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Professional Legal Organizations on the Internet: Websites and Ethics

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PROFESSIONAL LEGAL ORGANIZATIONS ON THE INTERNET: WEBSITES AND ETHICS*

*Drew L. Kershen***

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I. INTRODUCTION

As lawyers venture onto the Internet, they must think about the professional ethical rules that apply. Articles,¹ continuing legal education materials,² and ethics opinions³ provide guidance to lawyers and law firms about the Internet and compliance with professional ethics. Taken as a whole, these articles, materials, and opinions constitute a substantial literature.⁴

Missing from this substantial literature, however, is any sustained discussion of the ethical issues that professional legal organizations, in contrast to individual lawyers or law firms, must consider when the organization creates a website.⁵

Professional legal organizations want to use the Internet for several obvious reasons. The organization wants to tout its existence. The organization wants to inform the computer public of its programs and services. The organization wants to provide additional, more efficient services to its members. The organization wants to promote its members. If the organization accomplishes these goals by using the Internet, the organization will likely foster satisfied members, attract more members, increase its public influence, and insure its continued existence as an organization. These obvious reasons for being on the Internet certainly motivated the American Agricultural Law Association (AALA) to act.

1. See, e.g., Joan C. Rogers, *How Do Advertising Rules Apply to Lawyers on the 'Net?*, 12 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 37 (1996); Joan C. Rogers, *Malpractice Concerns Cloud E-Mail, On-Line Advice*, 12 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 59 (1996).

2. See, e.g., Michael P. Malakoff & David W. Snyder, *Lawyer Advertising on the Internet: Ethical Quagmires and Global Opportunities*, in CONSUMER FINANCIAL SERVICES LITIGATION 1998, at 131 (PLI Corporate Law and Practice Course Handbook Series No. 1047, 1998); see also Thomas H. Watkins & Lisa O. Laky, *Internet Issues for Lawyers*, in 18TH ANNUAL INSTITUTE ON COMPUTER LAW 1998, at 827 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 507, 1998).

3. The most comprehensive list of ethics opinions relating to legal ethics and the Internet is found at <<http://www.legalethics.com>>.

4. The American Bar Association Commission on Advertising has prepared a white paper that covers well the entire range of ethical issues relating to lawyers using the Internet to attract clients. See ABA Commission on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies* (last modified July 1998) <<http://www.abanet.org/legalserv/advertising.html>>.

5. But see Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-2 (1998); Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Inquiry Response 1997-T30 (1997). Opinion 98-2 is the formal legal ethics opinion written to respond to the 1997 inquiry. See Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-2 (1988). Both discuss the website of a professional legal organization. See *id.*; Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Inquiry Response 1997-T30 (1997). The author discusses both these Massachusetts documents at appropriate points in the Article's text.

In October 1997, the Board of Directors of the AALA asked this author to chair a Technology Committee⁶ to develop a website for AALA.⁷ As the Board charged the Committee with this task, the Board also instructed it to be very careful to comply with applicable rules of professional ethics. Moreover, the Board reminded the Committee of three important points:

- the AALA website would likely be the first Internet presence for many members of the AALA;
- the members of the AALA come from all fifty states and Puerto Rico, Canada, Mexico, and several other nations on all other continents;⁸
- the members should be proud of the website and absolutely confident that they, as individual lawyers, are not at risk for ethical discipline for anything appearing on the AALA website.

This Article is the chair's revised version of the Technology Committee's Report to the Board of Directors of the AALA discussing professional ethics and the AALA website. This Article does not represent the views of the Board of Directors of the AALA. This Article does not dictate the policies or procedures adopted by the AALA Board of Directors with respect to the AALA website. This Article does attempt to provide a thorough discussion of the ethical issues and options that the AALA Board of Directors—and by implication the Boards of Directors of any professional legal organization—had to face as the organization created and continually recreates a website on the Internet.

II. COMMERCIAL VERSUS NON-COMMERCIAL SPEECH

The American Agricultural Law Association came into existence in 1980 and since that time has produced a large quantity of published material—newsletters,

6. Other members of the AALA Technology Committee are William Babione, Leon Geyer, Sally Kelley, Linda Grim McCormick, Jesse Richardson, Susan Schneider, Gordon Tanner. The webmaster for the AALA website is Geoffrey B. Jennings, a student at the University of Oklahoma College of Law, Class of 2000. While the author acknowledges their valuable efforts and insights to the Committee and this Article, the author alone is accountable for the shape and wording of this Article.

7. See *The American Agricultural Law Association* (visited Apr. 18, 1999) <<http://www.aglaw-assn.org>>.

8. The author admits to a parochial effort because this Article only covers the ethical issues relating to the professional ethics of lawyers in the fifty states of the United States. The author's intelligence and patience were fully exhausted before he could delve into the ethics codes for lawyers in Puerto Rico and other nations.

conference books, law review symposia, monthly updates on agricultural law, articles in the popular press, membership directories, letterhead stationery, and television and radio segments. As the author researched the ethics of the AALA's website, it became clear that if any of those published material constituted commercial speech, the AALA had to comply with the applicable commercial speech regulations found in the professional ethics codes in order to protect its members, who participated in creating these materials, from possible ethics violations. The author posits that neither the AALA—nor any other professional legal organization—gave any thought to the ethics implications of producing the published material listed in this paragraph.

Lest the reader thinks that the author has created an imaginary concern, the reader needs to consider, as examples, two ethical rules that might have applied, if these published materials were classified as commercial speech.

In Iowa, if an attorney in any public communication states that he is a member or officer of any professional association or society, the attorney must accompany that membership statement with a disclaimer informing the public that the lawyer is not by virtue of such membership or position "necessarily any more expert or competent than any other lawyer."⁹ The AALA has many members from Iowa. Indeed, the AALA has had three presidents from Iowa and many other board and committee members from Iowa. These Iowa lawyers were constantly publicized in AALA materials while they held these leadership positions. Not once has the AALA ever printed in its materials the disclaimer that Iowa requires.

In Texas, a lawyer who advertises in the public media shall not state that she is a member of an organization "the name of which implies that its members possess special competence" unless the organization is accredited by the Texas Board of Legal Specialization.¹⁰ The AALA does not claim that its members possess special competence in agricultural law. But to the general public the name American Agricultural Law Association assuredly implies that its members possess a special competence in agricultural law greater than that of a lawyer, for example, who belongs to the American Immigration Lawyers Association (AILA). Indeed, the AALA and its members assuredly think of themselves as having a special interest, if not a special competence, in agricultural law or the associational purpose of the AALA would be meaningless. The AALA has never sought accreditation from the Texas Board of Legal Specialization even though the AALA

9. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C) (West 1998). Moreover, Iowa vigorously enforces its ethics rules relating to commercial speech (i.e., advertising). *See, e.g.,* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Kirlin, 570 N.W.2d 643 (Iowa 1997). *See generally* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wherry, 569 N.W.2d 822 (Iowa 1997); Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mahoney, 402 N.W.2d 434 (Iowa 1987).

10. TEXAS MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.04(b)(2) (West 1998).

has publicized its Texas members who have served on AALA committees, conference panels, and in leadership positions.¹¹

Commercial speech is speech seeking a commercial relationship. Commercial legal speech is speech seeking a legal relationship for profit.¹² Hence, any AALA publication which by its content or its context seeks to develop a legal relationship for profit for its members is commercial speech that states constitutionally may regulate and, for lawyers, have regulated in the codes of professional ethics for lawyers.¹³ Even if a website or publication is primarily informational, if the content or context indicates the solicitation for a commercial relationship, the website or publication is commercial speech subject to state regulation.¹⁴

By contrast, non-commercial speech is the expression of ideas, opinions, or information that does not have the content or context of seeking a commercial relationship. Non-commercial speech is entitled to full First Amendment protection, which means that governments may take action to regulate or punish non-commercial speech in only the most dire and limited circumstances.¹⁵ The expression of opinions by a lawyer is non-commercial speech even though the lawyer hoped that by publishing the opinions some readers would contact the

11. The author believes that if the Texas Board of Legal Specialization tried to make the AALA seek accreditation, the AALA may have constitutional protection under the freedom of association clause of the First Amendment. The author, however, has done no research on this constitutional issue because it is outside the scope of this Article. The freedom of association issue is outside the scope of this Article because the Board of Directors of the AALA charged the Technology Committee with complying with the ethics rules of the various states. The Board of Directors did not authorize the Technology Committee to make the AALA into a constitutional test case. The AALA wants to comply with ethics rules; it does not want to spend its limited resources defending itself or its members against legal or disciplinary actions. Compliance, not defiance, is the key attitude and approach that the Technology Committee adopted.

12. For general discussions of the commercial speech doctrine, see, e.g., Will Hornsby, *Professional Ethics and Lawyer Advertising on the Internet* (Mar. 24, 1997) <<http://www.collegehill.com/ilp-news/hornsby2.html>>; Joan C. Rogers, *How Do Advertising Rules Apply to Lawyers on the 'Net'?*, 12 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 37, 43-45 (1996); Lori Christman, et al., *Ethical Consideration of Legal Netvertising* (Aug. 1995) <<http://www.computerbar.org/netethics/brandy.htm>>.

13. For a general discussion of the cases concerning commercial speech regulation of lawyer advertising, see Mitchel L. Winick, et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1487, 1497-1527 (1996); Brian G. Gilpin, Note, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMPUTER & INFO. L. 697, 699-712 (1995).

14. See *Zauderer v. Officer of Disciplinary Counsel*, 471 U.S. 626, 639 (1985) (discussing that the attorney provided information to women about the Dalkon Shield device and pelvic infections but the content and context of the information clearly indicated that the attorney desired to establish a commercial relationship with the women who believed themselves injured by using the Dalkon Shield).

15. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

lawyer to pursue legal representation relating to the opinions expressed in the publication.¹⁶

When the commercial versus non-commercial speech analysis is applied to the publications of the AALA since 1981, it is clear that newsletters, conference books, law review symposia, monthly updates on agricultural law, articles in the popular press, letterhead stationery, and television and radio segments are non-commercial speech. In these publications, the AALA never by content or context sought to create a commercial relationship for its members. Consequently, the AALA was fully protected under the First Amendment when it published this material. Moreover, the AALA members who participated in these non-commercial speech publications, even though they may have gained substantial publicity which enhanced their economic position, were fully protected from state regulation of lawyer commercial advertising.

The careful reader has already noticed, however, that the membership directory is not on the list of non-commercial-speech publications of the AALA since 1981. Membership directories by their content and context do seek commercial relationships for AALA members, either by referral from other lawyers or from contact by persons who desire legal advice or legal representation.

Since 1981, AALA membership directories in the printed format have been subject to state regulation of lawyer advertising.¹⁷

With the realization that membership directories are likely the only commercial-speech publication that AALA presently prepares, AALA faces a decision about its website. The AALA could limit its website to the non-commercial-speech publications that AALA has regularly prepared in print format since 1981. By so doing, the AALA would free itself of having to worry about present compliance and future compliance with state regulations of commercial speech of lawyer publications because its website would not contain any commercial speech. Of course, the website would also not have the AALA membership directory, either for members or for the public. Moreover, the AALA would forfeit the benefits of using computer technology to more widely promote its

16. *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342-1346 (E.D. Tex. 1995) (discussing an attorney who paid for a political advertisement about the issue of whether judges should be selected by election or another method; attorney testified that he wrote the advertisement to express his political opinion but also with the intent to acquire clients to challenge the judicial selection method used in Texas; the court ruled that the Texas Rules of Professional Conduct did not apply to this paid political advertisement because it only applied to commercial speech; the court also ruled that the attorney, despite his intent, did not by content and context solicit a legal relationship for profit).

17. For three recent Iowa opinions on legal directories, see Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 95-32 (1996) (Iowa Legal Directory: Listing); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 95-31 (1996) (Law List: Union Privileges Legal Services); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 95-21 (1996) (Advertising: Bar, Electronic). Membership directories become a primary topic in the remainder of this Article.

members and would likely reduce its attractiveness to potential members. Yet, the easiest way to avoid ethical issues for the AALA website is to eliminate commercial speech content—i.e., the membership directory.

III. THE AALA WEBSITE AS COMMERCIAL SPEECH

If the AALA website contains commercial speech on behalf of its members, it obviously follows that the AALA website must comply with the regulations of commercial speech found in the legal ethics codes of the various states.¹⁸ States either follow the Model Rules of Professional Conduct, *Article 7. Information about Legal Services*¹⁹ or the Model Code of Professional Responsibility *Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available*.²⁰ The common fundamental principle of these regulations is that the speech must not be false or misleading, including omission of facts necessary to make the statement not materially misleading.²¹ The AALA website raises three concerns about false or misleading communications.

A. Law Firm

Under MRPC Rule 7.5(d), lawyers can state or imply that they practice with others only when that is the fact.

The vast majority of AALA members are lawyers. These lawyer members know with whom they are associated for practice and they know that their membership in AALA does not mean that they practice with the other members of AALA. They know that the AALA is not a law firm.

The nature of the Internet, however, is to make the AALA webpage available instantly to anyone, anywhere in the world who has access to the Internet—at

18. Numerous bar associations have opined that websites are commercial speech subject to compliance with all legal ethics regulations about lawyers' commercial communications. See, e.g., Alabama State Bar Office of Gen. Counsel, Op. RO-96-07 (1996) (a Model Rules of Professional Conduct [MRPC] state); Vermont Bar Ass'n Comm. on Prof'l Responsibility, Op. 97-5 (1997) (a Model Code of Professional Responsibility [MCPR] state).

Some lawyers are even practicing law through a virtual office on the Internet. These lawyers practicing law through an Internet office will have professional ethical obligations that go far beyond concerns about professional regulations of commercial speech. See New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998) (discussing an attorney planning to create a law office related to trademark law); South Carolina Bar Ethics Advisory Comm., Op. 94-27 (1994) (discussing a lawyer with a physical disability who inquired about the ethics of setting up an electronic law office on the Internet).

19. MODEL RULES OF PROFESSIONAL CONDUCT RULES 7.1-.5 (1997).

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 to -105 (1980).

21. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A).

home, at school, at work, at a public library or office. Hence, many readers of the AALA website will be unsophisticated about associational relationships for the practice of law. These unsophisticated readers of the website might mistakenly think that every member of the AALA is affiliated with every other member of the AALA for the practice of law. In this era of mega-law firms that are larger than the AALA, a public misconception that the AALA is a law firm might be an understandable mistake. The public needs to know clearly that the AALA is not a law firm.

To insure that no misunderstanding occurs, the AALA should post a statement on the webpage where the public accesses the membership directory explaining what the AALA is. The following disclaimer is suggested:

The AALA is a professional legal association. The AALA is not a law firm. As a professional legal association, the AALA has individual lawyers or individual law firms as members. The fact that a lawyer or a law firm is a member of the AALA does not mean or imply that the lawyer or law firm is affiliated with any other AALA member for the practice of law.

B. Trade Names

By using a disclaimer to clarify that the AALA is not a law firm, the AALA also protects its members from another potential ethical violation. Iowa²² and Texas²³ prohibit their lawyers from practicing under a trade name. Without the suggested disclaimer that the AALA is not a law firm, lawyers admitted in Iowa and Texas—or any other state with a similar “no trade name” rule—might be subject to discipline for practicing under a trade name. In other words, the disclaimer that the AALA is not a law firm also makes it clear that the AALA and its members are distinct entities in terms of their names.

C. Unauthorized Practice of Law—Jurisdiction

Internet readers of the AALA membership directory might conclude that every member in the directory can assist them with their legal problems—regardless of where the legal problem occurred. Internet readers might conclude that if a lawyer is on the instantly, easily accessible Internet, the lawyer must be able to practice law anywhere and everywhere. To prevent this misunderstanding

22. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (West 1998). For enforcement of the “no trade name” rule, see Committee on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mahoney, 402 N.W.2d 434 (Iowa 1987).

23. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01(a) (West 1998).

and to make the directory not misleading on a material fact, the AALA should take two actions.

First, the membership directory information should specifically spell out where each member is admitted to the practice of law. Each member must complete a form which provides the information to: "Admitted to practice in the following jurisdictions: _____."²⁴

Second, the AALA should post a disclaimer on the webpage where the public accesses the membership directory that makes clear that individual members and member law firms are not seeking legal business in any jurisdiction other than the jurisdiction where the lawyer is licensed to practice law. The following disclaimer is suggested:

Members of AALA are admitted to practice law only in the jurisdiction(s) listed on their directory page. By appearing in the AALA directory, AALA members do not solicit, target, or advertise for legal employment in any jurisdiction other than where the member is admitted to practice law.²⁵

The language of the disclaimer is meant to protect AALA members from being subject to disciplinary jurisdiction by states other than the states where the member is admitted to the practice of law.²⁶ The disclaimer should protect members from

24. Several ethics opinions from bar associations have stressed that a lawyer or law firm must explain where the lawyer or its lawyers are licensed to practice law. If the jurisdiction of admission is not set forth on the webpage, the opinions state that the lawyer would be omitting a fact that is necessary to make the communication not misleading. *See, e.g.,* North Carolina State Bar Ethics Comm., Op. RPC 241 (1997); South Carolina Bar Ethics Advisory Comm., Op. 94-27 (1995).

25. The author patterned this disclaimer on the language in Rule 3-1.3 of the Florida Proposed Rules of Professional Conduct. *See* FLORIDA RULES OF PROFESSIONAL CONDUCT Proposed Rule 3-1.3 (proposed Feb. 4, 1998). Proposed Rule 3-1.3 expands the power of the Supreme Court of Florida over attorneys who solicit, target, or advertise to Floridians. *See id.*

The author believes that this disclaimer also protects the AALA and its members, including its Iowa members, from being in violation of the Iowa ethics rules. *See* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-14 (1996). This opinion is discussed later in this Article. *See supra* note 57 and accompanying text.

26. The Utah State Bar opined that a website communication is no different than an advertisement in another media, such as newspapers or television, that cross state lines. *See* Utah State Bar Ethics Advisory Op. Comm., Op. 97-10 (1997). The Utah opinion reminds lawyers who are contacted by persons outside their geographic practice jurisdiction of the prohibition against the unauthorized practice of law. *See id.*

For an excellent discussion of issues relating to disciplinary jurisdiction, unauthorized practice, and general jurisdiction based on lawyers' webpages, *see* Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Inquiry 98-85 (1998).

being subject to claims of unauthorized practice of law.²⁷ The disclaimer also is meant to protect members from being subject to the general jurisdiction of other states which jurisdiction is based solely on the claim that the AALA membership directory can be read in the state.²⁸

IV. THE ETHICS REGULATIONS OF COMMERCIAL SPEECH

If the AALA website avoids the shoals of false and misleading communications, the AALA website must still navigate the ethics regulations that apply to truthful communications by lawyers about their services.

