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Lawyer Advertising and the First Amendment

Key Concepts

- The First Amendment protects a lawyer's advertising as commercial speech.
- The state may not prohibit a lawyer's advertising absent proof that the prohibition serves an important state interest, such as protecting consumers from deceptive, misleading, or intrusive communications.
- The state may prohibit in-person solicitation altogether, unless political rather than pecuniary interests motivate the solicitation.
- Advertising regulations that serve an important state interest still may be proven unconstitutional if less restrictive means could advance the state's interest, such as a disclaimer requirement.

Introduction

Legal advertisements have become so commonplace and pervasive that many law students may be surprised to learn that lawyer advertising is regulated at all. But states historically have regulated a lawyer's ability to advertise in a variety of ways, including outright bans.

As might be expected with a profession of lawyers, however, the United States Constitution was injected into debates over whether and how lawyers may communicate with the public about themselves and their services. The First Amendment of the Constitution grounds this debate:

> Congress shall make no law … abridging the freedom of speech.

The United States Supreme Court ultimately supported a lawyer's First Amendment right to advertise. This First Amendment framework thus protects lawyer advertising from some regulation and prohibition by the state. But the Supreme Court did not grant lawyers an ab*solute* right to advertise. As a result, states may regulate and even prohibit certain kinds of communications by lawyers that present recognized harms to consumers or the public.

Law students cannot fully appreciate how the Rules of Professional Conduct regulate lawyer advertising without learning the First Amendment framework behind these rules, because the Rules of Professional Conduct track the Supreme Court's First Amendment legal Analysis. This chapter outlines that constitutional framework.

A. Background to Lawyer Advertising

The legal profession has long scorned advertising and solicitation by lawyers, dating back to the English common law.[1] The ban on lawyer advertising may have "originated as a rule of etiquette and not as a rule of ethics."[2] But by 1908, when the American Bar Association ("A.B.A.") codified an advertising ban in the A.B.A.'s original Canons of Professional Ethics, "the attitude toward advertising fostered by this view [of etiquette had] evolved into an aspect of the ethics of the profession."[3] This general prohibition on lawyer advertising continued into the middle of the twentieth century when, in 1969, the A.B.A. updated the Canons of Professional Ethics to the Code of Professional Responsibility, which still banned advertising and solicitation.

Nevertheless, "[t]he traditional ban on lawyer advertising began to weaken and dissolve during the mid-1970s."[4] The profession confronted a tension between bans on advertising and the public's ability to evaluate and access legal services without meaningful information about the services, the cost of the services, and where to find the services. Moreover, the profession's internal agreement to prohibit

competitive advertising raised questions of whether lawyer advertising bans violated the Sherman Antitrust Act.[5]

B. The *Bates* Case

These issues reached the Supreme Court in 1977, in the case of *Bates v. State Bar of Arizona*.[6] The Supreme Court in *Bates* rejected the antitrust challenge to Arizona's ban on lawyer advertising.[7] Nevertheless the Court restricted the state's regulatory monopoly over lawyer advertising by protecting this form of advertising as commercial speech under the First Amendment. This decision laid the framework for the modern rules and practices of legal advertising.

The lawyers in *Bates* advertised modestly enough, purchasing a newspaper advertisement that offered " 'legal services at very reasonable fees,' and list[ing] their fees for certain services."[8] Arizona did not claim that the lawyers' advertisement was untruthful or deceptive, Arizona nevertheless claimed that such lawyer advertising was prohibited through an attorney ethics rule:

> 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 permit others to do so in his behalf.[9]

The lawyers conceded that their newspaper advertisement violated Arizona's ethics rule, but the lawyers argued that Arizona's prohibition violated their First Amendment right to free speech.

In deciding whether lawyers have a First Amendment right to advertise, the Supreme Court observed that lawyer advertising serves important First Amendment

values, including educating the public about socially valuable services and ensuring "informed and reliable decisionmaking."[10] Therefore, legal advertising receives First Amendment protection as "commercial speech." While not the full constitutional protection that political speech would receive, for instance, lawyers are granted more protection than mere commercial *activity* receives. The Court held that to prohibit the lawyers' advertisement, Arizona had to show that the regulation served an important state interest.

Arizona proffered six different rationales to justify its advertising prohibition. Lawyer advertising would: adversely commercialize the profession; inherently mislead consumers; agitate unwarranted litigation; increase the cost of legal services; incentivize shoddy legal work; and prove difficult to enforce. The Supreme Court, however, found that these interests were too generalized, or overly-paternalistic toward the legal market, to prohibit lawyer advertising altogether. Therefore, Arizona's blanket prohibition on legal advertising violated the First Amendment.

Bates did not leave states powerless to regulate lawyer advertising. The Supreme Court noted in *Bates* that the decision did not undermine states' ability to regulate advertising that is false, deceptive, or misleading.[11] The Court also recognized the state's legitimate concerns over in-person solicitation in contrast to general advertising. Furthermore, time, place, and manner restrictions may be justified, and states may prohibit advertising of illegal transactions.[12] Finally, the Court observed that "the special problems of advertising on the electronic broadcast media will warrant special consideration."[13] The Supreme Court, however, worked through some of these First Amendment regulations in subsequent cases.

C. The *Ohralik* Case

Shortly after the *Bates* decision, the Supreme Court enforced state power to restrict attorney communications with prospective clients in *Ohralik v. Ohio State Bar Association*.[14] The lawyer in *Ohralik* visited two car accident victims and their families in the hospital and in their home to secure a contingent fee agreement to represent the accident victims. When the accident victims attempted to proceed without Ohralik as their attorney, Ohralik sued to enforce the fee agreement, and

the accident victims complained to the bar. The state disciplined Ohralik for his in-person solicitation of the two accident victims.

On appeal to the Supreme Court, Ohralik conceded that the state has a sufficient regulatory interest to discipline in-person solicitation to protect lay consumers from high-pressure tactics by trained attorneys. But Ohralik argued the state had to prove that the individual attorney's solicitation caused actual harm as a condition precedent to discipline. This case-specific standard would leave conscientious attorneys immune from discipline for in-person solicitation.

