The Legal and Ethical Implications of Online Attorney-Client Relationships and Lawyer Advertising in the Philippines

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I. INTRODUCTION

The numerous possibilities created by the online presence of different law practices have yet to be explored in the Philippines. There is perhaps, fear by many practicing lawyers to take full advantage of the Internet as a medium of communication because of the dearth in rules that would govern its ethical implications. It seems that while rapid technological developments continue to produce what seem to be limitless opportunities, traditional rules of law are not as quick in its response to these advances. The effect of this incongruity is that rules that were once sufficient to control ethical norms in the past, tend to blur in the face of new technologies.

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The rules governing the ethical implications of the conduct of lawyers can be found in the Constitution, the Code of Professional Responsibility, the Revised Rules of Court, and Supreme Court decisions on legal ethics. While the principles underlying legal ethics may not have had the Internet in mind when they were formulated, it is all one has to measure the propriety of conduct in this new technological medium.

This note seeks to explore the uncharted territory of the Internet with two specific issues in mind: one, the creation of online attorney-client relationships and two, the state of lawyer advertising in the Philippines and the status of the online presence of Filipino lawyers and law firms alike. This seeks to argue that there is a need for both the bench and the bar alike to be provided with definitive rules with respect to these problem areas to avoid difficulties in the future and for the protection of the general public. The law must keep pace with technology as the unique nature of the Internet is fraught with dangers of violations of a gamut of ethical rules. Further, an urgent responsibility is placed upon the shoulders of the Supreme Court and the different bar associations in this jurisdiction to ensure compliance with these soon-to-be formulated rules.

I. CONSTRUING ONLINE COMMUNICATIONS AND EXCHANGES AS "CYBER-RETAINERS"

Communications and exchanges through the Internet take varying forms, and may likewise produce varying consequences. There are unilateral communications, such as in the case of websites that only present information for viewing purposes; and there are more interactive sites, that allow actual exchanges, which are also available in different degrees. The ethical implications brought about by the former is as discussed on internet advertising, the latter involves yet another matter which is subject to ethical considerations.

The opportunity for interactive communication through the Internet reveals another area where the online presence of law firms may prove problematic: the possibility of forming of attorney-client relationships over the Internet. Lawyers, law firms and legal advice have all been made available to the entire online community, by the ease of correspondences online. More lay people are able to gain access to those in the legal profession with very minimal effort. This new medium of communication introduces a new venue for the creation of attorney-client relationships, which transcends geographical limits, and promotes globalization of legal services across jurisdictions.

Lawyer to layperson communication in cyberspace is unlike other more traditional modes of communication. As a consequence, there are no legal rules or standards to govern it. It is unlike communication made through the

telephone or through the mails, as most web pages on the Internet are indiscriminately available to the general public. One surfing the net need not be privy to the actual address or identification number of a law firm's website. He only need key in the firm's name on any search engine, or be familiar with its domain name and he immediately gains access. Also, correspondence through electronic mail is less intimidating than communications through the telephone, and a message may also be sent without much red tape.

Compared with other traditional media, such as the radio and television, exchanges and correspondence through the Internet is a lot simpler and more direct. For instance, interaction with personalities on the radio or television must be done at the precise time that they appear on air or onscreen and only if a venue for communications is made available in the first place, e.g. through allowable hotlines or message boards. While with the Internet, almost all websites leave an e-mail address to which anyone can simply send a message, which can be answered once the other party goes online as well. As a result of the ease of communication online, people are not limited to merely viewing websites of another; rather, they are given the power to make communication with the other party and directly comment, participate or avail of what is being shown to them online without the risk of being exposed.

Although lawyer to layperson communication in cyberspace has not yet reached a very high level of popularity in the Philippines, it is pertinent to examine its ethical implications before it produces problems in the future. The most pressing issue that these communications raise, is whether these communications actually amount to the formation of an attorney-client relationship. It must be recognized that the responsibilities a lawyer has to a client, or even a mere potential client, extends to the realm of cyberspace. This matter has been subject to much discussion in the United States,[1] and it is high time that it be brought to the fore in the Philippines as well, which is not very far behind in terms of advancements in technology. A proper analysis is necessary to determine the metes and bounds by which the attorney-client relationships can exist in cyberspace. It should not be seen as a threat to traditional ethical norms, for if honed properly, these developments could actually help promote the profession as a public service by making proper legal assistance readily available to all who need it.

1. *See, e.g.* Catherine Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L. J. 147 (1999); J.T. Westermeier, *Ethical Issues for Lawyers on the Internet and the World Wide Web*, 6 RICH. J.L. & TECH. 5 (1999); James Q. Walker, *Ethics and the Internet, Serving Clients Well: Avoiding Malpractice and Ethical Pitfalls in the Practice of Law*, 617 PLI LIT 297 (1999).

A. Basic Rules on the Formation of Attorney-Client Relationships

The existence of attorney-client relationships puts into play a whole gamut of obligations and responsibilities between the parties, especially on the part of the lawyer. That is why it is necessary to determine the factors by which such a relationship is said to exist, to preclude the possibility of any improper conduct on the part of the lawyer. A basic understanding of the premises that underlie the relationship is of key necessity to this discussion.

Traditionally, a retainer agreement is necessary to establish the relationship.[2] A retainer is generally the act of a client by which he engages an attorney to manage a cause for him or to advice him as counsel.[3] However there is no need for a formal written contract between the parties.[4] Rather, all that is absolutely required is a contract of employment, express or implied, between the attorney and the party.[5] The contract of employment, as in other cases, consists of a mere offer or request by the client and the acceptance or assent of the attorney.[6] In other words, to establish the existence of a professional relation, it must be shown that the advice and assistance of an attorney is sought and received by virtue of his profession.[7]

In the United States, a relationship of client and lawyer arises when:

> [A] person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.[8]

In the Philippines, the factors are quite similar. The leading case on this matter is the case of *Hilado v. David*.[9] In that case, the Supreme Court had occasion to make the following pronouncements:

> To constitute professional employment, it is not essential that the client should have employed the attorney professionally on any previous occasion.... It is

2. RUPERTO MARTIN, LEGAL AND JUDICIAL ETHICS 80 (6th ed. 1976).

3. *Id.*

4. RUBEN E. AGPALO, LEGAL ETHICS 142 (1997) [hereinafter AGPALO, LEGAL ETHICS].

5. 5 AM. JUR. 2D *Appellate Review* §§ 306, 307.

6. FRANCISCO R. ALBUERO, ETHICS AND THE LAWYER 58 (1950).

7. RUBEN E. AGPALO, THE CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS 151 (1991) [hereinafter AGPALO, CPR].

8. Catherine Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 169-170 (1999) (citing Restatement on Lawyers Completed With Final ALI Approval of All Sections, 66 U.S.L.W. 2716 (1998).

9. 84 Phil. 571 (1949).

