doesn't have to be that way. Lawyers shouldn't fear social media and ethical social media use is neither difficult nor dangerous. In place of the pervasive paradigm of fear this presentation will focus on a simple common sense approach to using social media ethically.

This presentation divided into four sections. First, is a discussion of expectations and the fact that if lawyers use social media the way it's intended to be used, the way that users expect for it to be used, there is little to worry about from a legal ethics point of view. Next, is a simple comprehensible discussion of the constitutional law that backs up lawyer social media use and why, from a constitutional law perspective, lawyers should feel much freer to use social media than they typically do. The third section ties the two first pieces together and clarifies that ethical social media use is no than different than ethical communication and marketing in the pre-social media world. Lawyers simply need to remember their ethical obligations. The final section touches on the few areas in which the brave new internet world of social media does create some risks and gray areas that lawyers might not have previously considered.

1. Expectations

Lawyers who struggle to understand the ethical landscape for social media frequently do not understand the difference between inbound and outbound marketing. Much of traditional lawyer advertising – television, yellow pages and newspaper ads, and the like – can be characterized as “outbound marketing.” It's basically shouting from the rooftops about how great you are. That type of marketing works well in some situations but not often for legal services. Legal services are “considered purchases” – purchases in which people invest time and even money simply considering who they should hire. In considered purchases, people want information in order to make an informed decision. That's where the notion of “inbound marketing” comes in. It's not shouting about how great you are, it's informing, educating, enlightening and entertaining. Inbound marketing is about playing the longer game by showcasing your competence and experience (and even some of your humanity) and by building relationships and your network. Social media is about you. And that's what social media users expect. They don't expect to be sold to, pitched to, solicited, bragged to, or lied to.

- Association of Professional Responsibility Lawyers -

2. Constitutional Law

In 1977 the Supreme Court found that legal advertising was, indeed, commercial speech and, therefore, subject to First Amendment protection. Around the same time, the Supreme Court refined its definition of definition of “commercial speech” saying that commercial speech is “that which does no more than propose a commercial transaction.” The definition of “commercial speech” as it relates to legal advertising varies from state to state but generally emphasizes actively looking for clients or proactively advertising your availability for services:

- [ABA Comment 1 to RPC 7.2](#) “an active quest for clients”
- Michigan: “an active quest for clients” [Comment to Rule 7.2 MRPC](#)
- Texas: “communications made for the purpose of obtaining professional employment” Comment 1 to [Texas Disciplinary Rule of Professional Conduct 7.02](#)
- Washington: “an active quest for clients” [WRPC Comment 1 to RPC 7.2](#)
- New York: “communications . . . the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication.” Comment 6 to [NYRPC 7.1](#)
- California “any message or offer made by or on behalf of a member concerning the availability for professional employment . . . directed to any former, present, or prospective client, including but not limited to the following.” [CRPC 1-400](#)

So, the **first thing** for lawyers to remember is that that if speech is educating, enlightening, informing, or entertaining, it’s **not** commercial speech and, therefore, not subject subject to any restrictions that might otherwise prohibit commercial speech.

The **second thing** for lawyers to remember is that regulation of commercial speech has constitutional limits. If a regulator desires to regulate commercial speech, it must meet the constitutional standard to regulate commercial speech, which is *intermediate scrutiny*.

- **First Element:** regulation must have an important government interest (not necessarily hard to do)
- **Second element** regulator must also show that regulation of speech directly advances government interest and
- **Third Element:** that the regulation narrowly tailored (doesn’t prohibit permitted speech – more than it needs to)

[Bolger v. Youngs Drug Products Corp.](#), 463 U.S. 60 (1983); [Sorrell v. IMS Health](#), 131 S. Ct. 2653 (2011); [Bates v. State Bar of](#)

[Arizona, 433 U.S. 350 \(1977\)](#); [Central Hudson v. New York, 447 U.S. 557 \(1980\)](#); [Michigan Rule of Professional Conduct 7.2, comment](#); [Comment 1 to Texas Disciplinary Rule of Professional Conduct 7.02](#); [WRPC Comment 1 to RPC 7.2](#); [Comment 6 to NYRPC 7.1](#); [California RPC 1-400](#)

3. Same as it ever was

The technology/internet is revolutionizing everything from the way that we bank to the way we get our groceries, to the way we get around, to the way we buy homes, and beyond. And while the internet and social media interactions create some types of situations and affiliations that are unique to our age, many of the questions that lawyers face can be resolved by a common sense application of the existing rules. Because state rules vary from state to state I'm going to reference the ABA Model Rules. Most, not all, but most, states adhere relatively closely to or at least take as the baseline, the ABA Model Rules so they're a good start.