The Supreme Court rejected this position. Instead, the Court authorized states to prohibit in-person solicitation *categorically*, regardless of whether the individual lawyer coerced or harassed the prospective client. The Court embraced this prophylactic rule because of the greater risk of undue influence inherent with in-person solicitation. Moreover, unlike other forms of advertising, in-person solicitation occurs in private with little to no record, making effective regulation exceedingly difficult.

Bates and *Ohralik* thus establish two ends of the regulatory spectrum regarding legal advertisements: general advertising and in-person solicitation. Under *Bates*, the state may not discipline attorneys for advertising to the public without proving a real risk of harm to consumers from that advertisement. But under *Ohralik*, the state may ban in-person solicitation categorically without any individualized proof of harm to the consumer because of the risks presented by that conduct.

D. Further Lawyer Advertising Decisions

Falling in between these First Amendment bookends were the cases of *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*,[15] and *Shapero v. Kentucky Bar Ass'n*[16] In *Zauderer*, an attorney advertised in a newspaper to a targeted audience of prospective clients—people who had been injured by the Dalkon Shield, an intrauterine contraceptive device. The Supreme Court held that the First Amendment prohibited the state from disciplining the attorney for targeting a specific audience through general advertising, so long as the advertising did not mislead the target audience.

At the same time, however, the Supreme Court distinguished a state's regulation that bans lawyer communications from a regulation that imposes a disclosure

requirement. Ohio required lawyers who advertised a willingness to represent clients on a contingent-fee basis to disclose that the client still may be liable for certain expenses if the client loses. Because this disclosure requirement did not prevent lawyers from communicating their commercial message, the requirement needed only to relate reasonably to the state's legitimate interest in preventing consumer deception.[17]

The Supreme Court extended *Zauderer's* holding in *Shapero*. The lawyer in *Shapero* mailed solicitations directly to individuals facing foreclosure of their home. The Supreme Court concluded that these targeted mailings proved more analogous to *Zauderer's* targeted newspaper advertisements than to *Ohralik's* in-person solicitation, because the lawyer did not communicate directly and privately with the prospective client, and the advertisement created a record of the communication. Therefore, the state could not ban these direct mail solicitations. The Court, however, again emphasized that the state often may regulate these communications to advance the state's important interest in protecting consumers from deceptive or intrusive communications.

The Supreme Court further identified a regulation of lawyer communications that properly extended to a *temporary* ban in *Florida Bar v. Went For It, Inc*.[18] Florida's ethics rules prohibited lawyers from sending a targeted, direct-mail solicitation to an accident victim or the victim's relatives for 30 days following an accident or disaster. After reviewing the state's detailed study supporting this regulation, the Court concluded that the Bar had an interest in "protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."[19] *Went For It* thus supports meaningful regulatory oversight of lawyer advertising, even if a regulation temporarily prevents a lawyer from communicating to a desired market. The Court in Went For It, however, emphasized that the outcome might prove different "if the Bar's rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time."[20]

Finally, the Supreme Court made clear in *In re Primus*[21] that not every solicitation by a lawyer to a prospective client should be treated as commercial speech under

the First Amendment. In *Primus*, the state reprimanded a lawyer for soliciting women who had allegedly been sterilized, or threatened with sterilization, as a condition to receive Medicaid benefits. The lawyer approached the women as a member of the local American Civil Liberties Union ("ACLU") chapter, working in conjunction with another advocacy group. The lawyer offered for the ACLU to supply free legal counsel to the women as part of the ACLU's anti-sterilization legal campaign.

The Supreme Court overturned the state's discipline. The Court distinguished this case from *Ohralik* because in *Primus* the lawyer did not engage in "in-person solicitation for pecuniary gain." Rather, the lawyer communicated an offer of legal help from a civil rights organization. Indeed, this fact enhanced the First Amendment protection of the lawyer's communications, because the lawyer's motive involved political advocacy, which the state may regulate only in the narrowest of circumstances. To restrict this kind of political communication by lawyers, the state would need to prove *actual* abuse by the lawyer, such as misrepresentation, harassment, or invasion of privacy.

These cases have created the basic First Amendment framework that lower courts apply.[22] If an attorney advertisement concerns unlawful activity, is untruthful, or "is inherently likely to deceive or … has in fact been deceptive,"[23] the state may prohibit the advertisement entirely. By contrast, the state may restrict advertising that may potentially mislead, but is not inherently deceptive, only if the state meets two standards: (1) the regulation advances a substantial government interest; and (2) the regulation is no broader than necessary to serve that interest. Finally, if the state merely imposes a disclosure obligation on potentially misleading advertising, courts will uphold the regulation if it reasonably relates to the state's interest in preventing consumer deception.

Example. The State of Exasperation grew weary of complaints about increasingly aggressive advertising by lawyers. In particular, lawyers in Exasperation advertised that they could ensure specific results, employed fake testimonials and reenactments, using actors to portray former clients, judges, and jurors, and adopted suggestive advertising monikers, such as

"555-CASH"[24] and "Total Bad-Ass Trial Lawyer."[25] After surveying the public and the Bar about the effects of this advertising on consumer confidence and clarity about legal services, Exasperation's Supreme Court issued new regulations that: (1) prohibited communications that promise results; (2) prohibited communications identifying past results in actual cases; (3) prohibited communications that include portrayals of clients by actors, or a portrayal of events or scenes that are not authentic, without a disclaimer; (4) prohibited communications that utilize a nickname, moniker, or trade name that states or implies an ability to obtain results; and (5) prohibited communications that include a portrayal of a judge or a jury. Several lawyers sued in federal court to enjoin these new regulations on the ground that the regulations violated their First Amendment rights.[26]

Analysis. The State of Exasperation lawfully prohibited attorney communications that *promise* results. As one federal court concluded in upholding a similar prohibition: "A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results."[27] These advertisements therefore receive no First Amendment protection and may be banned.

Several of the other regulations, however, do not involve advertising that inherently deceives. These regulations instead address advertising that only potentially could mislead. As a result, these advertisements are protected as commercial speech under the First Amendment. The State of Exasperation thus must justify these regulations by showing that they advance a substantial state interest no more broadly than necessary to protect that interest.