> not necessary that any retainer should have been paid, promised, or charged for; neither is it material that the attorney consulted did not afterward undertake the case about which consultation was had. If a person, in respect to his business affairs or troubles of any kind, consults with his attorney in his professional capacity with a view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established.[10]

From this it can be inferred that the pertinent factors are communication by the client and acceptance by the lawyer. Any communication made to a lawyer by virtue of his profession would amount to an offer by a client, while any response permitting such consultation would amount to an acceptance by the attorney.[11] Accordingly, the mere fact of listening to a case and giving advice thereon establishes a professional relationship with the same effectiveness as though the lawyer appeared for a client in court.[12] This is not to say that lawyers have no right to refuse employment.[13] No lawyer is obliged to act either as adviser to or advocate for every person who may wish to become his client, and thus he must be responsible enough to decide what business he will accept as counsel.[14] But lawyers must be mindful that their actuations in connection with specific requests or inquiries by a potential client trigger the commencement of an attorney-client relationship.

While it is easy to decipher attorney-client relationships when there is an actual contract or retainer agreement, the task is not as simple when such is lacking. In the latter case, one must take into consideration the circumstances of each case to determine the nature of the communication between the lawyer and supposed client.[15] In case of doubt, the question would usually be decided in favor of a resolution that would preclude the appearance of any impropriety or unethical behavior on the part of the lawyer.[16]

B. Lawyer to layperson communication in Non-traditional Media

No distinctions have been made regarding the time and place where attorney-client relationships are formed, for the general rules earlier discussed are

10. *Id.*
11. AGPALO, CPR, *supra* note 7, at 151.
12. Hilado v. David, 84 Phil. 571 (1949); Dee v. Court of Appeals, 176 SCRA 651 (1989).
13. MARTIN, *supra* note 2, at 84.
14. *Id.*; CODE OF PROFESSIONAL ETHICS, Canon 31.
15. AGPALO, LEGAL ETHICS, *supra* note 4, at 143.
16. *Id.*

made applicable to all contexts. However it may be difficult to distinguish such relationships in less traditional milieus. In a recent article, Professor Catherine Lanctot analyzed the consequences created by other non-traditional media, such as radio, television, or in newspaper columns, in lawyer to layperson communication.[17] In her discussion, Professor Lanctot revealed that the general view of most bar associations in the United States allowed lawyer to layperson communication in such media, but limited it by prohibiting advice directed to particular members of the audience, [18] probably the purpose of which is to prevent the operation of the rules governing ethical misconduct. These types of media therein discussed that are relevant to the Philippine context.

In radio programs, the concerns raised by these communications include the insufficiency of information given to form good legal advice; confidentiality; or erroneous reliance by the public on specific advice.19 While the use of disclaimers has been recognized, they are not enough to relieve a lawyer from liability when it is indeed found that an attorney-client relationship is formed, necessarily implicating the basic rules of legal ethics. Many radio stations in the Philippines have used this media, with little complaint, if any, from the general public or the Courts, for that matter. Radio shows of the late *Compañero,* Renato Cayetano, whose radio program giving out free legal advice to callers, gained great popularity and set the trend for other similar programs.[20] Due to the popularity of such programs, the Radio Code formulated by members of the *Kapisanan ng mga Broadkaster ng Pilipinas,* an organization of Philippine broadcasters, imposes penalties on broadcasters who permit the giving out medical or legal advice by people who are not duly qualified or licensed professionals.[21] However, while this prevents what might be deemed an unauthorized practice of law, it still does not safeguard

17. Lanctot, *supra* note 9, at 255.
18. *Id.*
19. *Id.* at 222 (citing N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 480 (1981); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Op. 80-8 (1980); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Op. 80-8 (1980); Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Op. 94-13 (1994); Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 89-19 (1989); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Op. 80-8 (1980) FN 261, 262, 263).
20. *See* Angela Relos, *Goodbye, Compañero,* June 25, 2003 *available at* http://www.abs-cbnnews.com/images/news/microsites/ondspot/spot.htm (last accessed on Feb. 25 2004).
21. 1999 Revised Edition of the Radio Code *at* http://www.kbp.org.ph/radioCode_W_Formatd_rtf.rtf (last accessed Feb. 25, 2004).

against issues of confidentiality, conflict of interest and the like. The Court has given no categorical ruling or opinion regarding this.

As regards newspaper advice columns, similar opinions as those regarding the use of radio and television had been given by various American bar associations.[22] The general sentiment, therefore, seemed to encourage efforts to educate the public, while to express reservations against the giving of specific legal advice to particular persons.[23] Although a lawyer writing a newspaper column has more time to reflect upon the answer, including time to check for conflicts and to ensure a competent reply, issues of confidentiality still arise.[24] While the Court has admonished against using the newspaper for promoting the unauthorized practice of law by unlicensed practitioners,[25] there are, as yet, no specific rules to regulate attorney-client relationships that may arise from radio and television broadcasts.

Comparing these with communications in cyberspace, several parallelisms can be made. For instance, some online websites are similar to radio or television programs, where there is an open forum such as a chat room, which may be open to any member of the public. In other cases, communications through cyberspace can be more confidential when it is made through individualized exchanges of e-mail between a layperson and an individual lawyer, similar to newspaper columns, although, there is little, if any, editorial control over the content posted on the internet. In these case, the questioner may have a greater opportunity to provide information to the lawyer, and so will the lawyer have more leeway to think of his response unlike in radio or television broadcasts, lessening the chances of giving hasty legal advice.[26] Thus the same ethical concerns are in issue, with little rules to guide its conduct.

C. The Emerging Presence of the Law Profession in Cyberspace

The possibilities for communication and exchange today are as limitless as the bounds of cyberspace itself, what with new technologies burgeoning everyday. The most unique, which are fast gaining popularity, are communications online. Online communication are not limited to a particular form, in fact they are also available in different forms, such that lawyer-layperson exchanges can be done through email, message boards, chatrooms, or in a variety of other combinations. In the Philippines, there is a wide

22. Lanctot, *supra* note 8, at 229.
23. *Id.*
24. *Id.*
25. *See* Ulep v. Legal Clinic 223 SCRA 378 (1993).
26. *See* Lanctot, *supra* note 8, at 227-30.

array of services offered by these websites. They range from those that merely provide pertinent legal information,[27] or provide access to legal forms,[28] to those that merely leave general contact information for interested clients,[29] those that post questions and answers on certain topics of legal relevance,[30] and those that specifically seek to match lawyers and clients.[31]

Communication that are addressed to the general public, and not aimed at a particular individual, can hardly be said to amount to the creation of attorney-client relationship with those that view the site. However ethical obligations still arise as to the correctness of the information that is given out, even though they are in response to only general questions of law. The regulation of this conduct should be similar to regulation of legal advice columns in newspapers which purport to address the public in general, but cause individuals to rely on the advice for their particular causes.

