

Ethical Web Marketing: A Key to the Rules

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There's an old joke about a person who arrives at a place of mass institutional confinement (a prison, an army barracks, the associate ranks of a large law firm, etc.). Towards the end of the day, someone yells out “31!” and everyone, except the newcomer, laughs. The new arrival asks his neighbor for an explanation, and is told that, because all the residents know and have heard the same jokes after a period of years, they have assigned each joke a number which they can simply recite rather than telling the joke again. The newcomer immediately decides to test out the system, calling out “27!” No one laughs. Puzzled, he turns to back to his neighbor, who explains: “You didn't tell it well.”

Discussions of legal ethics can be a lot like that – filled with references to numbers that cause some participants to nod sagely while others scratch their heads in befuddlement. Instead of jokes, however, the numbers used in such discussions usually correspond to particular provisions of ABA the Model Rules of Professional Conduct (the “Model Rules”). Having spent many years as a headscratcher myself, I sometimes worry that this numerical shorthand will scare off otherwise-interested participants from fully participating in discussions of genuinely interesting ethics issues. Accordingly, to facilitate our panel

presentation on ethical mistakes to be avoided in web marketing, I thought it useful to provide this “number key,” identifying some key rules and the issues surrounding them in order to encourage audience participation in our panel’s discussion.

I. Rules Relating to Advertising

A. Model Rule 7.1 -- Be Honest, Which Means Being Timely

Unsurprisingly (or perhaps surprisingly given the general image of lawyers among non-lawyers), it is generally recognized that lawyers should not engage in false advertising. Indeed, the rules relating to lawyer advertising begin with this premise. [ABA Model Rule of Professional Conduct 7.1](#), entitled “Communications Concerning a Lawyer’s Services,” provides:

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

In August 2010, the ABA Standing Committee on Ethics and Professional Responsibility issued [ABA Formal Opinion 10-457](#), entitled “Lawyer Websites” (“Opinion 10-457”). This opinion, which provides an important review of the ethical issues that can arise when attorneys use their websites to communicate with the public, begins with a discussion of Rule 7.1. Noting that lawyer websites typically contain biographical information about lawyers, contact information, and information about their law firms, the opinion finds that websites constitute a “communication about the lawyer or the lawyer’s services” and are therefore subject to the requirements of Rule 7.1. Opinion 10-457 at 1. Obviously, then, the statements contained on a website, like those in any other advertising material, must not be false or misleading.

Opinion 10-457 goes on to offer a much more important analysis based upon the special features of web advertising. Unlike a print or television advertisement that has a defined date of publication against which its claims can be tested, web advertising tends to be persistent – constantly accessible long as it remains posted. This means that web advertising must be updated to take account of material changes. Rule 7.1 provides that a communication may be deemed false if it “omits a fact necessary to make the statement considered as a whole not materially misleading.” As such, Opinion 10-457 notes that it is not enough for website information to be accurate *when posted*. Instead, “[t]o avoid misleading readers, this information should be updated on a regular basis.” Opinion 10-457 at 1.

Accordingly, under Rule 7.1, updating one’s web presence to make sure it provides correct and current information is not merely a marketing issue, but an ethics one. For example, a firm website that continues to provide information concerning a lawyer who has left the firm not only helps out a possible competitor, but could conceivably face an ethics complaint. Opinion 10-457 at 1, n. 5 (citing Missouri Bar Inf. Advisory Op. 20060005 (2006) (noting firm obligation to remove lawyer’s biographical information within reasonable time of departure). Lawyers must also make sure that legal information they provide is accurate and reflects current developments. As Opinion 10-457 notes, websites that provide legal information “assist the public in understanding the law and in identifying when and how to obtain legal services.” Opinion 10-457 at 2. The opinion goes on to note, however, that lawyers may offer only

“*accurate* legal information that does not materially mislead reasonable readers.” *Id.* (emphasis supplied).

B. Model Rules 7.2 and 7.3 – Means of Finding and Approaching Clients.

Having established that lawyers must advertise truthfully, the Model Rules also provide restrictions on the means of advertising that lawyers can employ.

[Model Rule 7.2](#) limits lawyers’ ability to have others advertise for them. While Rule 7.2(a) provides that lawyers may advertise subject to the ethical restrictions provided by other rules, Rule 7.2(b) forbids a lawyer from giving “anything of value to a person for recommending the lawyer’s services” with four exceptions: (1) a lawyer may pay normal advertising costs; (2) a lawyer may pay charges of a legal service plan or a not-for-profit or regulatory-approved lawyer referral service; (3) a lawyer may pay to acquire a law practice from another lawyer as provided elsewhere in the Model Rules; and (4) a lawyer can enter into referral agreements if they are both nonexclusive and disclosed to clients. Further ensuring that any advertisement takes place under appropriate supervision, Rule 7.2(c) provides that any lawyer advertisement must include the name and office address of at least one lawyer or law firm responsible for its content.