- Example: Law firm claimed on internet to be "Jones and Associates" yet, there was only one attorney.
 - o Many decisions and ethics opinions from a wide variety of states have held that the use of "associates" in the name of a law firm with one practicing lawyer is false and misleading – regardless of the medium. See, e.g., [In re Mitchell, 614 S.E.2d 634 \(S.C. 2005\)](#); [In re Brandt, 670 N.W.2d 552, 554-55 \(Wis. 2003\)](#); [Portage County B. Ass'n v. Mitchell, 800 N.E.2d 1106 \(Ohio 2003\)](#); [Office of Disciplinary Counsel v. Furth, 754 N.E.2d 219, 224, 231 \(Ohio 2001\)](#); [S.C. B. Ethics Advisory Comm., Op. 05-19 \(2005\), 2005 WL 3873354](#); [Utah St. B. Ethics Advisory Op. Comm., Op. 138 \(1994\), 1994 WL 579848](#)
- Example: Solicitation on social media - Lawyers who search Twitter or FaceBook feeds looking for keywords and then soliciting those folks directly. Particularly think of people looking for keywords related to personal injury, divorce, or other emotionally "charged" situations.
 - o [ABA MPRC – 7.3\(b\)\(2\)](#) – prohibits solicitation involving coercion or duress.
 - o [Cal RPC 1-400\(E\), Standard \(3\)](#) – prohibits solicitation in situations in which a lawyer knows or should have reason to know that a potential client is not physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.
- Example: "Astroturfing" – creating false positive reviews for yourself or creating false negative reviews for the competition.
 - o [Prohibited by ABA MRPC 7.1](#) – "A lawyer shall not make a false or misleading communication about the 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.”

- [In New York: A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \\$350,000 In Fines](#)
- Also, remember that under [ABA MRPC 5.3](#) you are on the hook for anything anyone under your employ (vendors or employers) do on your behalf.
- [Florida Rules of Professional Conduct - Rule 4-5.3 – same rule](#)
- Example: Professionalism/attorney/client privilege
 - It used to be that you’d have to wait until you got back to the office to vent about a bad day in court, an insolent client, or an argument with opposing counsel. But today smartphones and social networks have eliminated the preexisting geographic and communication barriers so that the angry missive fired off by a frustrated attorney can be seen by all the world before he’s even cleared the courthouse steps. Besides the obvious cost to one’s professional standing, reputation for judgment, etc., a poorly thought out comment can actually lead to discipline if it reveals client confidences or materially interferes with the adjudicatory proceedings. However, while the barriers between a lawyer’s ill-advised communication and the rest of the world are lower than they once were, this type of communication in any public forum was always unwise, if not prohibited. [Gentile v. State Bar of Nevada, 501 U.S. 1030 \(1991\)](#); [In the Matter of Margrett A. Skinner, No. S13Y0105, \(Supreme Court of Georgia, March 18, 2013\)](#); [Office of Lawyer Regulation v. Peshek, 798 N.W.2d 879, \(Wis. 2011\)](#)

4. **But watch out!**

Even though most risks haven’t been altered dramatically by the internet, there are a few challenging situations that are relatively unique to the internet. Keep the changed (or changing) landscape in mind when considering these issues:

- Friending, following, or connecting with a judicial officer; judge use of social media
 - [ABA Formal Opinion 462](#), [Connecticut \(Op. 2013-06\)](#), [Kentucky \(Op. JE-119\)](#), [Maryland \(Op. 2012-07\)](#), New York ([Op. 13-39](#), [08-176](#)), [Ohio \(Op. 2010-7\)](#), [South Carolina \(Op. 17-2009\)](#), and [Tennessee \(Op. 12-01\)](#). These opinions largely state that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis.