A. Advertising Versus Solicitation

The commercial speech doctrine distinguishes between advertising and solicitation. Solicitation involves either in-person contact or directly targeted contact with potential clients. The Supreme Court has allowed states to regulate solicitation more stringently because of the pecuniary self-interest of the lawyer and the vulnerable position of the potential client.²⁹

In their professional codes, states do regulate solicitation more heavily than advertising.³⁰ For example, lawyers who initiate in-person visits, personal telephone calls, or computer chat room contact with potential clients are soliciting clients in violation of the ethics codes of various states.³¹ Furthermore, lawyers

27. The Philadelphia Bar Association discussed the unauthorized practice of law issue in an ethics opinion. See Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 98-6 (1998). The Philadelphia Bar recommended a notice like the disclaimer the author has written in the text. See *id.* However, the Philadelphia Bar ominously confesses, "[w]e offer no assurance this would be recognized by all states." *Id.*

28. Whether presence on the Internet creates jurisdiction in the courts of the various states or nations of the world is a much larger topic than the unauthorized practice of law. For a general discussion of these broader jurisdictional issues, see Joseph P. Zammit & Lynette A. Herscha, *Litigation Issues in a Cyber World*, in 18TH ANNUAL INSTITUTE ON COMPUTER LAW 1998, 107, 110-22 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 507, 1998).

29. Compare *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 644 (1995), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978), with *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 489-90 (1988), and *In re Primus*, 436 U.S. 412, 445 (1978).

30. The Model Rules of Professional Conduct reflect this distinction between advertising and solicitation in the contrast between MRPC 7.2 Advertising and MRPC 7.3 *Direct Contact with Prospective Clients*. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.2-.3 (1997).

31. See, e.g., UTAH RULES OF PROFESSIONAL CONDUCT 7.3 (1998); Utah State Bar Ethics Advisory Op. Comm., Op. 97-10 (1997); VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (Michie 1995); Virginia State Bar Standing Comm. on Lawyer Adver. & Solicitation, Op. A-0110 (1998). The Utah and Virginia ethics opinions specifically state that chat rooms are in-person contacts that are subject to the prohibitions of Utah Rules of Professional Conduct Rule 7.3 and Virginia

who directly target potential clients within short periods of times after traumatic losses are soliciting clients in violation of the ethics codes of several states.³²

The AALA can avoid the more stringent regulation of lawyer solicitation by making its membership directory a passive source of information that the public locates by seeking out the AALA website.³³ The AALA can clearly remain on the advertising side of professional regulations by limiting its membership directory information to the lawyer's name, street address, mailing address, city, state, zip code, country, jurisdiction(s) where admitted to practice law, telephone number, facsimile number, law school from which degree obtained, name of law firm, and other similar factual information.

E-mail requires a slightly more extended discussion. If a lawyer uses e-mail to directly contact potential clients, the lawyer may have violated professional ethics.³⁴ If a lawyer uses e-mail to contact the public generally, the lawyer is engaged in advertising that ordinarily is permitted³⁵ unless the e-mail itself is harassing to recipients.³⁶ If the lawyer simply lists an e-mail address, even an interactive e-mail address, the e-mail information should be no different than a telephone number or a facsimile number. Clients must dial the telephone or send a facsimile and, similarly, clients must activate the e-mail address to send a message to the lawyer.³⁷ Lawyer-members will not be able to use the website membership directory to send unsolicited e-mail messages to potential clients. Therefore, AALA may include interactive e-mail addresses in the membership directory without opening its members to ethical discipline.

E-mail raises other ethical concerns. The ease and speed with which an Internet reader can use the interactive e-mail feature of the AALA membership directory to contact an AALA member might mislead the Internet reader about the relationship being established. Moreover, the legal profession has vigorously

Disciplinary Rule 2-103, respectively. See Utah State Bar Ethics Advisory Op. Comm., Op. 97-10 (1997); Virginia State Bar Standing Comm. on Lawyer Adver. & Solicitation, Op. A-0110 (1998).

32. See, e.g., FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.4 (West 1998).

33. See, e.g., Illinois State Bar Ass'n Comm. on Prof'l Conduct, Op. 96-10 (1997).

34. In Florida, unsolicited direct mail communications, including e-mail contact, are never exempt from the filing requirements. See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5(b). Moreover, if the unsolicited e-mail came within thirty days of an accident or disaster to a specific recipient, the lawyer would be in violation of Florida Rules of Professional Conduct Rule 4-7.4, which prohibits direct contact with prospective clients. See *id.* Rule 4-7.4.

35. See, e.g., Michigan State Bar Comm. on Prof'l & Judicial Ethics, Op. RI-276 (1996).

36. See *In re Canter*, Nos. 95-831-O-H, 96-868-O-H, 96-908-O-H, 96-910-O-H (Bd. of Prof'l Responsibility Tenn. Feb. 6, 1997) <<http://www.legalethics.com/states/disbar.htm>> (disbarring an attorney who spammed the Internet with a lawyer advertisement).

37. See Utah State Bar Ethics Advisory Op. Comm., Op. 97-10 (1997). Florida Rules of Professional Conduct Rule 4-7.2(n)(1) specifically lists e-mail addresses as information in an advertisement that is presumed not to violate the basic rule against false and misleading advertising. See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(n)(1).

debated whether using e-mail violates MRPC Rule 1.6 confidentiality and/or undermines the attorney-client evidentiary privilege.³⁸ Taking into account these e-mail ethical concerns, the AALA should post on its membership directory webpage the following notice:

Although AALA members welcome your telephone calls, letters, e-mail messages, please keep in mind that merely contacting an AALA member does not establish an attorney-client relationship between you and the AALA member. Consequently, you should not convey any confidential information to an AALA member until you and the AALA member have established a formal attorney-client relationship.³⁹

B. Filing Requirements for Advertising

Even though the AALA website membership directory is advertising, not solicitation, the AALA still must comply with the ethical rules applicable to advertising. One such rule concerns filing the advertisement with disciplinary authorities.

Texas and Florida require attorneys who advertise, which would include the AALA membership directory, to file a copy of the advertisement with the appropriate bar authority before or concurrent with the dissemination of the advertisement. In addition, the filing must be accompanied by a filing fee.⁴⁰ Fortunately for the AALA, the Texas and Florida rules contain an exemption from the filing and fee requirements for advertisements that are solely informational (tombstone) advertisements.⁴¹ By restricting the information in the membership

38. See generally Stephen Masciocchi, *Internet E-Mail: Attorney-Client Privilege, Confidentiality, and Malpractice Risks*, 27 COLO. LAW. 61 (Feb. 1998); Lucy Schlauch Leonard, *The High-Tech Legal Practice: Attorney-Client Communications and the Internet*, 69 U. COLO. L. REV. 851 (1998); David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459 (1998);

39. The author adapted this notice to the AALA directory from the notice Holland and Knight posted on its firm's homepage. See *Law Offices, Holland & Knight* (visited Apr. 18, 1999) <<http://www.hklaw.com>>.

40. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.07(b)(4) (West 1998); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5(d) (West 1998).

41. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.07(d); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5(c).

Both the Texas and Florida bar associations presently have before them proposals redoing their ethics rules so as to better cover the Internet. In these proposals, similar exemptions from the filing and fee requirements exist for membership directories that contain basic, factual information. See TEXAS RULES OF PROFESSIONAL CONDUCT Proposed Rule 7.07(e) (proposed May 1998) <<http://www.legalethics.com/states/txprop.html>>; FLORIDA RULES OF PROFESSIONAL CONDUCT Proposed Rule 4-7.8(a), (g) (proposed Feb. 4, 1998).

directory to basic, factual information, the AALA can bring its membership directory within the Texas and Florida exemptions and can avoid having to file or pay a fee.

Alabama RPC 7.2(b) requires that a true copy of any advertisement be filed with the Alabama State Bar within three days of its dissemination. Tennessee CPR DR 2-101(F) requires that a copy be filed with the Disciplinary Board of the Tennessee Supreme Court within three days. Unfortunately for AALA, Alabama and Tennessee do not have any exemptions to the filing requirement. The filing requirement applies to all advertisements and advertisements include websites,⁴² and legal directories⁴³ regardless of the content of the information on the website or in the directory. Fortunately for the AALA, unlike Texas and Florida, Alabama and Tennessee do not have a filing fee. AALA should comply by filing the Alabama and Tennessee sections of its membership directory within three days of each new directory on the Internet. Due to the very short time frame within which to file—three days—the AALA webmaster should probably be charged with the task of handling the filing as soon as the membership directory is posted to the website in the annual cycle of membership dues.

Neither the Model Rules of Professional Conduct nor the Model Code of Professional Responsibility have a filing requirement. Consequently, the vast majority of states, in contrast to Texas, Florida, Alabama, and Tennessee do not have a filing requirement. However, the AALA should comply with all filing

42. See Alabama State Bar Office of Gen. Counsel, Op. RO-96-07 (1996); Tennessee Bd. of Prof'l Responsibility, Unpublished Op. 95-A-570 (1995).

43. See ALABAMA RULES OF PROFESSIONAL RESPONSIBILITY Rule 7.2(a) (1998). *But cf.* New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 721 (1997) (holding that legal directories are within an exclusion from filing set forth in New York DR 2-101(F); the New York County Lawyers' Association opines that Internet directories should be treated as similarly excluded from the filing requirement applicable to advertisements).

Alabama Rules of Professional Conduct Rule 7.2(a) also lists outdoor displays as advertising subject to the filing requirement. See ALABAMA RULES OF PROFESSIONAL RESPONSIBILITY Rule 7.2(a). Consequently, lawyers who advertise on billboards apparently must take a photograph and send it to the Alabama Bar Association within three days. Read literally, lawyers who advertise on law firm signs on the streets in front of their offices must also take a photograph of the sign and file the photograph within three days.