The State of Exasperation's regulation categorically prohibiting reports of past results restricts communications that include factually accurate, verifiable information. The State of Exasperation's concern that lay consumers may rely too heavily on this information is not a sufficient basis for prohibiting this speech altogether if the advertisement does not deceive or mislead consumers. Consequently, the state is limited to banning communications of past results that cannot be objectively verified or that create unjustified expectations of future results, such as, "I have won the unwinnable cases." Alternatively, a

required disclaimer, such as "past results do not ensure success in your case," could address the state's concerns without the need for a blanket prohibition on speech.[28]

The State of Exasperation also regulated too broadly in prohibiting all portrayals of judges and juries in advertising. A state may argue that consumers may interpret the reenactments as literal depictions of judges or juries or as a display of the lawyer's influence over judges and juries. This argument, however, presumes that all consumers are so unsophisticated that they can be misled by depictions of normal courtroom participants. Moreover, a method short of a broad prohibition, such as a disclaimer could alleviate any potential for confusion with these portrayals.[29]

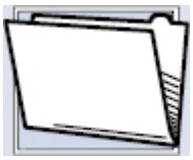
The State of Exasperation's prohibition of nicknames, monikers, and trade names that *imply* an ability to obtain results presents a tougher question. One federal court rejected the state's argument that "common sense" demonstrates that these communications inherently confuse or mislead consumers. Instead, the court claimed that "a dearth of evidence" supporting a "prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and indeed expected, in commercial advertising generally."[30] Exasperation, however, did not rely on the unsupported intuition that these communications inherently confuse or mislead. Rather, the state surveyed the public and the Bar to verify the effects of this advertising. Another federal court upheld this kind of regulation when it is supported with a similar survey and focus group data. In this court's view, this kind of evidence demonstrated that "[t]his rule is narrowly drawn to materially advance the substantial government interest in protecting the public from misleading lawyer advertising."[31]

Unlike the preceding regulations, the State of Exasperation's requirement of a disclaimer when advertising with actor-delivered client testimonials and portrayals of fictitious scenes or events does not restrict the content of speech itself. Therefore, the state must show only that the disclaimer requirement reasonably relates to a legitimate state interest. The state's interest in assuring that consumers accurately can distinguish reality from reenactment when evaluating lawyer advertising is legitimate. Under the more deferential test

> for state regulations requiring only lawyer disclaimers, survey data or even common-sense intuition can establish a legitimate state interest. A disclaimer reasonably relates to the state's interest in ensuring that consumers can judge the communication as actor-delivered or fictitious, so this regulation should survive First Amendment scrutiny.[32]

As this example shows, states, lawyers, and the public all have legitimate interests in the state regulation of lawyer advertising. These sometimes competing interests thus can require nuanced constitutional Analysis. These First Amendment issues remain very much in play, as lawyers continue to challenge various states' efforts to regulate what and how lawyers may communicate about their legal services.[33]

Quick Summary



The Supreme Court's First Amendment jurisprudence itself does not govern how lawyers may advertise. But, the Supreme Court's decisions heavily inform modern lawyer advertising ethics rules because the decisions identify advertising restrictions that states may *not* impose without violating the constitutional rights of lawyers. These decisions give states much more leeway to regulate advertising in the name of consumer protection, and very little discretion to regulate lawyer advertising to protect or promote a particular image or reputation for the profession. Following this framework, the Rules of Professional Conduct on lawyer advertising read in many respects like a First Amendment script for codifying lawyer ethics.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *See generally* Gregory H. Bowers & Otis H. Stephens, Jr., *Lawyer Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U. L. REV. 221, 223–233 (1987) (reviewing lawyer advertising regulations prior to the mid-1970s).

2 *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977).

3 *Id.*

4 Bowers & Stephens, *Lawyer Advertising and the First Amendment*, *supra* note 1, at 235.

5 Indeed, in 1976, the U.S. Department of Justice sued the A.B.A. for an alleged conspiracy to restrain trade. *See United States v. American Bar Association*, Civil No. 76–1182 (D.D.C. 1976). This suit was not resolved prior to the *Bates* decision, which settled the antitrust issue.

6 *Bates*, 433 U.S. 350.

7 The Supreme Court decided that the Sherman Act exempted Arizona's lawyer advertising ban because the ban was promulgated by the Arizona government and states

traditionally have regulated attorney conduct. *See id.* at 359–63. Students, however, should note the strong free-market themes in *Bates* underlying the Court's First Amendment Analysis.

8 *Bates*, 433 U.S. at 354.

9 *Id.* at 355 (*quoting* Arizona Disciplinary Rule 2–101(B) (1976)).

10 *Id.* at 364.

11 *See id.* at 383.

12 *See id.* at 366.

13 *Id.* at 384.

14 436 U.S. 447 (1978).

15 471 U.S. 626 (1985).

16 486 U.S. 466 (1988).

17 *See Zauderer*, 436 U.S. at 460–62.

18 515 U.S. 618 (1995).

19 *Id.* at 635.

20 *Id.* at 633.

21 436 U.S. 412 (1978).

22 *See generally Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010).

23 *Public Citizen, Inc.*, 632 F.3d at 218; *see also In re R.M.J.*, 455 U.S. 191, 202–203 (1982).

24 *Cf. e.g.*, https://www.theinjurylawyer.com

25 *Cf. e.g.*, http://www.dwibadass.com/

26 *See Public Citizen, Inc.*, 632 F.3d 212.

27 *Id.* at 218.

28 *See Public Citizen, Inc.* 632 F.3d 212.

29 *See id.*

30 *Alexander*, 598 F.3d at 95.

31 *Public Citizen, Inc.*, 632 F.3d at 225–26.

32 *See id.*

33 *See e.g.*, Jan Pudlow, *Lawyer Advertising Rules Challenged in Federal Court*, Florida Bar News (Jan. 15, 2014) (reporting on First Amendment lawsuit challenging 2013 Florida advertising rule requiring that online lawyer advertising be "objectively verifiable").

9

Communications Concerning a Lawyer's Services

Key Concepts

- Rule 7.1 governs all communications by a lawyer about the lawyer and the lawyer's services.
- This Rule prohibits both false and misleading communications.
- Whether a communication proves misleading depends on context from both the lawyer's perspective and the perspective of a reasonable consumer, and omissions in context can be misleading.
- Disclaimers are important to the question of whether a communication proves false or misleading.