- Other states have a more restrictive view: [California \(Op. 66\)](#), Florida ([Florida Ethics Opinion 2012-12](#)), [Massachusetts \(Op. 2011-6\)](#), and [Oklahoma \(Op. 2011-3\)](#)
 - [Florida Opinion 2013-14](#) cautioned Judges against using Twitter
 - I think they're wrong but it is good to be mindful of.
- Friending, following, or connecting with an opposing party, or even opposing counsel
 - Could you connect with co-counsel on a social network to try and learn trial prep or strategy?
 - What about friending an opposing party for discovery purposes?
 - What about encouraging a client to do so?
 - Advising clients to “clean up” social media pages
 - [PROFESSIONAL ETHICS OF THE FLORIDA BAR OPINION 14-1 June 25, 2015](#)
- Endorsements
 - A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations.
 - [South Carolina Ethics Opinion 09-10](#)
 - “we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals”
 - [New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 March 10, 2015](#)
 - Note: You can “hide” endorsements, either on an individual or total endorsement level
- For a good general overview on ethical social media marketing see [“The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-186”](#)



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“Usual” Social Media and Ethics Presentations

1.Scare

2.Scare*

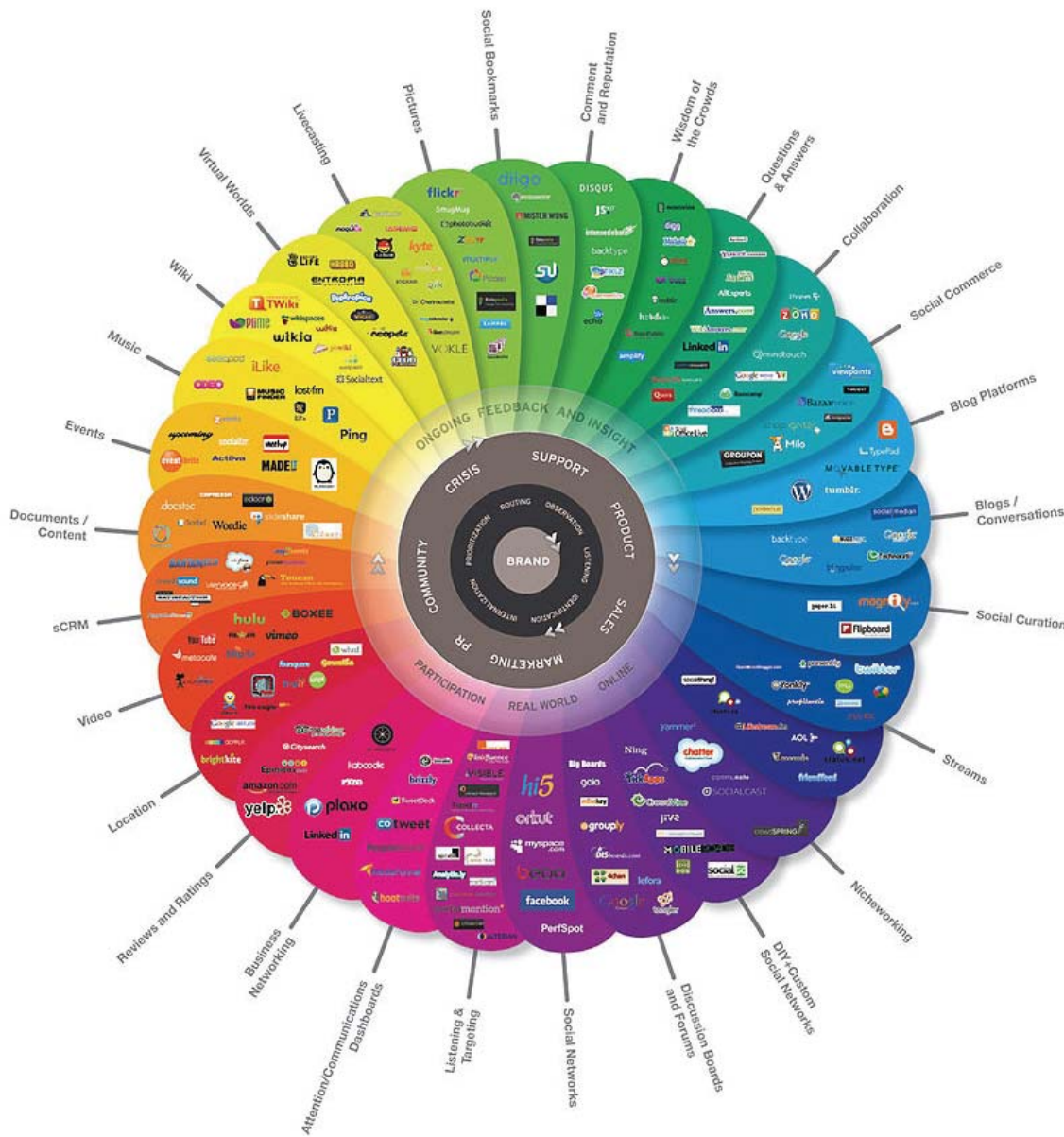
**3.Now, go get
social! 👍**

*And, sometimes laugh or make a joke about a hapless, usually young, lawyer

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Scare

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There are more social media sites, methods, channels, and formats than we could discuss in a week.