Perhaps the most common practice among lawyers' websites are those that merely display the credentials and areas of practice of the lawyer or law firm, with a page giving out contact information, including an email address. Some pages even leave online forms where one can leave his or her own contact information and the legal inquiry to which the lawyer or firm will supposedly get back to. Other than this being considered within the ambit of prohibited advertising, it seems harmless enough. However, this would depend a lot on the type of interactive communication that is sent, received and replied to. It has been opined that an attorney-client relationship can be established if the potential client reasonably believes that there is a relationship, whether or not the attorney intends to establish one.[32] A "Contact Us" page that allows spaces for the potential client's name and other personal information as well as their legal inquiries may lead the latter to believe an attorney-client relationship is immediately established.[33] Whether one is indeed established will be a question of fact, looking into the wording of the website, the amount of interactivity available, and whether the website

27. *See, e.g.* Chan Robles, http://www.chanrobles.com (last accessed on Feb. 25, 2004).
28. *See, e.g.* Poblador Azada & Bucoy, http://www.poblaw.com (last accessed on Feb. 25, 2004).
29. *See, e.g.* Agcaoli & Associates, http://www.avaslaw.com (last accessed on Feb. 25, 2004).
30. *See, e.g.* http://www.abogadomo.com (last accessed on Feb. 25, 2004).
31. *See, e.g.* Pinoylaw.com, http://www.pinoylaw.com (last accessed on Feb. 25, 2004).
32. Kenneth J. Withers, *Ethical Issues and the New Technologies*, in ETHICAL LAWYERING IN MASSACHUSETTS, § 24.5.3 (2000).
33. *Id.*

generated any sort of personalized response to the potential client's inquiry.[34] While this may seem to deviate from the practice of first requiring the attorney to consent to the relationship, it seems that his consent may be impliedly culled from the mere acknowledgment of receipt of the message, or by the fact that his services are made so easily available in this manner. As there are no restrictions yet on online legal communications, they can still be interpreted in any way, even as to manifest implied consent by the mere fact of acknowledging receipt of an online form. When, however, a response is in fact made to the query of a potential client, it would seem that applying the tests for determining the existence of an attorney-client relationship that one would necessarily be established, by virtue of the lawyer's implied consent.

There are other fora, however, where online communications take place, such as those that give legal advice in public, such as online message boards where legal questions and answers can be given and viewed by the public, or online chat rooms, although in the latter case, communication can be either public or private. The admonition given by the Court on such exchanges usually depends on the nature of the question, whether it is a general legal inquiry, or questions relating to a specific set of facts. Although not based on specific legal rules, the practice in the United States is to tolerate the former type of communication, while to frown upon the latter. The definition of attorney-client relationship, however, make no reference to the specificity of the consultation, thus any exchange may be sufficient to create the relationship.

Chatrooms, as mentioned, can be conducted in public or on a one-on-one basis between the potential client and the lawyer. It has been said that to talk about legal matters in public chat rooms is to invite disaster.[35] Great risks are created by the fact that the participants are not necessarily known to each other, nor can it be determined who is privy to the communication. Thus, lawyers must be particularly sensitive in chat rooms with non-lawyers, for they would not want to create attorney-client relationships unknowingly.[36]

The effect of disclaimers would be to put the potential client on guard that an attorney-client relationship is not established by the communications made online.[37] Thus, it is common practice for most websites to clad their

34. *Id.*

35. J.T. Westermeier, *Ethical Issues for Lawyers on the Internet and the World Wide Web*, 6 RICH. J.L. & TECH. 5 (1999) (citing Maureen Castellano, *Policing Cyberspace*, N.J. L.J., Apr. 8, 1996, at 1).

36. Withers, *supra* note 32.

37. *See, e.g.* Escano & Partners, legal disclaimer, http://www.escanolaw.com/index.php?Vb80bb774=10legal (last accessed on Feb. 25, 2004). The website of Escano & Partners provides the following disclaimer:

> The contents of this site, text and images included, are provided for information purposes only and are appropriate for use only in the Republic of the Philippines. We have endeavored to comply with all legal and ethical requirements in making this site available. Nothing herein contained shall be construed as soliciting, advertising or rendering legal and professional services.
>
> The hiring of a lawyer is an important decision. Thus, it should not be based solely upon written information about the qualification and expertise of any of our lawyers. Further, your accessing this site does not make you our client. No attorney-client relationship is created thereby, and all communication coming from you through or in connection with this site is not considered confidential.

websites with these disclaimers. But a disclaimer might not seem effective in a case where a potential client does sue for ethical misconduct on the part of the lawyer, if the former believes that an effective legal relationship had in fact been formed.[38]

D. Ethical implications of Lawyer to Layperson Communication in Cyberspace

It must be recognized that communications over the Internet, especially those that create the possibility of the formation of attorney-client relationships, would implicate most of the ethical duties of an attorney, i.e. prohibitions against the unauthorized practice of law, competence of the attorney; confidentiality and conflict of interest issues. This is not to say that the presence of law practices online is *per se* unethical. In fact, having an online presence may improve the availability of legal services to those who would not readily have access to competent lawyers. It is necessary, however, to determine the ethical implications this brings, is so that it can be utilized without creating risks of malpractice. Technology should work for the benefit of the public and the enhancement of the profession, and the profession should not be so inflexible as to be resistant to change or developments. The following discussion will look into the possible ethical issues that may arise from lawyer to layperson communication online.

38. Lanctot, *supra* note 8, at 160-61 (citing Maureen Castellano, *Policing Cyberspace*, N.J.L.J., Apr. 8, 1996, at 1).

1. Unauthorized Practice of Law

Clearly, the rules governing legal ethics prohibits the unauthorized practice of law.[39] Websites create a venue for people, whether or not they are licensed to practice law, to exhibit themselves as competent to give legal advice, where those who surf the internet are left unsuspecting of their lack of competence and capacity. As the qualification and capacity of the person with whom one is corresponding with online is not readily decipherable, it is easy for anyone to pass themselves off as licensed professionals. Given the vastness of the World Wide Web, it seems difficult to actually monitor the existence of all websites, making it difficult for one to distinguish the website of one who is licensed from those who are not.

It is thus pertinent to acknowledge the growing popularity of online communications so as to create standards and rules to prevent abuse in its usage. The proliferation of the websites of lawyers and law firms must therefore be regulated in some way, whereby indications of professional qualifications should therefore be made a requirement; otherwise the popularity of online legal communications may encourage unauthorized practitioners to ride the bandwagon.

2. Competence

Regardless of the fora by which a lawyer established a relationship with his client, he owes a duty of competence to those he advices and represents.[40] Accordingly, lawyers must be cautious in giving legal advice online, especially in those areas they may not have an expertise on. Because there seems to be no concrete relationship, it may seem that lawyers can just give their "two cent's worth," but they must realize that they owe a duty of competence to all clients. The lawyer owes entire devotion to the interest of his client and is bound by the highest standards of honesty, good faith, fairness, integrity and fidelity.[41]

A lawyer should strive for proficiency in his practice and should only accept employment in matters in which he is or can become competent after reasonable preparation.[42] This goes beyond the formal qualification of the lawyer to practice law, extending to the sufficiency of the lawyer's qualifications

39. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9. "A lawyer shall not directly or indirectly assist in the unauthorized practice of law."

40. *Id.*, Canon 15, Rule 15.05, which states: "A lawyer, when advising his client, shall give a candid and honest opinion on the merits and probable results of the client's case, neither overstating nor understating the prospects of the case."

41. *Id.*

42. ERNESTO L. PINEDA, LEGAL AND JUDICIAL ETHICS 229 (1999 ed.).

to deal with the matter in question and includes knowledge and skill and the ability to use them effectively in the interest of the client.[43]

The legal profession demands of a lawyer that degree of vigilance and attention expected of a good father of a family[44] and should adopt "the norm of practice expected of men of good intentions.[45]

3. Conflict of Interest Inssues

Notwithstanding the fact that the creation of attorney-client relationships online may not be readily ascertainable, it is necessary to avoid any badge of impropriety at the onset. To guard against this possibility, before lawyers give advice, they must determine the identity of their "client." Clearly, it is the lawyer's duty to avoid any possibility of conflict or unfair dealing.[46] The ease of response and exchange on the Internet may create laxity on the part of the lawyers to first determine whether the person they are communicating with would not pose a potential conflict of interest with a present or past client.