Introduction

To the surprise of no person who has watched midday or latenight television, lawyers advertise. Quite a bit, and sometimes quite ridiculously. Nevertheless, despite lawyers' robust exercise of their First Amendment right to advertise, the Rules of Professional Conduct do regulate lawyer advertising. These regulations target largely consumer protection interests.

Rule 7.1 supplies the foundation to this regulation of lawyer advertising. To prevent false and misleading communications, this Rule regulates every professional communication by a lawyer. Therefore, regardless of medium or context, any advertisement or other professional communication by a lawyer about the lawyer's services must satisfy Rule 7.1. Your analysis of every lawyer communication thus should begin with this Rule.

The Rule

Rule 7.1 contains a single provision. The Rule addresses false or misleading communications by a lawyer:

THE RULE Rule 7.1

Communications Concerning a Lawyer's Services

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.

This Rule prohibits lawyers from communicating untruthful information about themselves or their services, regardless of whether the statements mislead.[1] This prohibition draws on the Supreme Court's First Amendment case law on lawyer advertising by categorically prohibiting false and misleading communications.

1. False Communications

According to the Rule, a communication is false if it contains a material misrepresentation of fact or law. Consider this example:

Example. Lawyer Prickney graduated from law school one year ago and completed a one-year judicial clerkship. Prickney had little real-world litigation experience beyond observing lawyers in court during his clerkship. Prickney nevertheless was eager to develop a solo family and criminal law practice, so Prickney created a website with the domain, "www. divorcecriminallawyer.com." Prickney also created profiles on several commercial web sites, such as LinkedIn. On these web sites, Prickney claimed that he graduated from law school five years earlier than he actually did, that he had practice experience in federal court, that he had trial experience, and that he had experience in numerous practice areas. Prickney sincerely believed that he could practice at the experience level he advertised because of his clerkship experience and his outstanding grades in law school and top class rank. Representatives of the web sites also assured

Prickney that his profile information would comply with ethical requirements. Another lawyer who graduated from law school with Prickney saw the web sites and complained to the State Bar.

Analysis. Prickney's communications on his own web site and on the commercial web sites constituted false statements in violation of Rule 7.1 because they materially misrepresented Prickney's professional experience and credentials. Prickney has no defense to communicating falsely about his experience and credentials just because he subjectively believed that he could practice at the experience level he advertised—the question is simply whether he communicated false information about himself or his services. Nor did the advice Prickney received from representatives of the commercial web sites protect Prickney, because Prickney was personally responsible for his communications' compliance with the Model Rules. Therefore, Prickney is subject to discipline.[2]

2. Misleading Communications

Rule 7.1 further prohibits factually truthful communications that are misleading to consumers. a truthful communication may prove misleading if it omits a material fact necessary to make the communication as a whole not misleading.[3] a communication also proves misleading if a substantial likelihood exists that it will lead a reasonable person to form specific conclusions about the lawyer's services that lack a reasonable factual foundation.[4]

This standard leaves lawyers, presumably trained in the art of persuasion, significant room to editorialize about their professional services—a fact anyone who has watched television, examined billboards, or viewed the internet can confirm. At a minimum, lawyers may advertise their areas of practice, experience, language skills, office location, standard fees schedules or bases for fees, education, and othersimilarly verifiable information that, if truthful and not misleading, would help consumers to learn about and assess a lawyer and the lawyer's services.[5]

Nevertheless, Rule 7.1 requires a lawyer to evaluate her professional communications not only for literal factual accuracy from the lawyer's perspective, but also for overall accuracy and completeness from the perspective of the public in learning about legal services.[6] Otherwise, a lawyer risks discipline for his or her professional communications. This mixed subjective-objective assessment of whether to discipline lawyer communications understandably can lead to doubt about precisely where the line should be drawn in categorizing a lawyer's communication as "misleading."

Sometimes the line between a materially accurate and a false or misleading statement is not entirely clear. Where should this line be drawn?

Example. Lawyer Mauricio had practiced for years in the State of New Jersey under his birth surname, Mauricio Formername. Mauricio recently married his long-time partner, Freddy Newname, following New Jersey's adoption of same-sex marriage rights. Mauricio legally adopted Freddy's surname for personal and social purposes. Mauricio, however, decided to keep his pre-marriage surname for professional purposes, because Mauricio had used it for so many years in building a successful practice. a staunch opponent of same-sex marriage filed a complaint with the State Bar when he learned that Mauricio still used the name Mauricio Former-name for legal practice when he otherwise went by Mauricio Newname.

Analysis. Mauricio's professional continued use of his pre-marriage surname technically could be a type of false statement after he legally adopted his spouse's surname. But this misrepresentation would not be material if Mauricio continued to practice solely under the name he always used for practice and that he registered with the State Bar. Nor would Mauricio's use of his pre-marriage name be misleading in this context, because Mauricio had no improper or fraudulent motive, and used his married name solely for personal and social purposes unrelated to the practice of law. a different situation would exist, however, if Mauricio used a different name for practice that he did not register with the State Bar, because clients and third parties could not verify Mauricio's authority to practice, contact information, or history of any discipline.[7]

Even if truthful, a lawyer's communication will violate Rule 7.1 if it would mislead a reasonable consumer of legal services. Consider whether this lawyer's communications met this standard of "misleading":

Example. Lawyer Lazy bought space on some highly-trafficked web pages to advertise his personal injury practice. The advertisement presented quotes from supposed former clients that claimed, "Lazy won me a $100,000 judgment!" and "Lazy was awesome—by far the best lawyer in town!" Lazy indeed won a $100,000 judgment for a former client. Another former client once wrote to Lazy, "You are awesome—by far the best lawyer in town." But Lazy's advertisement used actors portraying clients to deliver these communications instead of Lazy's actual former clients. The advertisement also depicted Lazy himself giving a thumbs up to the camera with the caption, "No lawyer will obtain better results in your case than Lazy, so call me now. No recovery—no fee!" When a client did not find Lazy to be so awesome because Lazy failed to win the client a $100,000 judgment, the client complained to the State Bar.