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1,280,000,000



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1,370,170,000



Scare!!

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Ethical Duties Relating to Social Media

Part 7 of the [INSERT STATE NAME] Disciplinary Rules of Professional Conduct

- Rule 7.01. Firm Names & Letterhead
- Rule 7.02. Communications Concerning a Lawyer's Services
- Rule 7.03. Prohibited Solicitations & Payments
- Rule 7.04. Advertisements in the Public Media
- Rule 7.05. Prohibited Written, Electronic, or Digital Solicitations
- Rule 7.06. Prohibited Employment
- Rule 7.07. Filing Requirements for Public Advertisements & Written, Recorded, Electronic, or Other Digital Solicitations

Let's hit the highlights:

General Considerations in Using Social Media

(or, said differently, think before you click.)

Be careful about what you say on social media, and how you use it:

Galveston: Lawyer friended judge on Facebook, posted a string of updates about drinking and partying, and then told judge in court that the Lawyer's father had passed away so she needed a continuance. (Continuance denied.)

North Carolina: Judge friended defense counsel in a child custody case, and they discussed aspects of the case on Facebook (ex parte communication).

San Francisco: Prosecutor was disqualified for blogging about a pending case, including calling his opposing counsel "chicken" for requesting a continuance and mentioning evidence that had not been ruled admissible at trial.

Philadelphia Bar Association Advisory Opinion: Lawyer asked whether he could have a third party "friend" a witness so the Lawyer could secretly gain information to use for impeachment. PBA said that would be unethical.

Florida: The Florida Supreme Court corrected an attorney who claimed his comments were protected free speech when he blogged that a particular judge was an "evil, unfair witch."

X 24!

Followed by . . .

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Now

GO GET SOCIAL!

And thanks for listening.

Not your Father's Social Media and Ethics Presentation

or . . .

Ethical Social Media Use in Three Easy Steps

Avvo Webinar
Thursday May 26, 2016

Avvo

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**If you remember one thing
from today . . .**

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If you are using social media the way it is *intended* to be used, you shouldn't have to worry too much about the ethical rules.

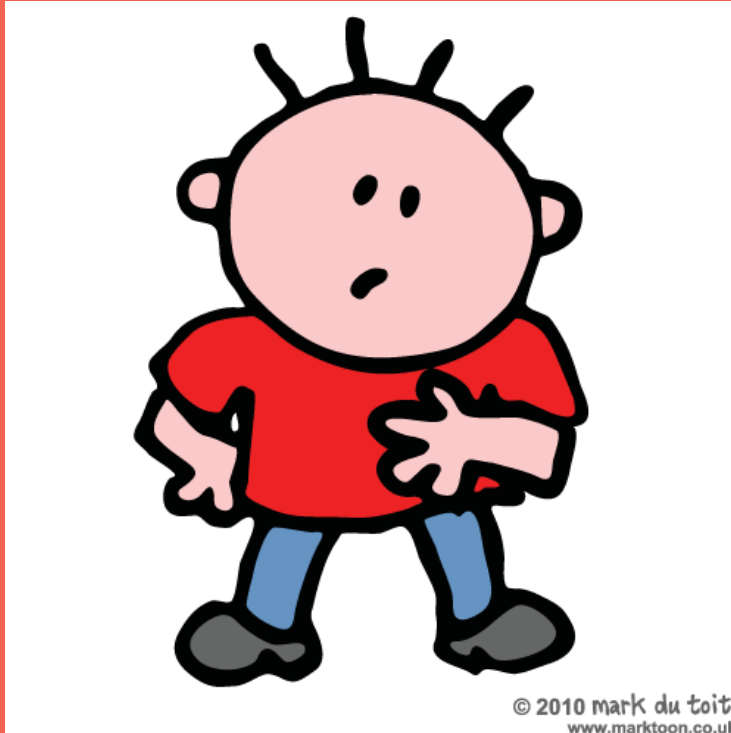
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Agenda

1. Expectations
2. Remember the Constitution
3. Same as it ever was
4. *Caveats

1) Expectations

What *is* social media?



Social media is about you!
("Who? Me?")

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What do social media users expect?

YES!