If it is found that an attorney-client relationship is formed, the same rules on conflict of interest would apply, regardless of the extent of the relationship. One time exchanges over non-traditional media such as on the radio, television, newspaper or Internet would fall under the definition of attorney-client relationships, but in reality are not as comprehensive in scope as traditional retainers. The effect of applying the same rules would be that one simple exchange would already preclude the attorney from accepting the opposite party's retainer in the same litigation regardless of what information was received by him from his first client.[47] It might seem impractical, therefore, to require the determination of all possible conflicts of interest in these cases, especially when the amount of information given through the online exchange is not substantial enough as to create any risks of prejudicial conduct or unfair dealing.

43. *Id.* (citing FRANCIS BENNION, PROFESSIONAL ETHICS: THE CONSULTANT PROFESSIONS AND THEIR CODE 5 (1969); Report of IBP Committee, p. 98).

44. Philippine Bank of Commerce v. Aruego, 102 SCRA 530 (1981)

45. Blaza v. CA, 162 SCRA 461 (1988).

46. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 15, Rule 15.01. "A lawyer in conferring with a prospective client, shall ascertain as soon as practicable whether the matter would involve a conflict with another client or his own interest, and if so, shall forthwith inform the prospective client."

47. PINEDA, *supra* note 41, at 201.

4. Confidentiality

One of the most pressing issues posed by online communication is that of confidentiality. This duty is provided for by ethical codes of conduct[48] as well as in jurisprudence,[49] subject to certain exceptions.[50] The duty to maintain inviolate the client's confidences and secrets being so comprehensive that it even outlasts the lawyer's employment.[51] The duty operates regardless of the venue where the attorney-client relationship formed, and even applies to mere prospective clients.[52]

While the public posting of lawyer to layperson communication is highly controversial, it may be deemed a waiver on the part of the client having sufficient knowledge of such posting.[53] However, in the absence of any waiver, there would necessarily be a violation of the duty, such as when an online exchange is suddenly posted or released to third parties. Although in some cases, even when the communications are not intended to be made public, it must be recognized, that the degree of security of online communications in cyberspace has been subject to question and must be exercised with even greater caution than ordinary communications.[54]

48. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 15, Rule 15.02. "A lawyer shall be bound by the rule on privileged communication in respect of matters disclosed to him by a prospective client." Canon 21 provides: "A lawyer shall preserve the confidences of his client even after the attorney-client relation is terminated."

49. *See* Uy Chico v. Union Life Assurance Society, 29 Phil. 163 (1915).

50. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 21, Rule 21.01.

> A lawyer shall not reveal the confidences or secrets of his client except:
>
> a) When authorized by the client after acquainting him of the consequences of the disclosure;
>
> b) When required by law;
>
> c) When necessary to collect his fees or to defend himself, his employees, or associates or by judicial action.

51. PINEDA, *supra* note 41, at 191.

52. *In re* Hamilton, 24 Phil. 100 (1913); Jones v. Harding, 9 Phil. 279 (1907); Uy Chico v. Union Life Insurance Co., 29 Phil. 163 (1915).

53. *See* CODE OF PROFESSIONAL RESPONSIBILITY, Canon 21, Rule 21.01.

54. Lisa A. Dolak, *Clients, Their Confidences, and Internet Communications*, ABA TORTS AND INSURANCE LAW JOURNAL 829 (2001).

While interception of electronic data is deemed a criminal offense under the E-Commerce Law,[55] the practice in some jurisdictions in the United States is to impose additional safeguards for online communications, such as requiring encryption or other security devices, and warning clients of possible incursions into their confidentiality in these exchanges.[56] In this light, it seems that the duty of confidentiality online is broadened as the attorney who communicates with non-lawyers will have an added duty to ascertain there are safeguards which effectively minimize the risk that confidential information might be disclosed through hacking or other similar means.[57]

E. The Need for Special Rules Governing Online Communications

The vagueness in characterizing online communications, and the uncertainty of its consequences may dissuade lawyers from taking full advantage of the Internet as a medium for communication with clients or potential clients. Based on the foregoing discussion, several points are exposed regarding online exchanges between lawyers and laypersons. First, there exists no specific rules governing communications and exchanges over non-traditional media, although the general sentiment in the United States has been to veer it away from the giving of specific legal advice so as not to amount to an attorney-client relationship. The courts in the Philippines, however, have not made any categorical pronouncements regarding this matter. Second, the determination of whether or not these communications may amount to the formation of an attorney-client relationship all remains on the theoretical level, where all one has for analysis is the broad definition of an attorney-client relationship. As there has been no test case to prove or disprove the existence of such relationships from these exchanges, most websites are treading on untested waters. Third, whether or not attorney-client relationships are formed through one time exchanges or communications online or through other non-traditional media, as there is a dearth in rules or standards that would govern the ethical implications of this conduct one way or the other. In the absence of specific rules to govern lawyer to layperson communication online, lawyers are left only with traditional rules whose application to modern technologies can only leave lawyers guessing as to what would constitute proper conduct in cyberspace.

Admittedly, it is difficult to make new technologies adapt to rules that were never meant to govern them. It is high time that parameters or policies be formulated, specifically addressing the expansion of the legal practice into more modern media. In her article, Professor Lanctot espouses the view that

55. Republic Act no. 8792, Electronic Commerce Act of 2000 § 33 (a).

56. Westermeier, *supra* note 35, at 46.

57. *Id.* (citing Ethics Comm. of the N.C. St. Bar Ass'n, RPC Op. 215).

a balance must be struck between nurturing the nascent potential of online communications, while at the same time protecting the public against negligent advice and unethical practices.[58]

Looking to the future, it may seem possible to recognize full-fledged attorney-client relationships created online, by merely reinforcing duties that may not be as readily apparent in this new media. However in the case of other lawyers who wish to have websites as a mere incident to their profession, where they are only willing to provide brief legal assistance in cyberspace but not to undertake further responsibilities, there is a need for defining and recognizing a more limited relationship.[59] Otherwise, lawyers will be less and less inclined to take advantage of new technologies. Perhaps, pending any conclusive determination that all instances of online advice-giving amounts to an attorney-client relationship, there is room to explore the possibility of recognizing professional arrangements that is more limited in character, such as those involving mere exchanges of question and answer.[60]

This issue of limited representation was introduced in recommendations developed and adopted at the Conference on the Delivery of Legal Services to Low-Income Persons, held at Fordham University Law School in December 1998.[61] The proposals in such conference included limited legal assistance, where it was noted that "[r]ecent experiments in the delivery of legal services – some but not all driven by technology – suggest the possibility of significant increases in access to services, provided the rules governing the practice of law are not interpreted to inappropriately narrow the delivery and evolution of services."[62] The recommendation suggests that the lawyer providing such service would be bound by the traditional duties of confidentiality, competence, and loyalty, but without having to give comprehensive legal advice, nor be bound by exclusive representation provided disclosures of client confidences are guarded against.[63]

It has been said that rules on legal ethics are slow to change in the face of the rapid development of technologies. It is thus very disparaging for lawyers to tread into these waters where the consequences are uncertain. Very few

58. Lanctot, *supra* note 8 , at 251.

59. *Id.* at 253.