Analysis. Lawyer Lazy's communications may have been technically accurate from Lazy's perspective. But Lazy's communications will remain subject to discipline if they would be misleading to a reasonable consumer of legal services. Lazy's use of actors to portray former clients could prove misleading, even if the actors communicated accurate information from former clients, because prospective clients could not know that they were hearing the testimonial from an actor rather than a former client. Lazy's advertisement should have employed former clients to communicate the information they shared, or have included a disclaimer identifying the testimonials as "dramatizations" of testimonials by former clients.[8]

Moreover, client testimonials, even if accurate, present a significant risk of misleading consumers, because prospective clients may form unjustified expectations that their cases will end with the same results. Every client's case could turn on specific factual and legal circumstances.[9] Lazy, therefore, should have included an

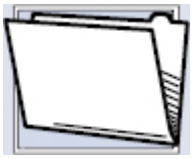
appropriate disclaimer in his advertisement to communicate that new clients may obtain different results depending on those specific circumstances.[10]

Unsubstantiated comparisons of the lawyer's services or fees with the services or fess of other lawyers also may prove misleading if the comparison would lead a reasonable person to conclude that the comparison in fact could be substantiated.[11] Lazy's former client's opinion that Lazy is "awesome" may be sufficiently apparent as an individual and subjective opinion that it would not mislead consumers. But the former client further claimed that Lazy is the best lawyer in town, and Lazy himself claimed that no lawyer could obtain better results. Lazy and his former client sincerely may believe that Lazy is the best lawyer in town who can obtain the best results. But Lazy could not possibly substantiate these claims. These communications thus invited unjustified expectations in prospective clients, and should not have been used.[12]

Finally, Lazy's claim, "No recovery—no fee," also may have been misleading in context. True, if Lazy charged only a contingent fee in his practice, clients who did not recover would owe no "fee" to Lazy. But Lazy's communication did not distinguish between legal fees and other litigation costs and expenses, when the client could remain liable for those costs and expenses under the fee agreement.[13] a reasonable consumer therefore could be misled by Lazy's advertisement into believing he or she also would owe nothing for litigation costs and expenses absent a recovery. Lazy's advertisement instead should have clarified that clients could remain liable for litigation costs and expenses.[14]

Rule 7.1's prohibition on false or misleading communications thus should cause a lawyer pause before engaging in too much puffery. At a minimum, the lawyer should be prepared to demonstrate some objective basis for self-congratulatory claims that otherwise could give the public unjustified expectations about what the lawyer can accomplish—especially unjustified expectations about case outcomes. Do not worry, however, that lawyers are overly constrained in their ability to communicate with the public about themselves and their services. As you will read in the next Chapter, Rule 7.2 makes clear that the Rules of Professional Conduct welcome robust advertising by lawyers.

Quick Summary



Rule 7.1 categorically prohibits any false and misleading communication by a lawyer about the lawyer or the lawyer's professional services. The key question underlying this prohibition is whether a lawyer's communication "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Communications that may mislead only in context, however, may be cured by an appropriate disclaimer that alerts prospective clients to that limiting or clarifying context.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *See id.*

2 *Cf. In the Matter of Dickey*, 722 S.E.2d 522 (S.C. 2012) (finding similar claims by a lawyer to be untruthful and therefore subject to discipline).

3 *See* DLRPC Rule 7.1, comment 2.

4 *See id.*

5 *See* DLRPC Rule 7.2, comment 2.

6 *See* DLRPC Rule 7.1, comments 2 & 3.

7 *See generally* AZ Bar Opinion 12–02 (2012); WA Advisory Opinion 2180 (2008).

8 *See generally* Glenn Machado, *Practice Tips*, Nevada Lawyer at 40 (Jan. 2013) (noting amendment to Nevada advertising rules to require lawyers to disclose when communications rely on actor portrayals or depict fictional scenes or events); WA Advisory Opinion 1192 (1988).

9 *See* DLRPC Rule 7.1, comment 3.

10 *See id.*

11 *See id.*

12 *See id.*

13 *See* DLRPC Rule 1.5(c).

14 *See generally* WA Advisory Opinions 1182 (1988) and 918 (1985).

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Lawyer Advertising

Key Concepts

- Rule 7.1 generally authorizes lawyer advertising.
- This Rule does not regulate taste or effectiveness in advertising, nor the media in which lawyers may advertise.
- Outside of limited exceptions, a lawyer may not give anything of value to any person for recommending the lawyer's services.

Introduction

The Rules of Professional Conduct are not hostile to lawyer advertising. On the contrary, Rule 7.2 broadly authorizes lawyers to advertise their services to the public. This Rule thus responds directly to the Supreme Court's decisions granting First Amendment protections to lawyer advertising. But, this Rule recognizes more than just the free speech rights of lawyers. On the contrary, this Rule also marks a shift from the Bars historical views toward lawyer advertising, by recognizingthat lawyer advertising can inform the public about valuable legal services and increase access to justice. As a result, lawyers maintain fairly broad advertising rights under the Rules of Professional Conduct, unless an advertisement undermines consumer interests.

The Rule

Rule 7.2 has three subsections divided into two main parts. First, the Rule in subsections (a) and (c) addresses advertising generally. In subsection (b), the Rule regulates the practice of lawyers giving referral fees in exchange for a recommendation.

1. Advertising Generally

Rule 7.2 begins by authorizing lawyers to advertise generally, subject to two other Rules in Title 7:

THE RULE — 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) Except as permitted by Rule 1.5(e), 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; and

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

(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.