- Inform
- Engage
- Enlighten
- Entertain

The "why" of social media



The Rolls-Royce Silver Cloud—\$13,995

“At 60 miles an hour the loudest noise in this new Rolls-Royce comes from the electric clock”

What makes Rolls-Royce the best car in the world? “There is really no magic about it—it is merely patient attention to detail,” says an eminent Rolls-Royce engineer.

1. “At 60 miles an hour the loudest noise comes from the electric clock,” reports the Technical Editor of *THE MOTOR*. Three mufflers tune out sound frequencies—acoustically.
2. Every Rolls-Royce engine is run for seven hours at full throttle before installation, and each car is test-driven for hundreds of miles over varying road surfaces.
3. The Rolls-Royce is designed as an *owner-driven* car. It is eighteen inches shorter than the largest domestic cars.
4. The car has power steering, power brakes and automatic gear-shift. It is very easy to drive and to park. No chauffeur required.
5. The finished car spends a week in the final test-shop, being fine-tuned. Here it is subjected to 98 separate on-tests. For example, the engineers use a *stethoscope* to listen for axle-whine.

years. With a new network of dealers and parts-depots from Coast to Coast, service is no problem.
7. The Rolls-Royce radiator has never changed, except that when Sir Henry Royce died in 1933 the monogram RR was changed from red to black.
8. The coachwork is given five coats of primer paint, and hand rubbed between each coat, before *nine* coats of finishing paint go on.
9. By moving a switch on the steering column, you can adjust the shock-absorbers to suit road conditions.
10. A picnic table, veneered in French walnut, slides out from under the dash. Two more swing out behind the front seats.
11. You can get such optional extras as an Espresso coffee-making machine, a dictating machine, a bed, hot and cold water for wash-

12. There are three separate systems of power brakes, two hydraulic and one mechanical. Damage to one system will not affect the others. The Rolls-Royce is a very *safe* car—and also a very *lively* car. It cruises serenely at eighty-five. Top speed is in excess of 100 m.p.h.
13. The Bentley is made by Rolls-Royce. Except for the radiators, they are identical motor cars, manufactured by the same engineers in the same works. People who feel diffident about driving a Rolls-Royce can buy a Bentley.
PRICE. The Rolls-Royce illustrated in this advertisement—E.o.b. principal ports of entry—costs **\$13,995.**
If you would like the rewarding experience of driving a Rolls-Royce or Bentley, write or telephone to one of the dealers listed on the opposite page.
Rolls-Royce, Inc., 10 Park Circle, Boston, Mass.

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What social media is *not*

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DRUG PROBLEM?



**I'LL TURN THAT ADDICTION
INTO A PRESCRIPTION!**

"Better Call Saul"



SAUL GOODMAN
ATTORNEY AT LAW

**CALL
NOW!**

BETTERCALLSAUL.COM SE HABLA ESPANOL

**Social
Media is
not a
billboard**



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What do social media users expect?

YES!

- Inform
- Engage
- Enlighten
- Entertain

NO!