60. *Id.* at 251 (citing Bruce A. Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1729 (1999)).

61. *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751 (1999).

62. *Id.* Rec. 48.

63. *Id.* Rec. 60 (a).

are bold enough to venture into the unchartered field of a legal practice online, and with the present rules, they may already have stepped over traditional rules of legal ethics. It is unfortunate that no rules have been developed, for there is a wealth of possibility and opportunity awaiting which may give lawyers the chance to improve their public service and keep abreast with the times.

III. TRANSPLANTING AN UPDATED *Bates*: LAWYER ADVERTISING IN THE PHILIPPINES

A. Survey of US Jurisprudence on Traditional Lawyer Advertising

Advertising for legal services was generally prohibited until 1977 when the US Supreme Court, speaking through Justice Blackmun in the seminal decision of *Bates v. State Bar of Arizona*,[64] classified lawyer advertising as commercial speech, and thus, cannot be entirely prohibited. Since then, lawyer advertising has flourished, and has prompted the American Bar Association to propose a Model Rules of Professional Conduct which include rules on the regulation of lawyer advertising.

In the *Bates* decision, the US Court gave restricted First Amendment protection to lawyer advertising as a form of commercial speech.[65] Commercial speech, as opposed to political speech, can be regulated and restricted if the speech is either false, misleading or promotes an illegal activity.[66] However, where commercial speech is not false, misleading nor promotes an illegal activity, government restriction is only allowed under "intermediate scrutiny." Thus, government restriction on commercial speech must be narrowly drawn, and further a substantial state interest.[67] In *Bates*, the Court while allowing lawyer advertising, stated that the full protection of the First Amendment cannot be given to it as advertising that was false, deceptive and misleading could be prohibited.[68]

The central issue in this case was whether a state could prohibit an attorney from listing the fees the attorney charged for routine legal services. The Court debunked seven main arguments of the State Bar of Arizona in upholding the right of an attorney to exercise its right to commercial speech. These

64. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

65. *Id.* at 364.

66. Friedmand v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979).

67. Central Hudson Gas & Electric v. Public Service Comm'n of NY, 447 U.S. 557, 100 S.Ct. 2343 (1980).

68. *Bates*, 433 U.S. at 366.

arguments will be discussed in more detail later on under the proponents' analysis.

Prior to *Bates*, the case of *Virginia Pharmacy Board v. Virginia Consumer Council*[69] can be said to have paved the way towards the opening of doors to lawyer advertising although the profession involved in this case was that of pharmacy. In this case, a challenge was made against a Virginia statute which declared a pharmacist guilty of unprofessional conduct if he advertised prescription drug prices. The pharmacist would then be subject to a monetary penalty or the suspension or revocation of his license. The statute thus effectively prevented the advertising of prescription drug price information. The Court then held that such form of advertising is commercial speech and thus entitled to restricted First Amendment protection. The decision in *Bates* may be said to have flown *a fortiori* from this decision.

Five years after *Bates*, the Court again discussed its decision in the case of *In re RMJ*,[70] and held that a state does not have to treat lawyer advertising in the same way as it treats other forms of commercial advertising. Quoting from *Bates*, the Court noted that "the public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling."[71] The Court stated that the regulation of lawyer advertising is allowable where the "form or method of advertising has in fact been deceptive" and that "claims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction."[72]

The Court confronted the issue of in-person solicitation directly in *Ohralik v. Ohio State Bar Association*.[73] In that case the attorney went to the hospital to see if a recent accident victim would consider employing him as her lawyer in the matter. The Court stated that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." The Court then upheld the disciplinary action by the state bar against the attorney for his actions. The implication of this case in the context of *Bates* decision is that while in-person solicitation is absolutely prohibited, written advertisements are permissible although subject to certain limitations.

69. 425 U.S. 748 (1976).

70. *In re* R.M.J. 455 U.S. 191, 199-202 (1982).

71. *Id.*

72. *Id.*

73. Ohralik v. Ohio State Bar Association, 436 U.S. 477 (1978).

In 1995, in *Florida Bar v. Went for It*,[74] the Court also allowed restrictions on direct-mail legal advertising. The Florida Bar had conducted a survey of Florida public views regarding direct-mail solicitation occurring immediately after accidents. The survey revealed that the Florida public viewed "...direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy..."[75] As a result of this survey, Florida adopted a rule prohibiting targeted mail solicitation for 30 days after an accident or disaster. The state claimed that the rule advanced the interest of protecting its citizens from an invasion of privacy. The Supreme Court relied on the findings of the survey as providing a substantial state interest which justified the restriction on the attorney's commercial speech.

B. Internet Advertising in the United States

The advent of technological advances such as the Internet has broadened the field of application of lawyer advertising, logically extending itself to the ubiquitous world of the World Wide Web. Although the Model Rules of Professional Conduct, promulgated by the American Bar Association, do not contain any specific reference to Internet advertising, there is no question that Internet presence, e.g. home pages of law firms, lawyers, etc. likewise falls under the category of advertising and is thus entitled to commercial speech protection, the test being whether or not it proposes a commercial transaction.[76] Consequently, it is reasonable to assume that traditional advertising rules as found in each state's rules of professional conduct are likewise applicable to Internet advertising. It is interesting to note that only 2 out of 50 states, Texas and Minnesota, have issued specific rules governing Internet advertising while other states have filled this gap by making traditional bar rules on lawyer advertisement applicable to web-based advertising.

As a general rule, there is advertising when written communications made by the attorney makes a solicitation aimed at making a profit or drumming up new business. This includes instances where the advertisement provides accurate, free, information beneficial to a segment of the population.[77]

74. Florida Bar v. Went For It, 115 S.Ct. 2371 (1995).

75. *Id.*

76. *See* Ohralik v. Ohio State Bar Association, 436 U.S. 477 (1978) (noting that the test to recognize distinction between commercial speech and other varieties of speech, is whether or not the speech in question proposes a commercial transaction).

77. T.K. Read, Pushing the Advertising Envelope: Building Billboards In the Sky Along the Information Superhighway *available at*

The Supreme Court ruling in *Zauderer v. Office of Disciplinary Counsel*[78] in upholding the use of disclaimers may be applied by law practitioners advertising on the Web to attempt and keep their sites in compliance with regular rules on advertising in this pre-Web regulation era. Disclaimers can be used to notify prospective online clients that the free information and forms provided at a certain website should not be substituted for sound legal advice by an authorized attorney on the particulars of their legal problems. Bold, large font warnings may label a site an "advertisement" and large letter type may state the jurisdictional limitations of the firm's ability to practice law.