[Model Rule 7.3](#), in turn, places limits on personal solicitations of clients by lawyers. Rule 7.3(a) precludes a lawyer from using “in-person, live telephone or real-time electronic contact” to solicit paid professional employment from a prospective client unless the person contacted (i) is a lawyer or (ii) has an existing “family, close personal, or prior professional” relationship with the lawyer making the solicitation. Rule 7.3(b) similarly precludes soliciting professional employment, whether through direct contact or by written, recorded or electronic communications, if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer or if the solicitation involves coercion, duress or harassment. Rule 7.3(c) further requires advertising material to be prominently identified as such, while Rule 7.3(d) permits a lawyer to participate in a prepaid or group legal service plan that the lawyer doesn’t own or operate that uses direct in-person or telephone contacts to solicit memberships or subscriptions from people not known to need legal services.

These rules might seem to have little real significance to web marketing. A standard website doesn’t typically involve the paid referrals prohibited by Rule 7.2 or the direct individual contacts that are addressed by Rule 7.3. Moreover, some of the more obvious questions raised by current technology are being addressed by the ongoing work of the ABA Commission on Ethics 20/20, which is reexamining the model rules to address current questions. In June 2011, that commission released a draft [Initial Proposal regarding Lawyers’ Use of Technology and Client Development](#) (the “Ethics 20/20 Proposal”) that proposes changes to Model Rules 7.2 and 7.3 expressly addressing concerns about the interplay between these rules and internet advertising methods. For example, the Ethics 20/20 proposal would modify the comments to Rule 7.2 to confirm that it prohibits recommendations of a lawyer’s credentials, abilities, or qualities, and would therefore not prohibit things like internet-based pop-up advertisements or internet-based client lead services (like search engine optimizers) that do not provide such direct recommendations. Ethics 20/20 Proposal at 5. The Proposal also would add comments to Rule 7.3 confirming that websites are not “solicitations” governed by Rule 7.3 and that e-mail marketing campaigns do not involve “real-time contact” of the form prohibited by Rule 7.3(a). *Id.* at 7

These rules do provide important guidance, however, for other “Web 2.0” marketing strategies. While websites, for example, may not constitute direct solicitations governed by Rule 7.3, the use of Facebook, LinkedIn, or other social networking sites might come much closer to the line. Rule 7.3 is understood to protect against the abuse of potential clients, who are potentially overwhelmed by the circumstances giving rise to a potential need for legal services, by trained advocates in direct interpersonal encounters. *See, e.g.*, Ethics 20/20 Proposal at 7 (restating current Comment 1 to Rule 7.3). “Friending” the bereaved, only to importune them with posts to hire you before it is too late to protect their interests, is presumably no less problematic than paying in-person or telephonic visits to deliver the same message. Similarly, the advertising restrictions imposed by Rule 7.2 (and its state counterparts) may be implicated by the use of online recommendation services. The South Carolina Bar, for example, has suggested that a lawyer’s “claiming” of client and peer testimonials on an attorney rating website renders it the lawyer’s own advertising and subjects it to the regulations governing attorney advertising provided by Rule 7.2 and other sources. *See* [South Carolina Bar Ethics Advisory Opinion 09-10](#).

C. **Model Rule 7.4 and State Advertising Restrictions – Further Concerns About Content.**

A final set of advertising-specific rules places limits on what may be said concerning the lawyer’s own practice. [Model Rule 7.4](#) addresses communications concerning fields of practice and specialization. Model Rule 7.4(a) provides, in general, that a lawyer may communicate the particular fields in which the lawyer does or does not practice. Rules 7.4(b) and 7.4(c) permit patent and admiralty practitioners to use particular designations. Beyond that, Rule 7.4(d) precludes lawyers from stating or implying that they are certified as specialists unless they have in fact been certified by a state-approved or ABA-certified organization, which must be named in the lawyer’s communication. These limitations appear to be premised on concerns that further statements about specialization or certification may prove misleading. As Comment 1 to Rule 7.4 explains, while a lawyer is generally permitted to claim “specialization” in a field, “such communications are subject to the ‘false and misleading’ standard applied in Rule 7.1 to communications concerning a lawyer’s services.”

Far more sweeping restrictions on the content of lawyer advertisement are provided by State variants to the Model Rules. While States frequently alter the Model Rules in adopting them, nowhere is this more true than in the area of advertising, where States frequently expand upon the requirements imposed by the Model Rules. Indeed, the ABA’s Center for Professional Responsibility maintains an updated [listing of those differences](#).