- Sell
- Pitch
- Solicit
- Brag
- Lie

2) Remember the Constitution

Bates v. Arizona - 1977

Advertising



Attorneys



Attorneys

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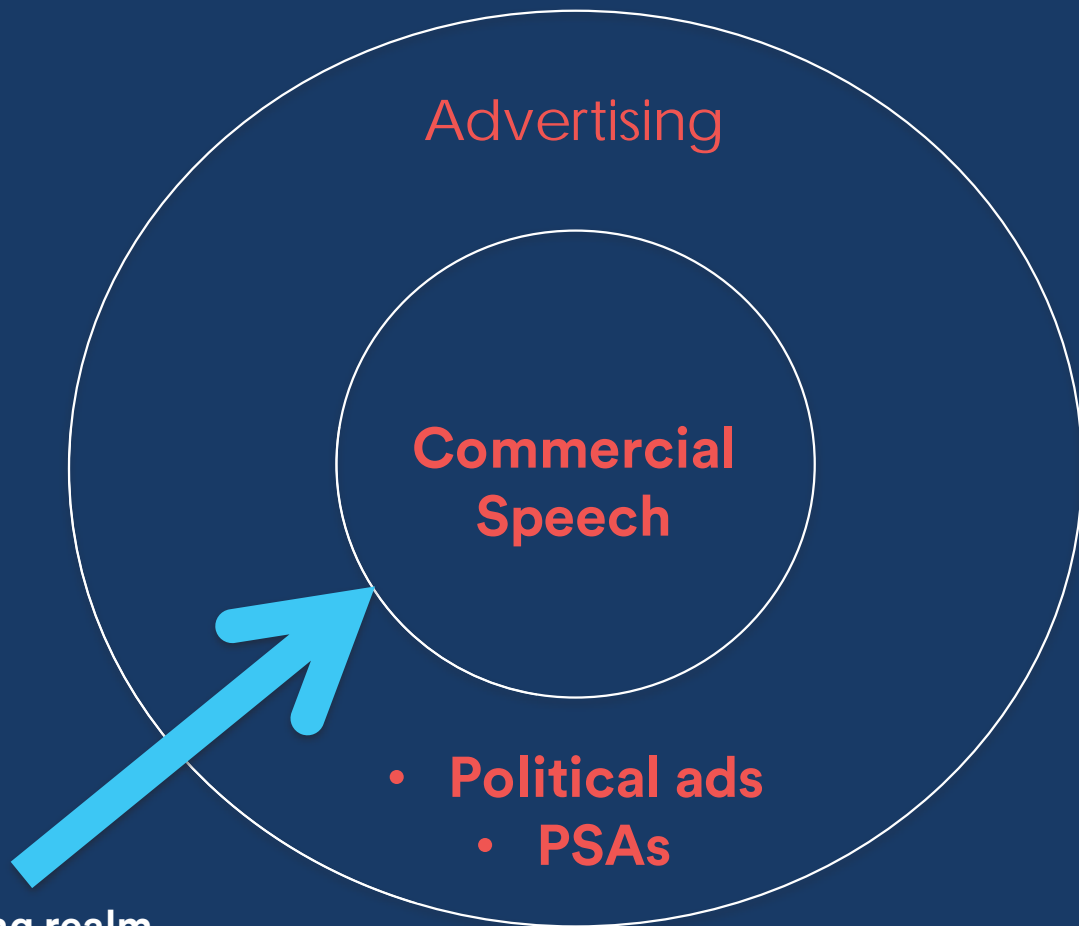
Commercial Speech

- For everyone else: “that which does no more than propose a commercial transaction”

Central Hudson 1980

- For attorneys: “an active quest for clients”
ABA Comment 1 to RPC 7.2

Advertising vs. Commercial Speech



In advertising realm
only **this** is subject to
regulatory scrutiny

What about social media?



In advertising realm
only **this** is subject to
regulatory scrutiny

If you are using social media correctly . . .

Legal
Publications

Advertising

- Engage
- Inform
- Enlighten
- Entertain

Commercial
Speech

- Political ads
- PSAs

In advertising realm
only **this** is subject to
regulatory scrutiny

Remember: Commercial Speech in Attorney Advertising

“an active quest for clients”

ABA Comment 1 to RPC 7.2

**Informing, engaging, entertaining, or
enlightening? That's OK!**

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Quiz time!

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California Bar: Formal Opinion No. 2012-186

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Josh King

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

Like · Comment · Share · Promote · 2 seconds ago · Only Me



Josh King

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

Like · Comment · Share · Promote · 2 seconds ago · Only Me



Josh King

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

Like · Comment · Share · Promote · 2 seconds ago · Only Me



Josh King

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

Like · Comment · Share · Promote · 2 seconds ago · Only Me



Josh King

Case finally over. Unanimous verdict! Celebrating tonight.

Like · Comment · Share · Promote · a few seconds ago · Only Me



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Quick aside about regulators

A bar's authority to regulate advertising is not unfettered . . .

Regulators' Burden

1. Important government interest
2. Regulation directly advances that government interest
3. Regulation is narrowly tailored

Changes in the offing?



3) Same as it ever was

False and misleading advertising

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See, e.g.:

**In re Mitchell, 614 S.E.2d 634
(S.C. 2005)**

**In re Brandt, 670 N.W.2d 552,
554-55 (Wis. 2003)**

**Portage County B. Ass'n v.
Mitchell, 800 N.E.2d 1106 (Ohio
2003)**

Office of Disciplinary Counsel v. *Avvo*

Solicitation

Avvo



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ABA Model Professional Rule of Conduct – 7.3(b)(2)

California Rules of Professional Conduct 1-400(E), Standard (3)

Astroturfing

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ABA Model Rule of Professional Conduct 7.1

**“A lawyer shall not make a
false or misleading
communication about the
lawyer or the lawyer's
services.”**

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[Home](#) » [Media Center](#) » [Press Releases](#) » [September 23rd 2013](#)

**A.G. Schneiderman Announces Agreement With 19
Companies To Stop Writing Fake Online Reviews And Pay
More Than \$350,000 In Fines**