In an informational post on the Florida Bar website, Florida attorneys are advised that advertisements appearing on billboards, ink pens, key chains, mugs, etc., must be filed for review unless these advertisements are exempt because the advertisements carry only tombstone information. See *Attorney Advertising Filing Requirements* (visited Apr. 18, 1999) <<http://www.flabar.org/newflabar/lawpractice/AdReg/adv2eth.html>>. Moreover, Florida, in its proposed rules, clearly states that Florida attorneys must file photographs of outdoor advertising if any advertisement shows more information than basic, factual, directory information on the outdoor sign. See FLORIDA RULES OF PROFESSIONAL CONDUCT Proposed Rule 4-7.7(b) (proposed Feb. 4, 1998) <<http://www.flabar.org/flabar/information/news/whatsnew/adrules.html>>.

requirements for any state that does not have an exemption for directory information advertisements.

C. Record Keeping Requirements for Advertisements

Although Texas and Florida exempt tombstone advertisements from the filing requirement, both states emphasize that the exemption from filing does not exempt that advertisement from compliance with all other ethics rules regulating advertising.⁴⁴ Thus, Texas and Florida require lawyers to keep copies of all advertisements.⁴⁵ In addition, the ABA MRPC Rule 7.2(b) prescribes that lawyers shall keep a record of all advertisements for a period of two years after dissemination. Following the ABA model, states uniformly require lawyers to keep copies of advertisements for varying periods of time.⁴⁶ For example, Alabama RPC 7.2(b) requires that lawyers keep copies of the advertisement for six years after dissemination.

In light of this record-keeping requirement, the AALA should keep a copy of the membership directory each year as the membership directory is redone to reflect the payment of annual dues. From the author's research, the Alabama requirement of a period of six years for retaining copies of advertisements is the longest retention period of any state. To be safe, the AALA should keep its copy of the entire annual membership directory for six years from when the directory appears on the Internet. If enforcement authorities in a particular state query an AALA member about advertisements, the AALA can provide that enforcement authority with a directory copy in order to assist and to protect the member regarding the query.

D. Disclosure Statements or Disclaimers for Advertisements

Oklahoma and Tennessee, as examples, require that every communication from a lawyer to a prospective client carry the disclosure "THIS IS AN ADVERTISEMENT" where the recipients can easily see and read the notice.⁴⁷

44. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.07 cmt. 7 (West 1998); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5 (West 1998).

45. See FLORIDA RULES OF PROFESSIONAL RESPONSIBILITY Rule 4-7.2(p) (three years); TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.04(f) (four years).

46. See, e.g., NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT Proposed Rule 239 (proposed Oct. 18, 1996) (stating that advertising on the Internet must comply with all rules of professional conduct, including the record keeping requirement).

47. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 7.2(f) (West 1998); TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(C)(2)(a) (1998).

This general advertisement notice should not be confused with more extensive disclosure statements or disclaimers that must accompany solicitations for employment. Compare OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 7.2(e) (requiring a special disclosure statement for direct mail

The author could make an argument based on the precise language of the Oklahoma and Tennessee rules that the passive, basic information in the AALA membership directory is not an “advertisement” for purposes of this disclosure requirement. Indeed, Massachusetts and Utah have opined that a passive, informational directory is not an “advertisement” for purposes of the similar disclosure requirement in their rules.⁴⁸

In light of the AALA attitude of compliance, however, the AALA should not risk that Oklahoma and Tennessee (and other states) will adopt the Massachusetts and Utah interpretation of the word “advertisement.” Compliance with the advertisement notice is simple and not burdensome. Consequently, the AALA should post on the webpage that gives the public access to its membership directory the following notice:

**“THE AALA MEMBERSHIP DIRECTORY IS
AN ADVERTISEMENT.”**

If the advertisement disclosure were the only state requirement, AALA would not face many tough decisions. Other states, however, have other disclosure and disclaimer requirements.

Alabama goes further than a disclosure statement by requiring every communication concerning a lawyer’s service to carrying the following disclaimer: “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.”⁴⁹

While this author wonders whether Alabama means to classify a tombstone directory advertisement as an “advertisement” subject to this disclaimer, the AALA in an abundance of caution should place the Alabama disclaimer on the webpage where the public gains access to its membership directory.

Florida requires all lawyer advertisements, including Internet homepages,⁵⁰ to carry the following disclaimer: “The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.”⁵¹

solicitations sent to targeted recipients), with TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(C)(2)(g) (requiring communications to a specific prospective client concerning a specific matter must state in the first sentence of the communication: “If you have already hired or retained a lawyer for this matter, please disregard this letter.”). The AALA membership directory—limited to passive, tombstone information—is an advertisement, and not a solicitation.

48. See Massachusetts Bar Ass’n Comm. on Prof’l Ethics, Published Op. 98-2 (1998); see also Utah State Bar Ethics Advisory Op. Comm., Op. 97-10 (1997).

49. ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 7.2(e) (1998).

50. FLABAR ONLINE, *Internet Guideline* (visited Apr. 18, 1999) <<http://www.flabar.org/newflabar/lawpractice/Adreg/adguide.html>>.

51. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(d) (West 1999).

The last sentence of this disclaimer ties into an ethics rule unique to Florida, Rule 4-7.3 *Legal Service Information*, that specifies requirements for the information that clients may request free by contacting the advertising lawyer.⁵² Fortunately for the AALA and its Florida members, the Florida rules have an exemption for this hiring statement for electronic advertisements that contain only basic, factual information.⁵³ The AALA membership directory should only contain basic, factual information in order to gain this Florida exemption.

Iowa has two disclaimers that apply to tombstone advertising, including directory advertising, by Iowa lawyers.⁵⁴ First, Iowa CPR DR 2-101(A) sets forth the following disclaimer for any lawyer advertising by an Iowa attorney:

"The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by the rule of the Supreme Court of Iowa."

Second, by being listed in the AALA membership directory, Iowa attorneys may be indicating implicitly a field of practice—agricultural law. Due to such implicit statement, Iowa CPR DR 2-101(C) requires the following disclaimer:

"Memberships and offices in legal fraternities and legal societies, technical and professional licenses, and memberships in scientific, technical and professional associations and societies of law or field of practice do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such a lawyer is necessarily any more expert or competent than any other lawyer."

"All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

52. See *id.* Rule 4-7.3. In the Florida Proposed Rules of Professional Conduct Rule 4-7.9, replacing Florida Rules of Professional Conduct Rule 4-7.3 that the Florida Bar is presently considering for adoption, Florida lawyers who advertise not only must have free information available upon request, but for certain matters they must send to the prospective client for the prospective client's signature a Statement of Client's Rights. See FLORIDA RULES OF PROFESSIONAL CONDUCT Proposed Rule 4-7.9(b)(3) (proposed Feb. 4, 1998).

53. See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(d) (the last sentence has the exemption).

54. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 95-21 (1996). See also Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Beckman, 557 N.W.2d 94 (Iowa 1996) (providing that an attorney was disciplined, among other reasons, for not having the appropriate advertising disclosures on the advertisement).

Iowa ethics opinions specify that these disclaimers must be on the webpage where the Iowa lawyer's advertisement is set forth.⁵⁵ Hence, the AALA should post the two Iowa disclaimers from DR 2-102(A) and DR 2-102(C) on every Iowa member's individual AALA directory listing.⁵⁶ Moreover, by putting these Iowa disclaimers on the AALA directory webpage for each Iowa attorney, AALA emphasizes that only Iowa members are subject to the Iowa advertising rules and to the jurisdiction of the Supreme Court of Iowa. By visually separating Iowa members' directory listings from non-Iowa members' listings, AALA should protect its non-Iowa members from ethical complaints under Iowa ethics rules.⁵⁷

Iowa DR 2-101(B)(6) reads as follows: "Biographical and Informational Brochures. Brochures or pamphlets containing biographical and informational data, as permitted by these rules, shall only be disseminated directly to clients, members of the Bar, or in response to direct request, and shall include the disclosures required by DR 2-101(A),(C), (D), and (F), and DR 2-105(A)(3)."⁵⁸ Iowa DR 2-102(B)(6) raises several difficult ethical issues for the AALA membership directory.

The AALA membership directory on the Internet will be seen by the general public—it is not being disseminated only to clients or members of the Bar.⁵⁹ On the other hand, the AALA could argue that its membership directory is being disseminated only "in response to a direct request" because the general public must seek out the AALA membership directory.⁶⁰ In other words, the AALA should only post its membership directory on the Internet; AALA should never send its

55. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-2 (1996); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-1 (1996).

56. The format recommended in the text for the AALA membership directory is the format that the West Legal Directory® for Iowa follows. Every listing of an Iowa lawyer in the West Legal Directory® has these two disclaimers. Further discussion of the West Legal Directory for Iowa occurs where this Article discusses fields of practice.

57. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-14 (1996) (stating that the implication of this Iowa ethics opinion is that a law firm that has offices in another state and in Iowa must have two separate and unconnected webpages—one for the other state and one for Iowa—if the non-Iowa attorneys of the law firm desire to protect themselves from being subject to Iowa ethics rules). See also discussion *infra* Part III.C.

58. IOWA CODE OF PROFESSIONAL CONDUCT DR 2-101(B)(6) (West 1998).

59. See *supra* text accompanying notes 85-97 (discussing members-only membership directory).

60. In the proposed changes to Florida ethics rules concerning the Internet, the Florida proposal appears to adopt the position that when the general public reads a lawyer's website, it is the functional equivalent to the person seeking out and requesting information from the lawyer. Consequently, so long as the lawyer is truthful on the website, the lawyer's website would not be regulated as advertising. See FLORIDA RULES OF PROFESSIONAL CONDUCT Proposed Rules 4-7.6(b)(3), 4-7.8(g) (proposed Feb. 4, 1998). See also Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-2 (1998) (approving a passive Internet Bar Directory reasoning that persons seek out the directory website, rather than the directory thrusting itself upon persons.)

membership directory to anyone. Yet, when a publisher of a directory informed the Iowa Committee on Professional Ethics and Conduct that the publisher intended to comply with Iowa DR 2-101(B)(6) by having the general public electronically request the directory information, the Committee responded with a terse, "No comment."⁶¹ Hence, the AALA faces uncertainty as to whether its membership directory, for its Iowa members, would violate Iowa DR 2-102(B)(6).