Like the concern for “specialization” reflected in Rule 7.4, state revisions to the Model Rules tend to view with suspicion various methods of describing legal services. Client testimonials, for example, are frequently prohibited by modifications to Model Rules 7.1 or 7.2.. *See, e.g.*, [Fla. R. Prof. Conduct 4-7.2\(b\)\(1\)\(E\)](#) (prohibiting testimonials); [Indiana R. Prof. Conduct 7.1, Comment 2](#) (explaining that rule against “misleading” communication includes truthful statements that contain “a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person’s legal rights.”) Statements about the results achieved in prior cases can also be troublesome, with many states precluding reference to past results at least without prominent disclaimers as to the uniqueness of each case. *See, e.g.*, [Texas Discipl. R. Prof. Conduct 7.02\(a\)\(2\)](#) (restricting reference to past success unless

lawyer served as lead counsel, information relating to case is provided, and information relating to client's net recovery was provided); [Va. R. Prof. Conduct 7.2\(a\)\(3\)](#) (precluding advertisement of "specific or cumulative case results" without prominent disclaimers as to the uniqueness of factors involved). Comparisons to other lawyers are also frequently prohibited. See [Ala. R. Prof. Conduct 7.1\(c\)](#) (defining as false or misleading any advertisement that "compares the quality of the lawyer's services with the quality of other lawyers' services" except as permitted by Rule 7.4); [Ga. R. Prof. Conduct 7.1\(a\)\(3\)](#) (prohibiting comparisons "unless the comparison can be factually substantiated.")

Determining when a particular state's particular rules of professional conduct apply to you can be tricky. In general, [Model Rule 8.5](#) addresses the scope of any jurisdiction's disciplinary laws, providing that lawyers are subject to the disciplinary authority of any jurisdiction in which they are admitted to practice or offer to provide services (Model Rule 8.5(a)) and that, in general, the rules applied will be those "in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction" (Model Rule 8.5(b)). Determining "predominant effect," however, is not always a simple business. While some states exempt from their advertising restrictions advertisements disseminated elsewhere if not primarily intended for that State's audience (see, e.g., [Nev. R. Prof. Conduct 7.2\(a\)](#)), other states specifically provide that out of state lawyers must abide by their restrictions to any lawyer soliciting retention by their residents. See, e.g., [N.Y. R. Prof. Conduct 7.3\(i\)](#). At a minimum, therefore, a lawyer making use of the worldwide (and interstate) web to advertise should not only whether the advertisement is in compliance with the rules of both the jurisdiction where the lawyer practices but also whether it complies with the rules in place where the likely audience is located.

II. Rules Governing Client Relationships that Affect Web Advertising

While the foregoing rules expressly discuss advertising, other Model Rules that do not specifically address marketing are nevertheless relevant to lawyers' use of the web to promote their businesses. Three are of particular relevance: Rules 1.6 and 1.9, both of which address a lawyer's duty of confidentiality and Rule 1.18, which addresses duties to prospective clients.

A. Rules 1.6 and 1.9 – Your Past is Not Your Own

[Model Rule 1.6](#) and [Model Rule 1.9](#) both place important restrictions on what can be said about your clients. Rule 1.6(a) generally provides that a lawyer generally "shall not reveal information relating to the representation of a client unless the client gives informed consent." Rule 1.9(c)(2) then continues this duty not to reveal information relating to the representation after the representation ends.

Even in jurisdictions that do not expressly preclude lawyers from referencing their past successes or relevant experience, these rules impose restrictions upon lawyers' identification of their clients. Most lawyers know not to reveal privileged communications. These rules, however, extend more broadly to preclude disclosure of *any* "information relating to the representation of a client." That is generally understood to include nonprivileged information, including the very identity of the client. Rule 1.6, Comment 3. In addressing the need for attorney websites to contain accurate information, Opinion 10-457 specifically notes that, while "[s]pecific information that identifies current or former clients or the scope of their matters" may be disclosed, such disclosure requires the informed consent of current or former clients under Rules 1.6 and 1.9. Opinion 10-457 at 2. Nor does it matter that such information might be a matter of public record. To the contrary, Opinion 10-457 confirms that the prohibitions

imposed by this rule extent to “all information relating to the representation, whatever its source” including even “publicly available information.” Opinion 10-457 at 2 n.7. Nor do the rules contain an exception allowing lawyers to use client information in advertising. While Rule 1.6 contains an exception allowing lawyers to disclose information when “impliedly authorized” by the client, Opinion 10-457 explains that disclosure of client identifying information for advertising purposes does not fall within the exception because “the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.” *Id.* at 2.

Rules 1.6 and 1.9 do not, of course, preclude lawyers from identifying their clients in their web advertisements, or from making use of past client relationships to promote new ones. They do, however, prevent lawyers from doing so *unless the client provides informed consent*. Using your client’s name to get new business, without telling the client, is therefore not only a generally bad idea (since, at best, it has the potential to surprise the client), but a violation of the ethics rules.