Under the State Bar of Texas rules on Internet Advertising[79] for instance, publications on the Internet such as homepages are considered to be public media advertisements and thus, subject to the provisions of Part 7 of the Texas Disciplinary Rules of Professional Conduct. Unless the homepage is exempt from filing requirements under Rule 7.07 (d),[80] the State Bar of Texas requires

http://www.computerbar.org/netethics/read.htm (1996) (citing Zauderer v. Office Of Disciplinary Counsel, 105 S.Ct. 2265 (1985)).

78. Zauderer v. Office Of Disciplinary Counsel, 105 S.Ct. 2265 (1985).

79. *See* State Bar of Texas Advertising Review Committee Interpretative Comments on Internet Advertising *at* http://www.texasbar.com/globals/tbj/2003/july/comment17.pdf (last accessed on Feb. 24, 2004). The Texas Disciplinary Rules of Professional Conduct is patterned after the American Bar Association Model Rules on Professional Conduct.

80. Rule 7.07 which provides that: x x x The filing requirements of paragraphs (a) and (b) do not extend to any of the following materials:

(1) an advertisement in the public media that contains only part or all of the following information, provided the information is not false or misleading:

(i) the name of the lawyer or firm and lawyers associated with the firm, with office, addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as attorney, lawyer, law office, or firm;

(ii) the fields of law in which the lawyer or firm advertises specialization and the statements required by Rule 7.04 (a) through (c);

(iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) technical and professional licenses granted by this state and other recognized licensing authorities;

(v) foreign language ability;

(vi) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);

(vii) identification of prepaid or group legal service plans in which the lawyer participates;

(viii) the acceptance or nonacceptance of credit cards;

(ix) any fee for initial consultation and fee schedule;

(x) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xi) any disclosure or statement required by these rules; and

(xii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) a newsletter mailed only to:

(i) existing or former clients;

(ii) other lawyers or professionals; and

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

that a lawyer or firm publishing a homepage on the Internet must file a hard copy, including the URL address of: 1) the first screen which is sent to the computer an accessing person when the home page location (URL) is accessed; and 2) any material changes in format that vary from the first screen of the original home page.

Although generally, information beyond the first screen should not be submitted for pre-approval with the State Bar Advertising Review Committee, additional information however, even beyond the first screen, that is primarily concerned with the solicitation of prospective clients must comply with Part 7 of the Rules of Professional Conduct, including the filing requirements under Rule 7.07. Examples of information not primarily concerned with the solicitation of prospective clients are newsletters, legal articles, attorney biographical information, legal development and events, attorney and staff recruiting or editorial opinions.

Moreover, even information that may not be considered primarily concerned with solicitation of prospective clients must still comply with the applicable provisions of Part 7 of the Rules. For instance, attorney biographical information must contain appropriate statements and/or disclaimers as required by 7.04 (a-c).[81] The first screen of the homepage must

(6) a written solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective clients specific existing legal problem of which the lawyer is aware;

(7) a written solicitation communication if the lawyers use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a written solicitation communication that is requested by the prospective client.

81. Rule 7.04 (a-c) which provides that:

(a) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation Patents, Patent Attorney, or Patent Lawyer, or any combination of those terms. A lawyer engaged in the trademark practice may use the designation Trademark, Trademark Attorney, or Trademark Lawyer, or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in

Intellectual Property Law, Patent, Trademark, Copyright Law and Unfair Competition, or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Article 320d, Revised Statutes, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement;

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess specialcompetence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, Board Certified, [area of specialization] Texas Board of Legal Specialization; and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, Certified [area of specialization] [name of certifying organization], but such statements may be made only if that organization has been accredited by the Texas Board of Legal specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that

also disclose the geographic location by city or town of the lawyer's or firm's principal office.

The most immediate and apparent problem lies in the filing requirement when it comes to web-based advertisements due to the fluid nature of the technology. For one, most commercial websites are now updated on a daily or weekly basis. Consequently, evidence of ethical violations may not be available by the time an objection against them is raised. Thus, the nature of web-based advertising may require at the very least, a much stricter enforcement of present rules or an entirely new set of regulations to cover a novel medium. Second, considering the capabilities of the Internet, it would be well to note that web-based lawyer advertising may take on the characteristics of in-person solicitation which has already been categorically denied by the Supreme Court[82] as opposed to arms-length, written advertising which is permissible but subject to certain restrictions. An urgent need for a new set of rules is thus created.

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are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall state with respect to each area advertised in which the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, Not Certified by the Texas Board of Legal Specialization. However, if an area of law so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in its area.

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language set forth in paragraph (b) so as to be easily seen or understood by an ordinary consumer.

82. *See* Ohralik v. Ohio State Bar Assn, 436 U.S. 477 (1978) where the US Supreme Court has categorically banned all in-person solicitation. Additionally, see Shapero v. Kentucky Bar Ass'n, supra, wherein the Court compares written advertising to face-to-face solicitation. 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

C. Philippine Rules and Jurisprudence on Advertising

In contrast to the American setting, Philippine law entirely prohibits any form of advertisement and solicitation subject to a few exceptions. Solicitation of cases for the purpose of gain, either personally or through paid agents or brokers makes the act malpractice.[83] Under the Code of Professional Responsibility, "a lawyer shall not do or permit to be done any act designed primarily to solicit legal business." The rule covers instances where the lawyer recommends employment of himself or any of his associates to a layman who has not sought his advice regarding such.

Philippine jurisprudence traces the roots of the prohibition back to the practices of the Inns of Court of England. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly.[84] Thus, the primary reason behind the prohibition on advertising was that lawyering then was primarily a form of public service in which pecuniary rewards is but a mere incident. This attitude evolved into a recognized custom and tradition of the legal profession which was later brought to the United States and from that country to the Philippines.[85] Professing adherence to this belief, Philippine courts have consistently held that a lawyer cannot advertise his talent as a shopkeeper advertises his wares.[86]

In *In re Tagorda*,[87] the respondent attorney, Luis Tagorda, was suspended from the practice of law for the period of one month for advertising his services and soliciting work from the public by writing several circular letters. The Court reiterated the pronouncements made in *Tagorda* in the case of *Director of Religious Affairs v. Bayot*.[88] In this case, the respondent attorney published an advertisement in a newspaper regarding the availability of his legal services. The Court held that:

> It is highly unethical for an attorney to advertise his talents or skill as a merchant advertises his wares. Law is a profession and not a trade. The lawyer degrades himself and his profession who stoops to and adopts the practices of mercantilism by advertising his services or offering them to the public. As a member of the

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83. RUBEN E. AGPALO, LEGAL AND JUDICIAL ETHICS 107 (2000) (citing RULES OF COURT, Rule 138 § 27) [hereinafter AGPALO, LEGAL AND JUDICIAL ETHICS].

84. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), (citing H. Drinker, Legal Ethics 5, 210-1 (1953)).

85. *Id.* at 108 (noting that the Canons of the American Bar were adopted by the Philippine Bar Association in 1917 and 1946).

86. *In re* Tagorda, 53 Phil. 37 (1927); Director of Religious Affairs v. Bayot, 74 Phil 579 (1944), Ulep v. Legal Clinic, 223 SCRA 478 (1993).

87. *In re Tagorda*, 53 Phil. 37.

88. 74 Phil. 579 (1944).

> bar, he defiles the temple of justice with mercenary activities as the money-changers of old defiled the temple of Jehovah. The most worthy and effective advertisement possible, even for a young lawyer... is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced but must be the outcome of character and conduct.[89]

The lawyer was then reprimanded after his appeal to leniency was considered by the Court.