The most cautious approach for AALA would be to exclude its Iowa members from the membership directory that is accessible by the general public.⁶² The author hopes that the AALA would not do so. Rather, the author hopes that AALA will seek an ethics opinion from the Iowa Committee on Professional Ethics and Conduct to request the Committee to opine that when the general public accesses the AALA membership directory, the person is making a direct request for biographical information as ethically allowed by DR 2-101(B)(6).

E. Fields of Practice

As described thus far, the AALA membership directory will contain only basic, factual information that allows the reader to contact the lawyer. However, in the printed directories that AALA has prepared in years past, AALA has allowed its members to self-identify fields of practice within agricultural law—e.g., agricultural finance, cooperatives, agricultural environmental law, estate planning, agricultural taxation, water law. Readers of the membership directory find this information useful because readers want to locate a lawyer who can handle particular problems. Hence, if ethically permissible, the AALA should include fields of practice information on its Internet directory.

ABA MRPC 7.4 allows lawyers to communicate that the lawyer practices in particular fields of law so long as the lawyer does not state or imply that the lawyer is recognized or certified as a specialist. Most states, following ABA MRPC 7.4, similarly allow lawyers to state that they practice in particular fields of law.⁶³ Hence, in the great majority of states, the AALA may allow its members to publish the self-identified fields of law within agricultural law in which they practice. But the AALA must be especially careful with fields-of-practice information.

The AALA membership directory should limit itself to self-identified fields of law. The AALA should not state that its members "limit their practice to" or

61. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 95-21 (1996).

62. The uncertainty about the ethics of directory information about Iowa lawyers explains why the Internet version of the Martindale-Hubbell Law Directory® does not contain any Iowa listing. See *ABA NetworkSM Lawyer Locator Frequently Asked Questions (FAQ)* (visited Apr. 18, 1999) <<http://www.martindale.com/aba/overview.html>>. See also *The President's Letter*, IOWA LAW., Sept. 1998, at 5, 6 (The President of the Iowa State Bar specifically mentions the absence of Iowa lawyers from the on-line Martindale-Hubbell Law Directory® and explains the consequences of that exclusion for Iowa lawyers).

63. See, e.g., OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 7.4 (West 1998).

“concentrate their practice in” agricultural law or any agricultural law subfield because the statement is likely to be false or misleading for many members. Moreover, if the AALA made such statements about a limited or concentrated law practice, the AALA would likely violate state ethics rules that allow such statements only if the lawyer devotes a specified percentage of time to that field of law or provides supporting data.⁶⁴ In addition, Iowa DR 2-105(A)(2) allows Iowa lawyers to list field of law but for no more than three fields. Acting cautiously to comply with ethics requirements, the AALA should also only allow its members, regardless of where admitted, to list a maximum of three fields of law within agricultural law as practice areas.

The AALA should in no manner state or imply that its members are recognized or certified as specialists in agricultural law or any agricultural law subfield. If the AALA were to state or imply such specialist recognition or certification, the AALA would have to gain accreditation as an entity authorized to grant such recognition or such certification.⁶⁵ The AALA has not ever been and does not intend to be an organization that grants recognition or certification of specialization in agricultural law. The AALA is and desires to remain an organization open to anyone who has an interest in agricultural law. Moreover, to insure that the public is not mislead into thinking the AALA members have been recognized as specialists based solely on the fact that the AALA membership directory lists fields of practice, the AALA should place on its webpage where the public accesses the membership directory the following disclaimer:

The listing of any area of practice by an AALA member does not indicate any certification or expertise therein.⁶⁶

Although the AALA and its members know that the AALA is an organization that is open to all who are interested in agricultural law and that the AALA does

64. See, e.g., DELAWARE RULES OF PROFESSIONAL CONDUCT Rule 7.5(a)(2) (1998) (permitting lawyers to say they limit their practice to a field of law only if they devote at least 25% of their practice time to that field and if they add a disclaimer stating that they are not certified or recognized as a specialist); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 7.4(a)(2) (1998) (requiring lawyers stating that they limit their practice to certain areas to explain their experience, expertise, etc. and to make available free background information upon request).

65. See, e.g., ARIZONA RULES OF PROFESSIONAL CONDUCT ER 7.4(c) (West 1998) (Arizona Board of Legal Specialization must recognize the certifying entity); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.6(b) (West 1999) (Florida certification plan or accredited by the American Bar Association); PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 7.4 (West 1998) (Supreme Court of Pennsylvania must approve the certifying organization). See also NORTH CAROLINA RULES OF PROFESSIONAL RESPONSIBILITY Proposed Rule 241 (proposed Jan. 24, 1997) (organization certifying specialists must be approved by the North Carolina State Bar).

66. The language of this disclaimer is based on Mississippi Rules of Professional Conduct Rule 7.6(a) (1998).

not recognize or certify specialization in agricultural law, the members of the general public may believe that membership in the AALA does imply a special competence in agricultural law. This potential misunderstanding by the general public becomes ethically important in light of Texas Rules of Professional Responsibility Rule 7.4(b) which states:

A lawyer who advertises in the public media: . . . (2) shall not include a statement that the lawyer . . . is a member of an organization the name of which implies that its members possess special competence, except that: . . . (ii) . . . such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization

The AALA can argue that its name does not state or imply that its members possess special competence. However, the attitude of the AALA is ethical compliance, not defensive argumentation. Consequently, to protect against Texas demanding that AALA seek accreditation and to be certain that the public is not misled, the AALA should include on its webpage where the public accesses the membership directory the following disclaimer:

The AALA is a membership organization open to all persons, including non-lawyers, who are interested in agricultural law. The AALA does not recognize or certify any member as having special competence in agricultural law. Membership in the AALA does not mean—and should not be interpreted to mean—that its members have a special competence in agricultural law.

While the disclaimer in the preceding paragraph should protect the AALA from being required to seek accreditation in Texas, the AALA faces another ethical choice about letting Texas members list fields of practice within agricultural law. Texas allows lawyers to state fields of practice⁶⁷ but, if they do so in a field for which Texas has not established a specialization,⁶⁸ the lawyers must set forth the following disclaimer: “Not certified by the Texas Board of Legal Specialization.”⁶⁹ In other words, if AALA lets its Texas members list fields of practice, each membership directory listing must carry the “Not certified by the Texas Board of Legal Specialization” disclaimer. If the AALA does not want to have this disclaimer on its Texas members’ directory pages, the AALA must not allow its Texas members to include fields of practice information in the directory and the

67. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.02(a)(5), (b), 7.04 (West 1998).

68. Texas has not established a specialization for agricultural law or any subfields of agricultural law.

69. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.04(b)(3).

AALA directory would only have basic, factual, contact information for its Texas members.

The Tennessee ethics rules presents the AALA with another set of ethical choices relating to its Tennessee members. Tennessee does not have an ethics rule comparable to the rule in Texas that raises the question whether membership in the AALA by itself requires a disclaimer. Consequently, the AALA can list its Tennessee members as members of AALA and the Tennessee members are not required to make any disclaimer relating to that membership. However, Tennessee does have three mandatory disclaimers one of which must be used anytime a Tennessee lawyer advertises a field of practice.⁷⁰

If the AALA allows its Tennessee members to set forth an agricultural subfield, such as agricultural estate planning, agricultural taxation, or any other self-identified subfield, the AALA must worry about whether those subfields are "reasonably included in a certified specialty."⁷¹ If those agricultural subfields are

70. See TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C). Tennessee CPR DR 2-101(C) reads:

A lawyer who publishes or broadcasts a communication with regard to any area of law in which the lawyer practices shall:

. . . .

(2) If the lawyer has been certified as a specialist by the Tennessee Commission on Continuing Legal Education and Specialization in the area so advertised, state with respect to each area, 'Certified as an (area of practice) Specialist by the Tennessee Commission on Continuing Legal Education and Specialization.'

(3) If the lawyer has not been certified as a specialist by the Tennessee Commission on Continuing Legal Education and Specialization in an advertised area in which certification is available, state with respect to each such area, 'Not certified as a (area of practice) specialist by the Tennessee Commission on Continuing Legal Education and Specialization.'

(4) If the lawyer has not been certified as a specialist by the Tennessee Commission on Continuing Legal Education and Specialization in an advertised area and if no certification is available from the Commission in that area of law, the lawyer may state 'Certification as (area of practice) specialist is not currently available in Tennessee.'

(5) No lawyer shall state in an advertisement that certification is not available in an advertised area if the advertised area has been identified by the Commission as included in an area of specialization; or, in the absence of such identification, if the advertised area is reasonably included in a certified specialty.

(6) The disclosures required by this section must be included in any communication in a prominent manner.

Id. DR 2-101(C)(2)-(6). The author learned, by talking to a Tennessee Board of Professional Responsibility attorney, that DR 2-101(C)(6) makes DR 2-101(C)(4) mandatory, when applicable, even though subsection four uses the word "may."

71. *Id.* DR 2-101(C)(5). See also Tennessee Bd. of Prof'l Responsibility, Unpublished Op. 95-A-570 (1995) (opining that websites must comply with all ethics rules, including appropriate disclaimers for areas of practice).