Rule 7.2(a) makes clear that, outside of false or misleading communications that violate Rule 7.1 and solicitations that violate Rule 7.3, lawyers may advertise information about their services "in the active quest for clients."[1] The comments to the Rules of Professional Conduct note that advertising simultaneously can educate the public about accessible legal services, especially for "persons of moderate means who have not made extensive use of legal services,"[2] and who therefore may lack access to justice if made to depend on traditional reputation sources for finding lawyers.[3]

The Rules of Professional Conduct further do not attempt to regulate "effectiveness and taste in advertising."[4] Deeming these questions too speculative and subjective, the Rules leave taste and efficacy to the market. Nor does Rule 7.2 distinguish between advertising media. On the contrary, recognizing that "[t]elevision, the Internet, and other forms of electronic communication are now the most powerful media for getting information to the public,"[5] the comments to the Rules of Professional Conduct opine that advertising regulations that distinguished between these different media improperly would limit the flow of information to large segments of the public.[6] Lawyers therefore have significant leeway in how and where to advertise, so long as their communications remain truthful and not misleading, do not solicit improperly, and identify at least one lawyer or law firm responsible for an advertisement's content.[7]

The Rules of Professional Conduct's generality in regulating attorney advertising, however, has generated some uncertainty as the landscape of lawyer marketing evolves dramatically with technology. To connect with prospective clients, lawyers more and more are turning to online technologies, such as social media, Internet lead generators, daily deal programs, and online lawyer rating sources, as just a few examples.[8] Lawyers also do not always compartmentalize their personal and professional presences online—Facebook providing a common example, where a lawyer may post about success for a client, the day's lunch order, and favorite music, all in one afternoon. The Rules of Professional Conduct's largely general proscriptions do not always guide lawyers clearly as to whether a lawyer's online presence is misleading in these emerging marketing contexts, or whether a lawyer's communications constitute live or "real time" solicitations.[9]

In one concrete example, an American Bar Association ("A.B.A.") Journal article recently profiled the question of whether LinkedIn "endorsements" violate attorney advertising rules.[10] Numerous lawyers use LinkedIn as a social media platform

to network with potential clients and other professionals. A lawyer's LinkedIn connections can endorse the lawyer in his or her profile for certain experience or skills. The endorser, however, is not required to identify a verifiable basis for this endorsement. The endorsement thus may not accurately reflect the lawyer's experience or skills. A poll by the A.B.A. nevertheless found that nearly 70% of approximately 500 lawyers publicized their endorsements in their LinkedIn profile. The A.B.A. Journal article, however, found inconsistent expert views on whether a lawyer has an ethical duty to correct or delete inaccurate or misleading third-party LinkedIn endorsements.[11]

To address the evolving nature of lawyer advertising in greater detail, some jurisdictions regulate lawyer advertising more robustly than the Rules of Professional Conduct do. For example, in a guideline that partially would address the preceding question about LinkedIn endorsements, Florida's ethics rules provide:

[A] lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.[12]

Lawyers, therefore, must familiarize themselves with how every jurisdiction in which they practice regulates lawyer advertising.[13] Lawyers should also acquaint themselves with the opportunities and challenges that current technology and media present to lawyers who want to create a public presence for their practice.[14]

In this vein, consider how this lawyer's marketing idea raised related ethical questions:

Example. Lawyer Catherine just opened a solo practice in which she specializes in defending DWI and related traffic offenses. To generate name recognition and business, Catherine would like to advertise through the daily deal website, Groupon,[15] offering heavily discounted DWI defense package deals. Groupon would email this daily package deal to Groupon subscribers. For each person who purchases a DWI package deal from Catherine though the Groupon email, Groupon would receive 50% of Catherine's fee. May Catherine ethically use Groupon to advertise discounted DWI defense deals?

Analysis. Rule 7.2(a) authorizes Catherine to advertise to generate business and name recognition through online media, including through a web service that ultimately will communicate with potential clients by email.[16] Rule 7.2(b) (1) further allows Catherine to "pay the reasonable costs of advertisements or communications permitted by this Rule." States, however, have split on the question of whether payments to daily deal websites like Groupon comport with this rule.[17] AlA.B.A.ma and Indiana, for instance, have found that Groupon's 50% take on each client fee is not a reasonable cost of advertising generally. Instead, Groupon's take compares to a for-profit referral system.[18] By contrast, North Carolina has approved of marketing serves like Groupon, so "long as the percentage charged against the revenues generated is reasonable compensation for the advertising service."[19] New York similarly has opined that the daily deal website does not refer individual clients to the lawyer. The daily deal website instead merely has relayed the lawyer's advertisement to a subscriber base in exchange for a fee.[20] South Carolina has reached the same conclusion.[21] Because of this split in authority, Catherine should proceed cautiously

before advertising through Groupon or similar daily deal services until her jurisdiction has clarified its position on this marketing strategy.

In the modern online world, lawyer advertising is not always initiated by the lawyer. Rather, following other professional services, legal services now include a growing roster of websites where former clients, peers, and other individuals can review lawyers and their services. Examples include martindale.com, avvo.com, legalreviewz.com, linkedin.com, google.com, and yelp.com.[22]

Evaluate whether this lawyer reacted properly to a negative client review:

Example. Lawyer Fred previously represented Client. Even though Fred worked diligently for Client, the case did not resolve to Client's satisfaction. Client promptly went to a lawyer review website and posted a review to Fred's profile: "Fred is a lousy lawyer. Got me a terrible result but made sure he still lined his pocket with my fee. If you want a greedy lawyer who doesn't know what he's doing, be sure to retain Fred." Fred was outraged at this wholly inaccurate review, and feared that it might undermine his hard-earned reputation. Fred registered with the review website under an anonymous email address, posing as his own former client, and posted a very positive review that directly refuted Client's review: "Client doesn't know what he's writing about—Fred was a great lawyer for me!" Fred added details about his strategy and results in the fake client's case to support this positive review. Did Fred violate the Rules of Professional Conduct when responding to Client's online review?

Analysis. Positive reviews on lawyer review sites greatly can burnish a lawyer's market presence. As a recent A.B.A. article on the subject reported, " 'earned media is always more effective than paid media; people just believe it more.' "[23] But, as Lawyer Fred's circumstance demonstrates, these online reviews may not necessarily flatter the lawyer or the lawyer's services. Furthermore, these online reviews can become permanent and easily accessible records that are posted and maintained by third parties whom the lawyer cannot control.[24]

Lawyers who find themselves on the defensive with an online review may respond.[25] But since the lawyer's response communicates about the lawyer or the lawyer's services like any advertisement, the lawyer's response must adhere to the Rules of Professional Conduct. For example, the lawyer must ensure she or he takes responsibility for the response,[26] and the response must be truthful and not misleading.[27] Fred's response did not disclose his identity as the poster. Rather, Fred pretended to be one of his own clients and fabricated a positive client review. This communication thus likely violated the Rules of Professional Conduct.