In 1993, the Philippine Supreme Court rejected the application of the *Bates* ruling in the case of *Ulep v. Legal Clinic, Inc.*[90] In this case, Nogales, a licensed attorney, opened a Legal Clinic offering legal support services through paralegals with the use of modern computers and electronic machines. Nogales argued that one, the clinic is not engaged in the practice of law, and two, even assuming that these services constituted the practice of law, the fact of advertisement of these services should be allowed in the light of the decision of the US Supreme Court in *Bates*. After inviting a number of bar associations to serve as *amicus curiae* on the matter, the Court held that the Legal Clinic was engaged in an unauthorized practice of law, being staffed by paralegals who are not members of the bar and therefore, the advertisement of its services was proscribed. On the issue of advertisement, the Court further held that:

> [T]he standards of the legal profession condemn the lawyer's advertisement of his talents. A lawyer cannot, without violating the ethics of his profession, advertise his talents or skills as in a manner similar to a merchant advertising his goods. The proscription against advertising of legal services or solicitation of legal business rests on the fundamental postulate that the practice of law is a profession.[91]

Moreover, the Court held that the *Bates* decision is not applicable either because the disciplinary rule involved in said case explicitly allows a lawyer, as an exception to the prohibition against advertisements by lawyers, to publish a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services. No such exception is provided for, expressly or impliedly whether in the former Canons of Professional Ethics or in the present Code of Professional Responsibility. Therefore, it cannot be made to apply in the case at bar.

The Court, however, clearly stated that lawyer advertising is not *malum in se* and not all types are prohibited. It likewise enumerated few exceptions to the improper advertising rule. The first exception is publication in reputable

89. *Id.* at 581

90. Ulep v. Legal Clinic, 223 SCRA 478 (1993).

91. *Id.* at 489.

law lists published primarily for that purpose. The information must not be misleading and is limited to certain data, e.g. lawyer's name and address, address, telephone numbers, date of admission to the bar, schools attended with dates of graduation, degrees and other educational distinction, legal authorships, etc. Moreover, the law list must not be a mere supplemental feature to a paper, magazine or trade journal which is published principally for other reasons.[92] The second exception is the use of an ordinary simple professional card, stating only the lawyer's name, the name of the law firm address and telephone number.[93] This is what is sometimes known under American rules as "tombstone advertisement."[94] The third exception is addressed to lawyers engaged in particular branch of law and who wishes to make their availability to act as an associate of other lawyers in that specific branch of legal service known.[95] Thus, he can publish a brief and dignified announcement in a local legal journal of his availability. The announcement must not be sent to persons who are not lawyers and it cannot be published in any publication other than a law list or a local legal journal.

Other exceptions include publication in a law journal on a topic of general legal interest and the seeking of appointment to public office which can only be filled by a lawyer.[96]

The other reason behind the improper advertising rule is that it would encourage competition among lawyers and would thus result to needless litigations and incite to strife otherwise peaceful citizens. Interestingly, this is one of the reasons proferred by respondent State Bar of Arizona in the *Bates* case. The US Supreme Court struck down this argument by stating that although advertising might increase the use of the judicial machinery, the notion that it is always better for a person to suffer a wrong silently than to redress it by legal act is simply unacceptable.[97]

D. Treading a Thin Line: Internet Advertising in the Philippines

Despite the ban on lawyer advertising under Philippine law, quite a handful, if not most, of Philippine law firms maintain presence in the Internet through

92. AGPALO, LEGAL AND JUDICIAL ETHICS, *supra* note 83, at 111.

93. *Id.* at 112.

94. Commentaries on the Texas Rules, *supra* note 79.

95. AGPALO, LEGAL AND JUDICIAL ETHICS, *supra* note 83, at 112.

96. *Id.* at 111-13.

97. *Bates*, 433 U.S. at 376.

the World Wide Web.[98] These websites or homepages are no different from those of their American counterparts. A site usually includes information about the law firm, its roster of lawyers and specific biographical information, recruiting profile, areas of practice and specialization, geographical location and contact information. The question now posed is whether or not these sites fall under advertising, which would, if they are so, be proscribed under present Philippine law and jurisprudence.

There is no specific definition of advertising under Philippine jurisprudence although it may be considered as any form of professional touting in order to attract or solicit legal business. Under the ruling in *Ohralik*, any speech which proposes a commercial transaction is commercial speech. Advertising is reasonably considered as included within the concept of commercial speech. The fact that the information provided in websites of Philippine law firms is the same kind of information contained in websites of American law firms in whose jurisdiction advertising is allowed albeit regulated results to the necessary assumption that these websites are a form of implied legal solicitation which is prohibited under Philippine law. On the other hand, one may proffer the argument that these websites may be akin to handing out professional business cards which is admittedly an exception to the prohibition. However, in considering this argument, one must take into consideration the nature of the World Wide Web. It is not a static medium but rather a medium that embodies all the capabilities of print, media and broadcast. The information it can convey is not merely limited to those which are found in a professional business card. Since a prohibition exists and there is a public policy to be protected, any doubt concerning this rule would have to be resolved towards its prohibition and not its allowance. Even disclaimers as those that can be found in the website of Escano Law cannot be construed as changing the character of the website as implied solicitation and advertising. However, as there is no definitive rule on this kind of practice, the true status of these websites in the light of Philippine legal ethics rules remains to be seen.

The problem with web-based advertising is that as one moves along the continuum, adding information to websites such as a lawyer or firm's name, specialties and inducements to the reader, the sites begin to take on the appearance of legal advertising with which people are already familiar. According to *Zauderer,* even legal solicitation for profit which includes free beneficial information is advertising.[99] Under the *Zauderer* reasoning, informative websites which contain any kind of solicitation are advertising. If this reasoning is followed in this jurisdiction, the website-cum-online law

98. These law offices include Sycip, Salazar, Hernandez and Gatmaitan, ACCRA Law Office, Ponce, Enrile, Manalastas and Reyes, Quisumbing Torres, Zambrano and Gruba, Poblador, Bautista and Bucoy.

99. *Zauderer,* 105 S.Ct., 2274-75.

library maintained by the law firm of Chan Robles[100] would be considered advertising and must necessarily fall under the prohibition since although it is a repository of Philippine laws, rules and jurisprudence, the website also consists of a link to the official website of its law office. The offer of contact information, including e-mail and telephone numbers, may be considered as an implied form of solicitation. Moreover, the mere use of the law firm name as the name of the online library already constitutes advertising of its services although to date there has been no Court pronouncement yet as to its legality.

Although the sprouting of websites of Philippine law firms may be traced to the explicit lack of prohibition under the Code of Professional Responsibility, it is not difficult to surmise that the present rules governing traditional advertising should likewise govern Internet advertising as well. In that case therefore, the present practice of maintaining websites on the Internet is prohibited and must be stopped altogether until and unless an amendment of the Code is made.

E. The Need to Allow Lawyer Advertising

This note argues that lawyer advertising must be allowed and regulated in this jurisdiction. Moreover, it is also argued that the Code of Professional Responsibility must be amended in order to keep up with the needs of the modern times, and to recognize the novel medium of the Internet as an entirely new avenue in which the traditional rules on regulated advertising as they exist now in the United States cannot be simply transplanted here and applied.