Tennessee does have a recognized specialty for estate planning (which might reasonably

reasonably included in a certified specialty, the Tennessee member, who does not hold Tennessee recognition as a specialist, must include the following disclaimer: "Not certified as an (area of practice) specialist by the Tennessee Commission on Continuing Legal Education and Specialization."⁷² If those agricultural subfields are reasonably included in a certified specialty, the Tennessee member who is recognized in Tennessee as a specialist must include the following statement: "Certified as an (area of practice) Specialist by the Tennessee Commission on Continuing Legal Education and Specialization."⁷³ If those agricultural subfields are not within a recognized specialty, the Tennessee member must include the following disclaimer: "Certification as a (area of practice) specialist is not currently available in Tennessee."⁷⁴

While the AALA could rely upon its Tennessee members to provide the correct information and to make the correct ethical determinations, the author worries that the AALA will accidentally entrap a Tennessee member and itself into disciplinary disputes with the Tennessee Supreme Court.⁷⁵ The AALA could adopt a more cautious, preventive approach for its Tennessee members by simply not including any fields of practice information on the directory information of its Tennessee members. The author recommends this latter approach.

Iowa DR 2-105 prescribes very precise and restrictive ethical rules for any description or indication of the limitation of practice.⁷⁶ Iowa lawyers are allowed to describe or indicate fields of practice only in the exact terms as listed in DR 2-105(A)(2)⁷⁷ and only if the lawyer

- spends 200 hours or 20 percent of practice time in the indicated field or practice;
- completes at least ten hours of accredited CLE in the indicated field of practice; and

include agricultural estate planning) but not for taxation (which, if taxation were a recognized speciality, might reasonably include agricultural taxation).

72. TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C)(3).

73. *Id.* DR 2-101(C)(2).

74. *Id.* DR 2-101(C)(4).

75. The AALA wants to use as standard a format as possible for its membership directory. Therefore, the AALA does not want members to use the organization's membership directory as a form of individualized advertising. Moreover, as will be explained later in this Article, the AALA does not want to become an advertising agency for its members beyond providing a basic membership directory.

76. See IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105 (West 1998). Iowa enforces its rules relating to communications that describe or indicate fields of practice. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Kirlin, 570 N.W.2d 643, 647 (Iowa 1997); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wherry, 569 N.W.2d 822, 827 (Iowa 1997).

77. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-2 (1996) (setting forth the disclaimer of Iowa DR 2-105(A)(3)(c) does not cure reference to areas of practice not listed in the DR 2-105(A)(2)).

- files an annual report of compliance with the Iowa Commission on Continuing Legal Education.⁷⁸

Moreover, if the Iowa lawyer describes or indicates a field of practice, the lawyer must use the following disclaimer:

“A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.”⁷⁹

The AALA does not want to burden its Iowa members with the time, CLE, and report requirements of Iowa rules. Hence, the AALA should not indicate any fields of practice information on the directory pages for its Iowa members. However, the AALA must worry that its Iowa members are at some risk simply because they are in an agricultural law directory. By being in an AALA directory, this may indicate implicitly a field of practice.⁸⁰ Unfortunately, agricultural law is not on the list of permissible fields of practice, thereby making it unethical in Iowa to describe or indicate that one practices agricultural law.⁸¹

AALA thus faces choices. First, the safest, most cautious choice is to exclude Iowa members from its membership directory because even being in an AALA directory could trigger the application of Iowa DR 2-105.⁸² The author hopes that AALA would not choose to exclude its Iowa members. Second, the AALA could choose, as the author recommended for Tennessee members, to include Iowa members in its directory but have no fields of practice information on the Iowa members' listings. Moreover, to address the fact that these Iowa lawyers are in an agricultural directory, the AALA should place—in addition to the general disclaimers relating to expertise that the author has recommended for the AALA webpage—on each individual Iowa member's directory listing the Iowa disclaimer

78. See IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(4).

79. *Id.* DR 2-105(A)(3)(c).

80. See *supra* text accompanying notes 54-62. Similar choices for AALA about its Iowa members are discussed at this cross-reference point.

81. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-2 (1996) (Question 1).

82. The difficulty of complying with Iowa DR 2-105 provides a partial explanation for why the Internet version of the Martindale-Hubbell Law Directory® does not have Iowa lawyers. See also *supra* text accompanying notes 54 to 62.

from Iowa CPR DR 2-105(A)(3)(c).⁸³ By setting forth general disclaimers and the specific Iowa disclaimers on each Iowa member's directory listing, the author believes that AALA can ethically include basic, factual, contact information for its Iowa members in its membership directory.⁸⁴

V. FOR MEMBERS ONLY MEMBERSHIP DIRECTORY

Since its inception in 1980, the AALA has published a membership directory approximately every third year in print format. These printed directories provide contact information and fields of practice information. These printed directories carried none of the disclaimers that the author has just recommended for the AALA membership directory on the Internet. Has the AALA—and impliedly other professional legal organizations—been in violation of ethics rules relating to advertising by publishing a printed membership directory without the recommended disclaimers? Is there something ethically different about an Internet membership directory?

From 1963 to 1976, the ABA Code of Professional Responsibility in DR 2-102(A)(6) read as follows:

A lawyer or law firm shall not use . . . legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form: . . . (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name . . . ; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates;"⁸⁵

In *In re Members of the State Bar*,⁸⁶ dissenting Justice Holohan noted that the Arizona Bar Association and other state bar associations accepted advertising in reputable legal directories because only subscribers—which in reality meant

83. See *supra* note 79 (quoting this disclaimer in the text of this Article).

84. The approach the author recommends to AALA for its Iowa members mimics the approach the West Law Directory[®] appears to use for its listings of Iowa attorneys. The West Law Directory[®] does not set forth any fields of practice information for Iowa lawyers but each listing does state the three mandatory Iowa disclaimers, of which the disclaimer about fields of practice from Iowa Code of Professional Responsibility DR 2-105(A)(3)(c) is one.

85. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(6) (1970). The present ABA Model Rules of Professional Conduct no longer has a comparable ethics rule. Canon 27 of the ABA Canons of Professional Ethics, a precursor of the ABA Model Code of Professional Responsibility, was similarly worded to ABA Code of Professional Responsibility DR 2-102(A)(6). See THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 625 (1999).

86. *In re Members of the State Bar*, 555 P.2d 640 (Ariz. 1976) (en banc).

lawyers and a few libraries—could obtain the directory.⁸⁷ These reputable directories were neither easily or widely accessible to potential clients.⁸⁸

Florida,⁸⁹ Iowa⁹⁰ and Texas⁹¹ explicitly retain exceptions in their present ethics rules for legal directories primarily for the use of the legal profession.⁹² As a consequence of these exceptions, Florida, Iowa, and Texas do not apply their ethics advertising rules to print-format legal directories.⁹³

As long as the AALA print directories were primarily for its members (almost all of whom were lawyers), the AALA print directories were exempt from ethics rules relating to advertising. However, when the AALA moves its membership directory to the Internet for the public generally, the primarily-for-lawyers exemption disappears. Without this primarily-for-lawyers exemption, the AALA must carefully consider and must comply with the ethics rules for advertising, including disclaimers, for its Internet membership directory that is open to the public generally.⁹⁴

87. See *id.* at 650 (Holohan, J., dissenting).

88. The author has always heard ABA DR 2-102(A)(6) (1963) (the provision approving lawyers' listings in legal directories) called the "Martindale-Hubbell exception." Advertising in Martindale-Hubbell Law Directory® was the major exception to the ethical prohibition of lawyer advertising that existed prior to 1977 after which *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and its First Amendment commercial speech progeny changed the face of lawyer advertising in the United States.

89. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(o) (West 1999).

90. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C) (West 1998).

91. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 7.04(a)(3) (West 1998).

92. See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(o); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C); TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 7.04(a)(3). The author has not read the ethics rules of all fifty states. States other than Florida, Iowa, and Texas may retain a legal-directory-primarily-for-lawyers exception to their advertising rules. Even if a state does not have an explicit legal directory exception, the author has spoken to ethics counsel for state bars, notably Alabama and Tennessee, who informed the author that their state bars have a policy that exempts legal-directories-primarily-for-lawyers from the advertising rules.

In light of the Tennessee position exempting legal-directories-primarily-for-lawyers from the Tennessee advertising rules, an AALA members-only directory could list agricultural law practice areas for its Tennessee members without having to worry about compliance with the specialist disclaimers found in Tennessee Code of Professional Responsibility DR 2-101(C).

93. The fact that Iowa has an exemption from its advertising rules for directories primarily-for-lawyers is visually observed by reading the printed, bound volumes of Martindale-Hubbell Law Directory®. The Martindale-Hubbell Law Directory® lists Iowa lawyers with practice areas as supplied by the attorneys themselves. Moreover, the Martindale-Hubbell Law Directory® areas of practice volume lists agricultural law as a practice area; within the agricultural law practice area, the Martindale-Hubbell Law Directory® sets forth the names of attorneys from Iowa who self-identified as practicing agricultural law.

94. The distinction in the text between print directories available primarily to lawyers and Internet directories available to the public generally explains why the Martindale-Hubbell Law Directory® print version has information on Iowa lawyers and law firms while the Martindale-Hubbell Law Directory® Internet version does not. In the print version, their directory is an Iowa reputable

Realizing that different ethical rules apply to a general-public directory and a members-only directory,⁹⁵ the AALA faces several choices.

- The AALA could choose to provide a members-only directory, thereby avoiding the ethics rules for advertising.⁹⁶ The author recommends against this alternative because the AALA would lose the benefits to its members and to the public of an Internet membership directory.
- The AALA could choose to have only a general-public membership directory which complies with the ethics rules relating to advertising from the various states. The author hopefully has explained how this may be done ethically.

legal directory; in the Internet version, their directory is simply another form of commercial speech subject to the Iowa ethics rules about advertising.

The distinction in the text also explains why the West Legal Directory® has Iowa lawyers and law firms on its electronic version. The West Legal Directory® can be accessed only by subscribers who have a password and a client identification. These subscribers are almost exclusively lawyers, law firms, and law schools. The West Legal Directory® Internet version thus remains a primarily-for-lawyers directory.