*“Operation Clean Turf” Concludes Year-Long Undercover Investigation Into
Reputation Management Industry, Astroturfing And False Endorsements*

Schneiderman: Astroturfing Is 21st Century’s False Advertising

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ABA Model Rule 5.3

“Responsibilities Regarding Nonlawyer Assistants”

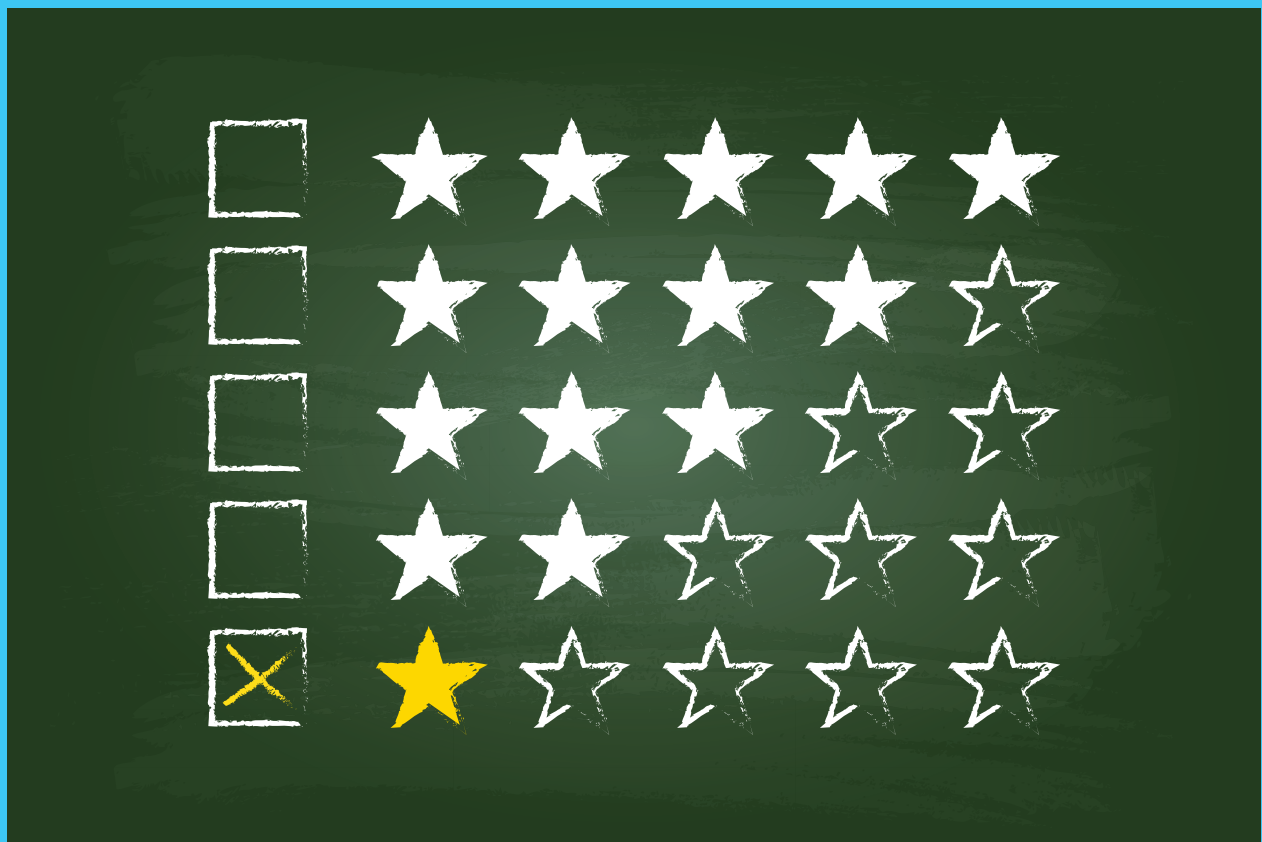
Professionalism

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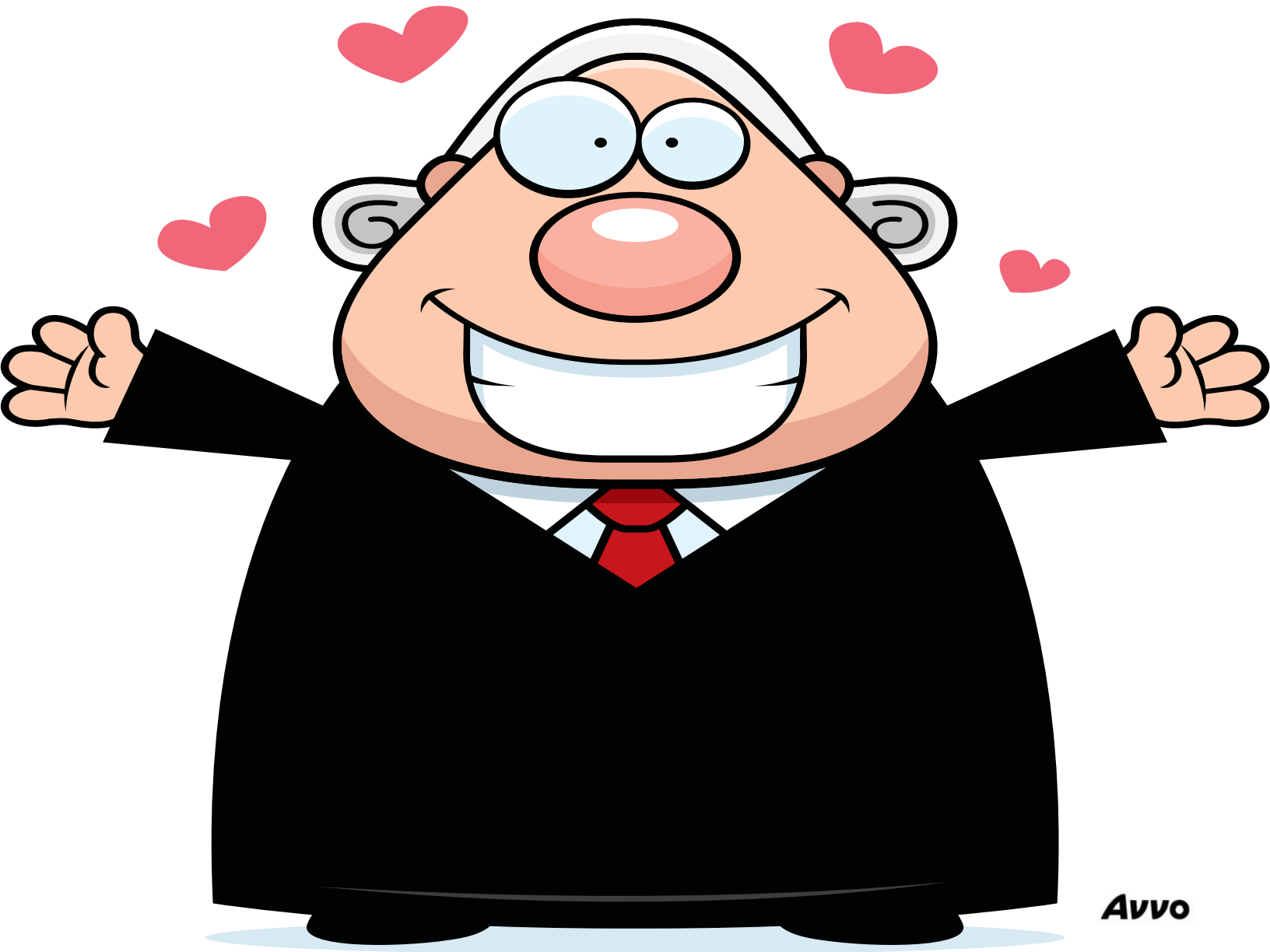
E.G. In re Skinner (Georgia, 2013)





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*Caveats



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Two camps

More “open”

- ABA Formal Opinion 462
- Connecticut (Op. 2013-06)
- Kentucky (Op. JE-119)
- Maryland (Op. 2012-07)
- New York (Op. 13-39, 08-176)
- Ohio (Op. 2010-7)
- South Carolina (Op. 17-2009)
- Tennessee (Op. 12-01).

More “restrictive”

- Florida (Florida Ethics Opinion 2012-12)
- Florida (Florida Ethics Opinion 2013-14)
- Massachusetts (Op. 2011-6)
- Oklahoma (Op. 2011-3)
- California (Op. 66)

Add as Friend



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Florida Bar Opinion 14-1 June 25, 2015

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CDA 230
"The Law that Makes the
Internet Go"



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Three Easy Steps

1. Expectations
2. Remember the
Constitution
3. Same as it ever was*

But if all else fails . . .

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**If you remember one thing
from today . . .**

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*If you are using social media the way it is **intended** to be used, you shouldn't have to worry too much about the ethical rules.*

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THANK YOU!

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