

The Ethics of Digital Marketing

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Introduction

Twenty years ago, most lawyers advertised in the Yellow Pages and perhaps in local newspapers. They had printed newsletters and business cards that they handed out at networking events. Fast forward to today. Lawyer marketing has not undergone an evolution – it's undergone a revolution. It's no wonder that so many lawyers get in trouble inadvertently – suddenly, they are trying to master Facebook, LinkedIn, Twitter, blogs, videos, website optimization and podcasts, to name only a few of the new marketing tools of the digital era. Mind you, there are a few bad apples flaunting the rules, but many more are simply haplessly trying to figure out what's proper and what's not. Like entering the maze at Villa Pisani in Italy, you can get really lost really fast. Herewith, a guiding hand.

Read the Rules

Not a complicated thought, but it is curious how many lawyers do not read the rules. For purposes of this article, we are going to talk about the ABA Model Rules of Professional Conduct because all but one state has adopted them, though not always verbatim. You'll have to look at your own state rules, but most share the common threads we'll discuss.

First, bone up on Rule 5.1-5.3. As an attorney, you have a duty to supervise junior lawyers and non-lawyers who work for you. There's no such thing as claiming that "Bob" or "Jill" had responsibility for the firm's website or social media posts – the buck stops with the

lawyer/supervisor of the person in question. Then read through Rules 7.1-7.5, which largely govern advertising by lawyers. Because they are so pivotal and because there were changes made in August of 2012, we include them with this article.

Rule 7.1 A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Minor changes were made to the Comment to this Rule, but not to the Rule itself, at the House of Delegates meeting on August 6, 2012.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

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Rule 7.3 below was materially changed by the House of Delegates, which passed Resolution 105B on August 6, 2012 so read the revised Rule carefully. The Comment was also revised so make sure to read that as well.

Rule 7.3 Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.5 Communication About Fields of Practice & Specialization

a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization

Rule 7.5 Firm Names And Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a

government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Social Media, Website, Blogs and Videos

The big three social media sites for most lawyers are Facebook, LinkedIn and Twitter. When we are on the speaking circuit, we often poll our audiences. It used to be striking how many lawyers were primarily involved with LinkedIn, but that has changed over time. Now we see lawyers using Facebook as much as LinkedIn and a rising (though still smaller) number of lawyers using Twitter. We have heard attorneys claim that social media usage does not constitute advertising. Rare is the case where we have seen social media use that is not effectively advertising – that is precisely why the lawyers are there. As the old saying goes, if you want to catch fish, you must fish where the fish are. And indeed, the “fish” sought by the lawyers participate in social media.

Gone are the days when many lawyers don’t have websites. In fact, many are now on their fourth or fifth generation website, having realized how essential a good website is to modern marketing.

Lawyer blogs continue to proliferate – not only do they showcase the expertise of their authors, but by updating site content all the time, they are invaluable to search engine optimization. A

2011 study by LexisNexis and Vizibility revealed that nine out of ten law firms either have a blog or intend to have a blog. The larger firms often have multiple blogs.

As for lawyer videos, they are exploding in number too. We're not sure how many there are, but since Google changed its algorithm to give greater weight to videos and as people have chosen to receive more information via videos, lawyers have noticed the cultural shift and moved their messages to video.

So what are the ethical violations we see most often in connection with social media?

1. Postings that are deceptive or misleading. You are not John Smith & Associates if you have no associates.
2. The inadvertent formation of an attorney/client relationship or an attorney/prospective client relationship. Particularly problematic are forms which invite a site visitor to tell you what their problem is without a very visible disclaimer. The lines are blurry on social media. As many experts have noted, it is best to take an initial online contact offline at the earliest possibility to avoid the possibility of unintentionally forming an attorney-client relationship.
3. Advertising a "speciality." In LinkedIn, make sure to leave the "specialization" field blank unless you are sure that what you list conforms to your state's ethical rules.
4. Citing case victories without a disclaimer noting that the outcome of cases are dependent on the specific facts of the case.