Fred's response implicated other ethical rules, as online activity often can for lawyers. A lawyer, for example, must remain professionally loyal to the legal interests of former clients.[28] Therefore, a lawyer may not reveal confidential information that the lawyer acquired while representing a client, even after that relationship ends.[29] If Fred instead had attempted to refute Client's negative review by revealing confidential information from his representation of Client., that disclosure very likely would violate the Rules of Professional Conduct.[30] In addition, Fred's action of pretending to be a former client involved dishonesty and misrepresentation.[31]

Fred also should have been more strategic about *how* to respond to Client's review to avoid aggravating the negative impression created by the review. Avvo's own General Counsel, for example, has advised lawyers: "Done correctly, such a [response] communicates responsiveness, attention to feedback and strength of character … a poorly-handled response to a negative review is much worse than no review at all. It makes you look thin-skinned and defensive."[32] Lawyers further can prevent or limit some negative client reviews by screening clients more effectively, maintaining better communication with clients, pursuing correction or removal of an online review, or perhaps seeking nondisclosure agreements with clients.[33] In Fred's case, however, Fred's response likely violated the Rules of Professional Conduct, and also demonstrated poor professional judgment.

2. Referral Fees

The authorization to advertise in Rule 7.2(a) is followed by a prohibitory subsection in Rule 7.2(b). This Rule prohibits lawyers from giving anything of value in exchange for a recommendation, subject to three identified exceptions:

THE RULE — Rule 7.2

Advertising

(b) Except as permitted by Rule 1.5(e). 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 services plan or a not-forprofit or qualified referral service. A qualified referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

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

This subsection to Rule 7.2 recognizes that lawyer advertising is not limited to the commercial advertising that has become so familiar and ubiquitous. On the contrary, a very traditional and important type of "advertising" for lawyers is the client referral: when a client, another lawyer, another professional, or any other person recommends a specific lawyer to an individual seeking legal services.[34]

Lawyer referrals carry a lot of market value. Lawyers in private practice routinely depend on client referrals to generate and maintain business, for a personal referral can influence client market choices much more than commercial advertising. The referring individual, moreover, understandably may perceive market value in the referral, particularly if the referral is based on professional goodwill that the referring individual has cultivated with the individual acting on the referral.

Client referrals, however, have proven rife with potential for abuse because of the *quid pro quo* that the market value of a referral often has incentivized: a referral

fee. As a reward for delivering business to a lawyer, a referral fee may take the form of a percentage of the lawyer's ultimate fee, a fixed amount of money, or any other thing of value. Yet, client referral fees ignore that "[c]lients are not commodities that can be purchased and sold at will."[35] And in the worst form, referral fees operate just like a kickback: the person referring the prospective client to a lawyer offers the referral to claim the referral fee from the lawyer, not to enhance the prospective client's market position in finding quality counsel. The referral fee thus not surprisingly can affect the referring individual's judgment about whether to refer someone to a particular lawyer. The referring individual even consciously or unconsciously may sell the lawyer beyond that lawyer's true quality because of the referring individual's subjective interest in the referral. Even worse, the prospective client may not know of the referral fee and instead will believe that he or she has been given objective advice about where to go for quality legal services.

Rule 7.2 nevertheless permits client referrals, if any recommendation remains truthful and not misleading and does not violate solicitation rules. But, to protect consumers from referral fee abuses, Rule 7.2(b) categorically prohibits referral fees, defined as "anything of value."[36] Notice that the referral fee ban does not depend on any context that demonstrates actual abuse—Rule 7.2(b) does not allow referral fees, for example, even when the referring individual's objectivity would not be seriously affected, when the client is informed of the referral fee, or when the referral fee involves minimal or non-pecuniary value. Rule 7.2(b) instead operates as a "prophylactic" legal rule: a rule that regulates an activity without regard to case-specific context because of the risk that individual circumstances would be too difficult to monitor or regulate to protect vulnerable interests effectively.[37] Therefore, the old adage, "No harm no foul," does not apply to Rule 7.2(b)'s referral fee ban.

The referral fee ban, however, applies only to "recommendations" of a lawyer. Recent 2012 amendments to Rule 7.2 clarify the definition of

"recommendation." Generally, "[a] communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."[38] In a more specific clarification responding to a growing marketing trend,[39] the Rules of Professional Conduct permit "a lawyer [to] pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer" and complies with other applicable ethics rules.[40] A lawyer thus "may not pay a lead generator that states, implies or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral."[41]

Rule 7.2(b) does except three specific circumstances from the referral fee ban. One important exception allows lawyers to pay the costs of advertisements or communications permitted by Rule 7.2(a).[42] Many jurisdictions also recognize an additional important exception that permits lawyers to enter into reciprocal referral agreements with other lawyers or non-lawyer professionals under two conditions: (1) the reciprocal referral agreement is not *exclusive*; and (2) the client is *informed* of the existence and nature of the agreement.[43] Some of these jurisdictions, however, limit this exception to reciprocal referral agreements with lawyers, prohibiting these agreements with non-lawyer professionals.[44] Outside of these specific exceptions, the only thing of value that lawyers may give or accept for a client referral is the goodwill that comes with a reliable recommendation of legal services.

Lawyers must distinguish a referral fee, which is impermissible, from a *split* fee between lawyers, which the Rules of Professional Conduct do permit. A referral fee compensates someone solely for recommending a lawyer. With a split fee, by contrast, two or more lawyers share in the fee that the client pays for *legal services*.[45] This fee sharing is permitted if the lawyers divide the fee proportionately based on the legal services performed or if the lawyers assume joint responsibility for the representation, and if the overall fee is reasonable and the client agrees in

writing.[46] A lawyer, however, must be careful not to "split" a client fee with any non-lawyers. To ensure that lawyers do not subordinate their professional loyalty and independent judgment to a non-lawyer's financial interests in the representation, the Rules of Professional Conduct do not permit lawyers to share fees directly with non-lawyers.[47]

Evaluate whether this lawyer crossed the line from creative business development to unethical payments for referrals:

Example. Lawyer Amy hired Bradley, an ordained pastor, as a "paralegal" in her personal injury law office. Bradley's primary duty was to find Amy new clients. Amy arranged for Bradley to be able to access the local hospital emergency room area to meet with accident victims and their families. In the emergency room, Bradley met with the accident victim and family dressed as a pastor, identified himself as a chaplain, and prayed with the victim and family before giving them Amy's business card and suggesting that they call Amy for assistance. Amy paid Bradley a $20,000 salary, but Bradley received "bonuses" that exceeded his yearly salary. In one case, when Amy won a $3,000,000 verdict for a client whom Bradley steered to Amy, Amy gave Bradley a $47,500 bonus. Amy claimed that the bonuses were not referral fees, but rather payments to Bradley for the personal services, companionship, and spiritual counseling that Bradley provided to injured victims and their families. Did Amy violate the Rules of Professional Conduct when paying "bonuses" to Bradley?