In this analysis, the arguments raised in *Bates mutatis mutandis* would be used to justify the need to allow lawyer advertising, both traditional and web-based, in this jurisdiction. It is the view of the authors that the Philippine Supreme Court comitted a misappreciation in the case of *Ulep* when it held *Bates* inapplicable because although the challenge presented was whether or not a lawyer can advertise the prices by which he performs routine legal services, the decision did not merely talk about price advertising but advertising in general, it being given that price advertising necessarily includes the advertisement of one's law firm or office. Therefore, when the US Supreme Court afforded commercial speech protection to and thus allowed lawyer advertisement, it did not merely authorized state bars to allow lawyers or firms to advertise their prices, but it also authorized them to advertise their services in accordance with the rules promulgated by specific state bar associations. It can likewise be gleaned from the discussion on the arguments raised by respondent State Bar that the whole issue of the case was about

100. *See* Chan and Robles Law Library at http://www.chanrobles.com. It is considered the premier online law library in the Philippines.

lawyer advertising in general, and not merely price advertisement. Nowhere in the *Bates* case was it provided under the Disciplinary Rules of the State Bar of Arizona that price advertisement constituted an exception to lawyer advertisement,[101] as stated by the Supreme Court, through Justice Regalado in the *Ulep* decision. Consequently, there was no need for the Court's declaration that since no such exception was provided for, expressly or impliedly in our rules, then no exception can be made for respondent Nogales. The Court should have simply stated that Nogales' Legal Clinic was prohibited under present Code of Professional Responsibility and on the strength of existing jurisprudence. *Bates* cannot be applied without overturning previous decisions holding otherwise. Besides, the Court is not constrained to adopt a US decision, however persuasive, on account of Philippine sovereignty, and in the exercise of its sound discretion.

1. Adverse Effect on Professionalism

The primary reason behind the prohibition on lawyer advertising is the recognition that the practice of law is a first and foremost a form of public service – thereby acquiring for itself a certain sense of traditional dignity.[102] The proscription against advertising of legal services or solicitation of business aims to preserve that dignity. The U.S. Supreme Court debunked this argument by stating that while it is true that the profession is imbued with the spirit of public service, it recognized the fact that lawyers earn their livelihood at the bar. No client, even one of modest means, expects that his attorney's services will be rendered for free.

Moreover, members of other professions engage in advertising of their services but are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession.

The same is true in this jurisdiction. The current prohibition against advertisement only serves to allow lawyers to resort to surreptitious means to escape the technical proscription. Again, since the roots of the prohibition originate largely from tradition, it may be high time to consider allowing the advertisement of legal services in order to encourage the public, especially those of modest means, to seek competent counsel to assert their rights. The

101. The challenged Disciplinary Rules of the State Bar of Arizona state that:

> [A] lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

102. AGPALO, LEGAL AND JUDICIAL ETHICS, *supra* note 83, at 108.

public policy involved is much more valuable than merely keeping the traditional dignity of the profession. Besides, members of the legal profession are generally accorded higher respect in the Philippine jurisdiction than their American counterparts, due to the value that Filipino culture accords to lawyers in general.[103] Thus, it would make no difference if advertising is allowed or not. Again, the tilt of the balance must be made in favor of accessibility of competent legal services than anything else.

2. The Inherently Misleading Nature of Attorney Advertising

It is argued that advertising of legal services inevitably will be misleading because lawyering basically involves catering to unique problems that require individualized solutions, which information advertising would not be able to adequately convey.

This argument assumes that the public is ignorant enough to place full belief upon the incomplete information placed in the advertisement. People who seek legal services will not normally rely solely on the advertisement as this is merely a conduit by which they would eventually contact the lawyer concerned in person and get the complete information needed for his purposes.

3. The Adverse Effect on the Administration of Justice.

The second reason why advertising is not allowed in Philippine jurisdiction is to preserve the public policy of preventing unnecessary litigation and to incite otherwise peaceful citizens to strife. It was also argued that advertising may lead to assertion of fraudulent claims, corruption of public officials and attacks on marital stability and may likewise encourage lawyers to engage in overreaching, overcharging, under representation and misrepresentation.[104]

However, as the U.S. Court in *Bates* stated, although advertising might increase the use of the judicial machinery, the notion that it is always better for a person to suffer a wrong silently than to redress it by legal act is simply unacceptable.[105] A greater responsibility is therefore placed upon the different bar associations, especially the Integrated Bar of the Philippines, to draw up

103. This is one of the reasons why Filipino lawyers have the title of "Attorney" appended before their names, and is usually called by this designation as a sign of respect. American lawyers do not use the title "Attorney" before their names and are not called by such designation.

104. AGPALO, LEGAL AND JUDICIAL ETHICS, *supra* note 83, at 109 (citing *Advertising, Solicitation and Professional Duty to Make Legal Counsel Available*, 81 YALE L.J. 1184 (Note) (1972)).

105. *Bates*, 433 U.S. at 376.

measures to countenance any evil that regulated advertisement might cause to the general public.

Moreover, the Judiciary itself has the power to throw out unnecessary claims and prevent further clogging of its own dockets.

4. The Undesirable Economic Effects of Advertising.

It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. It is claimed likewise that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members.

These claims are at best doubtful. Advertising over the Internet is minimal in cost and reaches a wide audience. It will enable new lawyers to keep up with the established ones by not limiting the procurement of prospective clientele to small social circles interconnected with each other. This need is especially great in this jurisdiction where much of the client base and the competent lawyers are concentrated in the Greater Manila Area, thus depriving citizens in the province the opportunity to seek competent counsel. Advertising also does away with the necessary time required to build contacts and a sizeable social network. Thus, by leveling the playing field, competition is heightened and prices of legal services would decrease, thereby making the service widely available.

5. The Difficulties of Enforcement

Finally, as argued in the *Bates* case, the claim is that the overseeing of regulated advertising is much burdensome due to the sheer number of purveyors of legal services.

However, it is argued that as the US Supreme Court in *Bates,* most lawyers will behave as they always have, whether or not advertising is allowed. The presumption that must be accorded to all members of the Bar is that everyone will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.

> For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.[106]

106. *Id.* at 379.

IV. Conclusion

Based on the foregoing analysis of the ramifications of new technologies on the legal profession, it becomes apparent that the present state of rules governing the practice of law in the Philippines seems inadequate to address the burgeoning developments in cyberspace. Clearly, the Internet is both a novel and complicated medium, which creates an entirely new way to communicate and to conduct business. Rules should be formulated to address the peculiar circumstances that attend online communications; in order to encourage lawyers to take advantage of the benefits brought about by this medium. Further, there is a need for the lifting of the prohibition on lawyer advertisement, both traditional and web-based, and the concomitant crafting of specific rules to govern each medium. It is therefore urged, that the Supreme Court, as the chief regulator of the Philippine Bar,[107] sees to it that steps should be taken as promptly as possible in order to develop guidelines and rules so that both lawyers and the general public alike are protected and the legal profession would be up to date with the technology of the times.

107. PHIL. CONST. art. VIII, § 5 (5).