B. Rule 1.18 – Duties Arising from Interactivity

A final rule deals not with existing clients, but with potential ones. [ABA Model Rule 1.18](#), entitled “Duties to Prospective Client,” addresses what lawyers must do once they actually engage prospective clients in conversation about their legal problems, and is of particular importance to lawyers who employ web marketing tools to interact with possible clients.

Rule 1.18(a) defines a prospective client as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” Once such a discussion has occurred, Rule 1.18(b) prohibits any use or disclosure of information learned by the lawyer about that matter without the same informed consent that a former client would need to give under Model Rule 1.9. Significantly, that duty may be disqualifying. A lawyer, or law firm, that has received information concerning a matter that “could be significantly harmful” to the prospective client may not represent others with adverse interests in the same or related matters. *See* Rule 1.18(c). That disqualification can be overcome only with the prospective client’s informed consent or, for a firm, by taking measures to limit dissemination of the information including screening of the disqualified lawyer from the subsequent matter. *See* Rule 1.18(d).

In a world of immediate interactivity, Rule 1.18 presents special challenges. Lawyer websites that allow clients to contact or pose questions to lawyers or social networking sites that permit direct interactions between lawyers and potential clients can create confusion about when a lawyer-client relationship has been formed and when a duty to maintain confidences has been created. While providing general information about the law and legal developments generally doesn’t qualify as rendering legal advice, Opinion 10-457 remarks that “lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner’s individual circumstances.” Opinion 10-457 at 3. Absent specific language to the contrary, website visitors “who may be inexperienced in using legal services” therefore “may believe that they can rely on general legal information to solve their specific problem.” *Id.* In such circumstances, Opinion 10-457 reasons that Rule 1.18 may come into play. Opinion 10-457 notes that the “discussion” contemplated by Rule 1.18 must necessarily begin with an initial communication from either lawyer or client, which can be furnished by web communication. Opinion 10-457 at 4. Although the commentary to the Rule 1.18 itself notes that “a person who communicated information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of

forming a client lawyer relationship is not a prospective client,” a lawyer website that specifically requests or invites submission of information concerning legal matters would lead to a “discussion” within the meaning of the rule were a prospective client to take the website up on the offer. *Id.*

Establishing when a prospective client is owed duties under Rule 1.18 is far from a simple matter. Opinion 10-457 suggests that “it may be difficult to predict when the overall message of a given website communicates a willingness by a lawyer to discuss a particular prospective client-lawyer relationship.” Opinion 10-457 at 5. Cautionary language advising that no client-lawyer relationship is intended, that no legal advice has been given, that visitor information may not be confidential or that the lawyer will not be prevented from representing an adverse party should help, but only (as the Opinion cautions) if “reasonably understandable, properly placed, and not misleading” – including making sure that the information is “conspicuously placed to assure that the reader is likely to see it before proceeding.” *Id.* at 6. Nor is the problem posed by Rule 1.18 for interactive web marketing likely to go away soon. In addressing Rule 1.18, the Ethics 20/20 Proposal suggests modifications that would eliminate the need for a “discussion” to trigger the rule, allowing instead a unilateral “communication” to do so under circumstances where the prospective client “has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.” The use of internet chat rooms to promote one’s services, for example, might allow for unilateral communications to trigger Rule 1.18’s duties (although the Ethics 20/20 Commission, adopting some of the positions taken in Formal Opinion 10-457, does note that the existence of disclaimers along with past history may determine whether a visitor to a website should be deemed a prospective client).

Most attorneys no doubt hope that their websites will help create new and profitable client relationships. Most lawyers, however, would also like to avoid creating inadvertent lawyer-client relationships that do not lead to an actual engagement, but serve only to *prevent* them from taking on business. Rule 1.18 is therefore a particularly important rule to be considered by lawyers who want to use the interactivity of the web to grow their business. While permitting the use of interactive tools, Rule 1.18 reminds the lawyer to make clear what it is that the lawyer intends to hold confidential and what duties the client should understand the lawyer is, or is not, undertaking.

III. Conclusion

Notwithstanding the sometimes mysterious nomenclature associated with the Model Rules that prompts this article, I suspect that the foregoing review principally confirms that the basic ethical precepts underlying them are familiar. Whatever new challenges web marketing may present, the essential requirements imposed by the rules– that lawyers should represent their qualifications honestly, that they must refrain from misleading others, and that they must understand and respect the needs of prospective clients when soliciting their business – likely come as no surprise to most lawyers. In adapting existing ethical marketing rules to modern technology, the biggest issue for most lawyers may lie in understanding the capabilities that distinguish them from other forms of advertising, and then applying the underlying ethical concepts (whether by number or by principle) along with a heaping measure of common sense, to arrive at an ethically-appropriate answer.