5. Making claims that cannot be substantiated, “the most respected personal injury law firm in Podunk.” Even a domain name can get you in trouble here:
“www.bestvirginiafamilylawyer.com” would clearly not pass muster.
6. Allowing someone to recommend you on LinkedIn using language that would not be permissible for you to use, e.g. “Jane is clearly the most respected elder law attorney in the County.” Remember, you have to approve LinkedIn recommendations before they become public so you must ensure that they conform with the ethics rules. If you “trade” recommendations with someone, you are likely in violation of Rule 7.2 because you have offered something of value in exchange for a recommendation.
7. Using copyrighted content without proper licensing – we used to see music on websites all the time, but now it tends to be photos and videos. There are technologies that scour the Internet looking for copyrighted material so don’t think you can fly under the radar.
8. Failing to note that something is a dramatization or that the person speaking is a non-lawyer.
9. Failing to supervise a subordinate who places something on the Internet in violation of the rules.
10. Appearing to offer services in a jurisdiction where you are not authorized to practice.
11. Having a ghost blogger write your blog – there is no hard and fast information on this, but most ethical experts seem to agree that it is misleading to put your name on something you didn’t write. However, a law **firm** blog where various lawyers contribute wouldn’t present any issues. Note that there are some who argue that ghost blogging

isn't unethical so long as the lawyer reviews and approves the blog post, but we are in the other camp!

How are you likeliest to get caught? By your competition. Attorneys are always turning in other attorneys to their state bars. Moreover, some state bars are trolling websites and discovering ethical violations on their own.

Daily Deal Sites

The question here is whether sites like Groupon and its brethren violate Rule 5.4 which prohibits fee sharing between lawyers and non-lawyers. So far, North Carolina, South Carolina and New York have said they do not violate the rules. Indiana has suggested that it probably does. Don't you love certainty?

The essence of the reasoning of the three states that approved the use of these sites is that there is no fee sharing involved – rather, the monies given to these sites constitutes a charge for advertising. Many states have not yet spoken on this issue and some seem a tad reluctant to give these “discount” sites their blessing. If you have an ethics hot line in your state, this is a good time to use it. And certainly continue to look for any recent ethics opinions that may have been issued.

Avvo, JustAnswer.com and Their Brethren

We certainly have a problem with a site that advertises that it dispenses free legal advice. Can a lawyer participate in such a site and assume that a disclaimer will provide protection? “Get Free Legal Advice from Top-Rated Lawyers” is the headline from JustAnswer.com – how can this

not be trouble? And some of the answers we've read were clearly legal advice as opposed to general legal information.

Avvo allows client testimonials – and won't allow lawyers to remove them. If the testimonials themselves would violate the professional rules, it creates at least a disturbing impression.

Clearly, an attorney may not encourage such a testimonial, but simply having them associated with the attorney seems problematic. Attorneys who claim their profile on Avvo effectively give up control of some of the information that may be posted on their profile.

Not long before we went to press, South Carolina issued Ethics Advisory Opinion 12-03, which dealt with the site www.justanswer.com. A lawyer had requested an advisory opinion about the ethics of participating in such a site. The site allows members of the public to post questions which will be answered by "experts" in all manner of professions. To ask a question, the user pays the site a fee. The lawyer who submitted the question to the bar asked if lawyers could participate in this or similar sites for compensation – would it be ethical?

The short answer from the bar was 'no'. S.C. said that the site's use of testimonials, endorsements, the word 'expert' and other misleading statements prohibited participation by lawyers. The obligatory disclaimer on the site that answers were not a substitute for legal advice was not controlling where so much of the language on the site was misleading. Ohio and D.C. have also spoken on this issue and both express extreme wariness of sites that invite users to ask specific legal questions fearing that the advice tendered will create an attorney-client relationship and that fees given to attorneys may violate Rule 1.8(f). No doubt more opinions will follow.

Conclusion

If you are looking for your own state's rules regarding marketing in the digital era, the ABA has done a terrific job of collecting the rules at

http://www.americanbar.org/groups/delivery_legal_services/resources/ad_rules.html. Double check to make sure that what you're looking at is current of course.

The ABA has done a lot of pioneering work through its Commission on Ethics 20/20 as we've reported in this article. The ABA has taken a moderate stance but done a good job of bringing the rules into this century and accounting for new technologies.

Remember that what you do online may well live forever. It has now become routine to archive someone else's blog or website with the click of a button. Once archived, removing anything unethical does not remove the evidence of the offense!

Digital marketing is without doubt the way of the future. Lawyers who do not embrace it are likely to see their practices shrivel. As each new facet of digital marketing emerges, it is important for lawyers to continue to educate themselves on the propriety of using the new tools and to seek ethical guidance from their state bars if they are uncertain about how to proceed. There is ethical quicksand in the world of digital marketing – the best way to avoid it is to stay informed and exercise caution.

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