95. The AALA can place the members-only directory in the members-only section of its website. Only members can access the members-only section of the website and members gain this access by having paid their current dues and by having arranged an identification name plus a password with the AALA webmaster.

96. The author cautions that the AALA would be wise to set forth the mandatory Iowa disclaimers on the individual directory pages of Iowa members even in a members-only directory. AALA should err on the side of caution and not put its Iowa members at risk of disciplinary problems for failure to have the disclaimers. The West Legal Directory®, a primarily-for-lawyers directory on the Internet, carries the mandatory Iowa disclaimers on its Iowa lawyer listings.

In addition, if the AALA uses a members-only directory, the author suggests that the webpage where members access the members-only directory should carry the following three disclaimers:

The AALA Membership Directory is for AALA members only and is intended primarily for the use of AALA lawyers and law firms in the practice of their profession. The AALA Membership Directory may not be used other than intended without prior written permission from the AALA. The AALA Membership Directory may not be used for any commercial, political, or other purpose.

AALA members providing information regarding themselves and their law firms for inclusion in the AALA Membership Directory are responsible for both the accuracy of the information submitted and compliance with local law and bar regulations.

AALA members self-designate area(s) of agricultural law practice to which he or she devotes professional time. The individual member, the member law firms, and the AALA do not imply that the self-designated area(s) of agricultural law practice have any official approval or special certification by any governmental authority.

These three disclaimers are patterned after disclaimers that Martindale-Hubbell Law Directory® uses in its printed, primarily-for-lawyers directory.

- The AALA could choose to have both—a general-public membership directory and a members-only directory. The author recommends this alternative because some AALA members might desire to receive referrals and consultation calls only from fellow AALA members without being available for public contact.⁹⁷ Moreover, some AALA members may not feel comfortable with the disclaimers that the AALA will publish on the webpage where the general public accesses the membership directory. The webmaster will have little difficulty creating two membership directories but the webmaster must be careful in matching each membership directory to its intended audience.

VI. LEGAL DIRECTORY OR LAWYER REFERRAL

To this point in the Article, the author has identified the commercial speech component of the AALA website as the membership directory, especially the membership directory for the general public. Before proceeding further to discuss other possible components of the AALA website, the AALA needs to be conscious of the difference between a legal directory and a lawyer referral service.

The AALA eventually will post its membership directory for the general public to use. When the AALA posts its membership directory for general public use, the AALA will restrict who appears in the membership directory to its members—both as an incentive to membership and to present truthful information to the general public. In order to be a member, AALA charges membership dues and part of these dues are the organization's costs for having a website. Does the fact that the AALA charges for membership and restricts its membership directory to members present ethical problems?

A. *Membership Dues*

ABA Model Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services except that a lawyer may pay the reasonable costs of advertising and pay the usual charges of a not-for-profit lawyer referral service or legal service organization. The AALA membership dues that partially pay for the AALA membership directory on the Internet are assuredly ethically permissible as a reasonable cost of advertising.

97. AALA has many members who are academics and government lawyers. These members may not be interested in general public contact but may be interested in contact from AALA members who are lawyers in private practice.

What ABA Model Rule 7.2(c) prohibits is lawyer payments to others for referrals that are purchased referrals. Purchased referrals raise two obvious ethical concerns. First, the potential client is misled by the referral because the potential client thinks the referral is an unbiased referral, when in fact the person making the referral does so because the recommendation has been purchased. Second, if the person who makes the referral shares in the fees generated by the referral, the organized bar worries that the independence and loyalty owed the client by the attorney is compromised in favor of the person making the referral.⁹⁸

The AALA is a membership organization and will clearly state that it is a membership organization on the webpage where the general public accesses its membership directory. Hence, the general public is not misled as to which lawyers are in the directory—those lawyers who are members of AALA.

The AALA provides the membership directory as a service to its members and to the general public. The AALA does not have any further financial interest in the client-lawyer relationships that develop from this membership directory service. Consequently, any AALA lawyer member who acquires a client as a result of the membership directory has complete independence and loyalty to that client with no compromising financial arrangements with AALA whatsoever.

B. Lawyer Referral Services

The reference in ABA MRPC Rule 7.2 to lawyers being allowed to pay the reasonable charges to not-for-profit lawyer referral services or legal service organizations also evidences a concern about purchased referrals if the lawyer referral service were a for-profit service.⁹⁹ Moreover, the ABA is concerned about sham referral services—i.e., referral services begun by a lawyer or several lawyers who refer cases only to the founder(s) of the service. These concerns about purchased referrals and sham referral services led the ABA to adopt Model Supreme Court Rules Governing Lawyer Referral Services which creates a category of “qualified” referral services with which lawyers may ethically cooperate.¹⁰⁰ Qualified referral services must be open to all lawyers in a given geographical area, have reasonable experience standards, have procedures for admitting and removing lawyers from the referral lists, and have procedures for

98. The ethical rule most directly related to these concerns is ABA MPCR 5.4, entitled *Professional Independence of a Lawyer*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1997); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1980) (division of legal fees between lawyers who are not in the same firm).

99. For discussion of the not-for-profit lawyer referral service exception in Rule 7.2, read 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 7.2:401 (2d ed. 1996 Supp.).

100. For a brief discussion of the ABA Model Supreme Court Rules Governing Lawyer Referral Services, read STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 349 (1997 ed.).

matching persons seeking lawyers with lawyers appropriate to those persons' needs.

Florida, Iowa, and Texas have ethical rules about lawyer referral services that predated and prefigured the ABA Model Rules on lawyer referral services. Florida RPC 4-7.8 prohibits a lawyer from accepting referrals from a service unless, among others, the service makes quarterly reports to the Florida Bar and carries (or requires its lawyers to carry) a minimum of \$100,000 per claim or occurrence legal malpractice insurance. Iowa CPR DR 2-103(D) permits lawyers to be part of a lawyer referral service only if the service is legal aid or public defender office, a military legal assistance office, a bar-sponsored lawyer-referral service, or a pre-paid legal services plan that reports annually to the Iowa client security and attorney disciplinary commission.¹⁰¹ Texas RPC Rule 7.03 prohibits Texas lawyers from paying anything of value to a lawyer referral service unless the service meets the requirements of Article 320d, Revised Statutes.¹⁰² The most basic requirement of Article 320d is that the entity that operates the lawyer referral service must be certified by the Texas state bar.¹⁰³

The AALA does not want to be a lawyer referral service. The AALA does not want to place itself in the position of having to carry \$100,000 legal malpractice insurance, of having to file reports with state bars, having to gain certification from state bars, or having to meet other requirements that Florida, Iowa, Texas, or the ABA Model Rules impose on lawyer referral services. The AALA wants to continue as a legitimate, open membership professional association of persons interested in agricultural law.

The AALA should simply post its membership directory on the AALA website. The AALA should not take any action that makes or could be construed to make a referral to any of its members. The AALA should post its membership directory and permit the general public to access the membership directory. The person who accesses the membership directory should make all decisions about whether to contact an AALA member, which members have the jurisdictional and professional qualifications that match the person's needs, and which specific member to contact. By providing a passive membership directory that leaves all

101. See IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) (West 1998). Iowa enforces its ethical rules relating to lawyer referral services. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 91-18 (1991), *aff'g* Formal Op. 90-8 (1990) (prohibiting Iowa attorneys participation in Commercial Law Affiliates); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 96-4 (1996), *aff'g* Formal Op. 93-22 (1993) (prohibiting Iowa attorneys participation in American Association of Creditor Attorneys). See also Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Formal Op. 90-1 (1990) (prohibiting Iowa lawyers participation in the marketing of living trusts by an estate planning concern).

102. TEX. REV. CIVIL STAT. ANN. art. 320d (West 1998). The title of this article is "Texas Lawyer Referral Service Quality Assurance Act."

103. See *id.* art. 320d, § 4.

choices to the person who access the directory, the AALA should have a legal directory, not a lawyer referral service, on the Internet.¹⁰⁴ In an abundance of caution, however, the author recommends that the AALA carry on the webpage where the public accesses the membership directory the following disclaimer: "The AALA is a membership organization with an Internet directory. The AALA is not a lawyer referral service."

VII. FOR MEMBERS-ONLY BULLETIN BOARD

The AALA will have a members-only section of its website.¹⁰⁵ Within the members-only section, the AALA will offer a message board service (a bulletin board) for its members. Members will be allowed to post any message relevant to agricultural law, the AALA organization, or other messages which further the goals of the AALA. Other members can respond to the posted messages to create a discussion thread. Two obvious points about this message board service are significant for reasons related to ethics—the limitation to members-only and the public nature of the communication.

A. *Limited to Members-Only*

The message board is for members only of the AALA. The membership of the AALA is almost entirely lawyers, although the AALA does have a good number of agricultural economists, agricultural journalists, agricultural managers, agricultural producers, and agri-business persons as members who are not lawyers. All members share a common interest in agricultural law and are more sophisticated about agricultural law than the ordinary person in the general public. All members share the common bond and the common peer pressure of being members of the AALA. Consequently, these discussion threads are not discussions or contacts between strangers, although these may occur between people who have not personally met one another. These are discussion threads between related people.

Because the message board is accessible only by members, the members should be able to discuss any topic related to agricultural law without being

104. See Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Published Op. 98-2 (1998) (Internet Bar Directory); New York County Lawyers' Ass'n. Comm. on Prof'l Ethics, Op. 721 (1997) (Internet Advertising); North Carolina State Bar Ethics Comm., Final Op. RPC 241 (1996) (participating in a Directory of Lawyers on the Internet). These three ethics opinions conclude that Internet directories are no different than print-format directories so long as the reader of the directory makes all choices about selecting a lawyer. See Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Published Op. 98-2 (1998); New York County Lawyers' Ass'n. Comm. on Prof'l Ethics, Op. 721 (1997); North Carolina State Bar Ethics Comm., Final Op. RPC 241 (1996).

105. See *supra* note 95 (discussing how members access the members-only section of the AALA website).

concerned about ethical violations related to solicitation. No posted messages and no posted answers should be considered unethical solicitations for commercial purposes. By keeping the message board as a members-only benefit, the AALA avoids the ethical restrictions that apply to “real time” or “live” interactions between lawyers and potential clients that cause “chat rooms” to be characterized as in-person solicitation under ethics rules.¹⁰⁶

B. Public Communication

Even though the message board is open to AALA members only, the message board is a public communication as opposed to a private communication. As a public communication, AALA members need to be reminded of several ethical considerations unrelated to solicitation concerns.¹⁰⁷ As they post messages to the message board, members need to keep in mind the following:

- they should not discuss anything on the message board that would violate a client’s confidences;¹⁰⁸
- they should not enter into a professional relationship with anyone through the message board until conflicts of interest checks take place;¹⁰⁹
- they should not give specific legal advice to anyone through the message board until they know with whom they are messaging because the lawyer could be messaging with an opposing represented or unrepresented person;¹¹⁰

106. See, e.g., Illinois St. Bar Ass’n Comm. on Prof’l Conduct, Op. 96-10 (1997); Massachusetts Bar Ass’n Comm. on Prof’l Ethics, Published Op. 98-2 (1998); Vermont Bar Ass’n Comm. on Prof’l Responsibility, Op. 97-5 (1997); Virginia State Bar Standing Comm. on Lawyer Adver. & Solicitation, Op. A-0110 (1998). These four state ethics opinions express the ethical restrictions that apply to “real time” interactions between a lawyer and potential clients on the Internet. See Illinois State Bar Ass’n Comm. on Prof’l Conduct, Op. 96-10 (1997); Massachusetts Bar Ass’n Comm. on Prof’l Ethics, Published Op. 98-2 (1998); Vermont Bar Ass’n Comm. on Prof’l Responsibility, Op. 97-5 (1997); Virginia State Bar Standing Comm. on Lawyer Adver. & Solicitation, Op. A-0110 (1998).

107. See generally Joan C. Rogers, *Ethics, Malpractice Concerns Cloud E-mail, On-Line Advice*, 12 ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 59, 67-72 (1996).

108. See, e.g., Bd. of Professional Responsibility of the Supreme Court of Tennessee, Advisory Ethics Op. 95-A-576 (1995) (responses by lawyers to Internet postings raise ethical concerns about confidentiality and conflicts of interest).

109. See, e.g., Philadelphia Bar Ass’n Prof’l Guidance Comm., Op. 98-6 (1998).

110. See, e.g., *id.* (the Philadelphia Bar is specifically thinking of ABA MRPC Rules 4.2 & 4.3). See also South Carolina Ethics Advisory Comm., Op. 94-27 (distinguishing between general discussions of legal topics and specific legal advice over the Internet).

- they should raise and discuss legal issues on the message board only in general terms because specific answers may create malpractice liability.¹¹¹

The author suggests that the AALA turn the four points just made into short disclaimers that the AALA places on the webpage where its members access the message board service.¹¹²

VIII. LINKS

The AALA intends to provide on its website a webpage with links to members' personal homepages, to other agricultural law websites, and to allow others to link to the AALA website. By providing these links, the AALA facilitates quick transfer from its website to other websites for its members and for the general public.

Links to members' personal homepages and to other agricultural law websites raise two issues—accountability and purchased referrals. Allowing other websites to link to the AALA website also raises the issue of purchased referrals.

A. Accountability

The Massachusetts State Bar has opined that an organization can create links on its website to its members' home page without accountability for the content of

111. See, e.g., Illinois State Bar Ass'n Comm. on Prof'l Conduct, Op. 96-10 (1997).

112. The author suggests the following language for the four disclaimers discussed in the text.

The AALA encourages its members to use the Message Board to exchange ideas, to seek information, to inform each other of agricultural law developments, etc. As members use the Message Board, they should be aware of the following guidelines:

- a. Do not discuss anything on the Message Board that would violate a client's confidences.
- b. Do not give specific legal advice to anyone through the Message Board because the giving of specific legal advice about specific facts likely establishes an attorney-client relationship between the giver and the receiver. An attorney-client relationship carries obligations of confidentiality, loyalty, freedom from conflicts of interest, and other professional ethical duties.
- c. Do not give specific legal advice about specific facts to anyone on the Message Board because giving such specific legal advice may create malpractice liability or may subject the giver of the advice to a complaint about being engaged in the unauthorized practice of law.
- d. Do not enter into a professional relationship with anyone on the Message Board until you have performed a conflicts of interest check and otherwise followed the routine procedures that you normally follow before accepting a person as a client.

the members' home page.¹¹³ The Massachusetts State Bar determined that a provider of an Internet directory would have no more accountability for a member's homepage than a provider of a print-format directory would have accountability for a law firm's brochure. The individual member is accountable for the content of the member's home page—its compliance with ethical rules and its accuracy on legal information set forth.¹¹⁴

If the AALA may ethically link to members' homepages without creating accountability for the AALA, the AALA should also be able to link to non-members homepages without creating accountability. The AALA has no control over non-members webpages.

Even though the AALA may ethically link to members' homepages and non-member websites, the AALA should provide a clear disclaimer on the link page as follows:

The AALA provides URL links to members' homepages and to agricultural law websites of interest to its members. Each entity to which the AALA provides URL links is responsible for the correctness, the completeness, and the timeliness of its own homepage and website. The AALA does not intend, promise, or guarantee that the content on the URL linked websites is or will be correct, complete, or up-to-date. The AALA provides these URL links solely as a service to its members and to the general public. When you click on one of the provided URL links, you are leaving the AALA website to enter another's website.¹¹⁵

B. *Purchased Referrals*

ABA MRPC Rule 7.2(c) prohibits a lawyer from giving anything of value to another for a recommendation of employment, except for reasonable costs of advertisements. ABA MRPC Rule 7.2(c) is especially concerned about purchased

113. See Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-2 (1998).

114. By contrast, if the AALA provided its members a webpage-creation service where the AALA actually created members' homepages, the author believes that the AALA would have accountability for these created member websites. The author recommends that AALA not provide any webpage-creation service to its members. AALA can ethically and easily link to member homepages created by the member, but the AALA cannot ethically and easily become a webpage provider to its members.

115. In drafting this disclaimer, the author has modified language and ideas expressed in the State Bar of Georgia on-line directory and in an inquiry response written by the Massachusetts Bar Association's Committee on Professional Ethics. See *Disclaimer* (visited Apr. 18, 1999) <http://www.gabar.org/ga_bar/disclaim.html>; Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Inquiry Response 1997-T30 (1997).

referrals.¹¹⁶ By providing links to members' homepages, agricultural law websites, and by allowing others to link to the AALA website, the AALA should show sensitivity to whether this linking is providing value in return for a recommendation of employment.¹¹⁷

When the AALA provides links to its members, the AALA is providing a service to members for which members may pay reasonable charges as allowed by ABA MRPC Rule 7.2(c)(1).

When the AALA provides links to non-member webpages, the AALA should select non-member webpages that provide agricultural information of especial interest to AALA members. The AALA assuredly is allowed ethically to assist its members in finding needed information efficiently and easily to enhance its members competence. Yet, as the AALA selects these non-member webpages for linking, the AALA should make these choices without any quid-pro-quos. By selecting non-member webpages on the basis of interest to its members, AALA should be able to avoid ethical concerns about purchased referrals being sought from the non-members.

Similarly, when an entity creates a link on its webpage to the AALA website, the AALA should provide nothing in return for the link. The AALA can request a search engine to list the AALA website. However, the AALA should not pay a search engine to give prominence to the AALA membership directory. Moreover, non-members should link to the AALA website because the non-member voluntarily, honestly, and unbiasedly recommends the AALA website for viewing by others. AALA is ethically allowed to develop a reputation for its website and others have First Amendment rights to express their opinion about the AALA website. If the non-member acts independently of the AALA, the AALA has not violated any ethical concerns about purchasing referrals.

IX. CONCLUSION

The author has surveyed the ethical issues that the AALA, as well as any other legal professional organization, faces when it creates an Internet website. The author believes that the survey has been thorough and sensible, but the author admits that he has not read the professional ethics codes of all fifty states. In light of this survey, the author has several concluding recommendations.

116. For discussion of purchased referrals, see *supra* text accompanying notes 98-100.

117. See generally Cincinnati Bar Ass'n Ethics & Prof'l Responsibility Comm., Op. 96-97-01 (1997) (discussing ethical concerns created by links on lawyers' webpages). See also ABA Commission on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies* (July 1998) <<http://www.abanet.org/legalserv/advertising.html>>.

- The AALA should expand its Technology Committee to have a member from every American state and several international members. These members should be charged with the task of keeping the Technology Committee informed of any ethical issues or concerns specific to their jurisdiction. By having representatives from many jurisdictions, the AALA can better insure that its website will comply now and in the future with the ethical codes that govern lawyer websites.
- The AALA must use a Membership Information Form that allows AALA to gather correct, permissible information for the membership directories that AALA will post on its website.
- The AALA must use a webmaster who understands the ethical obligations that AALA faces and who can comply with these ethical obligations in a timely and correct manner. The Technology Committee, under the direction of the AALA Board of Directors, should provide the oversight and instructions that guide the webmaster in meeting these ethical obligations.

The AALA can create a professionally acceptable and professionally enhancing website for its members, the general public, and itself. The AALA can and should be on the Internet.