Analysis. This case shows how lawyer credibility can play a role in the Bar's adjudication of disciplinary issues. If the Bar credits Amy's explanation for her payment of bonuses to Bradley, she may not have violated the Rule —a lawyer is allowed to offer and pay for "law-related services" that extend beyond traditional legal representation by the lawyer.[48] But in context, the Bar very well might find Amy's explanation incredible: the timing and amount of the bonuses suggest that Amy was paying Bradley a bonus, or more accurately a *bounty*, for new clients whom Bradley successfully referred to Amy for legal

services. This type of "runner" arrangement violated Rule 7.2(b).[49] Moreover, because Amy paid Bradley's bonuses directly from client fees, the bonuses violated Rule 5.4(a)'s prohibition on fee sharing with non-lawyers.[50]

Ethics rules like Rule 7.2(b) respond to the temptations of a competitive legal market, which can prompt some lawyers to pursue overly aggressive means of channeling business to themselves and away from competitors. Overall, however, Rule 7.2 invites lawyer advertising, not only to educate the public, but also to develop business.

Quick Summary

Rule 7.2 invites lawyers to market their services in a variety of media and formats to develop their business and client base. So long as the communications remain truthful and not misleading, and do not violate other ethics rules, the Rules of Professional Conduct leave advertising taste and effectiveness to the marketplace. Lawyers, however, may not extend this advertising authority, including the ability to pay for it, to giving any person anything of value in exchange for recommending the lawyer's services. A lawyer therefore may pay others to deliver the lawyer's communications about his or her legal services, self-congratulatory as those communications may be. But, the lawyer generally may not compensate others to compliment the lawyer's services, except out of goodwill.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 DLRPC Rule 7.2, comment 1.

2 *Id.*

3 *Id.*

4 DLRPC Rule 7.2, comment 3.

5 *Id.*

6 *See id.*

7 *See* DLRPC Rule 7.2(c). Lawyer advertising does raise ethical issues outside of Title 7 of the Rules of Professional Conduct. *See generally Lawyer Websites*, A.B.A. Formal Op'n 10–457 (2010). These issues will be addressed in other chapters of this textbook.

8 *See generally* William Hornsby, *Lawyer Advertising and Marketing Ethics Today: An Overview* (Jan. 23, 2013), available at http://www.attorneyatwork.com/lawyer-advertising-and-marketing-ethics-today-an-overview/ (last visited February 17, 2014); Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, A.B.A. JOURNAL (Feb. 1, 2011).

9 *See* DLRPC Rule 7.3(a).

10 *See* Rachel M. Zahorsky, *Do LinkedIn Endorsements Violate Legal Ethics Rules?*, A.B.A. JOURNAL (May 21, 2013).

11 *See id.*

12 The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Aug. 16, 2013).

13 *See* Hornsby, *Lawyer Advertising and Marketing Ethics Today*, *supra* note 8 (noting state-specific lawyer advertising ethics rules and opinions); *see also generally* Gillers, Simon & Perlman, Regulation of Lawyers: Statutes and Standards, at 472–478 (Wolters Kluwer concise ed. 2013). For a comprehensive compilation of state variations, *see* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_

14 For general guidance, *see e.g.*, Carolyn Elephant & Nichole Black, *Social Media for Lawyers: The Next Frontier* (A.B.A. ed. 2010); Simon Chester & Daniel Del Gobbo, *Social Media Networking for Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging*, A.B.A. LAW PRACTICE MAGAZINE (Jan.-Feb. 2012).

15 *See* groupon.com (last visited Feb. 18, 2014).

16 *See* DLRPC Rule 7.2, comments 1–3.

17 States also have considered whether these daily deal advertisements implicate other ethical rules, such as Rule 5.4(a)'s prohibition on fee-sharing with non-lawyers and a lawyer's duty not to accept representation unless the lawyer can provide competent, diligent, and conflict-free representation. *See* Rules 1.1, 1.3, 1.7(a), and 1.16(a)(1). These considerations are addressed in other chapters of this textbook.

18 *See* AlA.B.A.ma Op'n No. 2012–01 (2012); Indiana State Bar Assoc'n Op'n No. 1–2012 (2012).

19 North Carolina 2011 Formal Ethics Op'n 10 (2011).

20 New York State Bar Assoc'n Op'n 897 (2011).

21 South Carolina Ethics Advisory Op'n 11–05 (2011).

22 *See generally* Laurel A. Rigertas, *How Do You Rate Your Lawyer?: Lawyers' Responses to Online Reviews of Their Services*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 242 (2014.

23 Stephanie Francis Ward, *Grade Anxiety*, 96 A.B.A. JOURNAL 48, 53 (Feb. 2010).

24 *See id.* at 49 (quoting Avvo.com founder, that " 'Attorneys don't control comments on their profiles, which is the beauty of it' ").

25 *See* DLRPC Rule 7.2(a); Rigertas, *How Do You Rate Your Lawyer?*, *supra* note 22.

26 *See* DLRPC Rule 7.2(c).

27 *See* DLRPC Rule 7.1.

28 *See generally* DLRPC Rule 1.9, comment 1.

29 *See* DLRPC Rules 1.6(a) and 1.9(c)(2).

30 *See generally* Rigertas, *How Do You Rate Your Lawyer?*, *supra* note 22; *see e.g.*, *In re Skinner*, 740 S.E.2d 171, 172–73 (Ga. 2013). Whether the client's online review may have invoked Fred's authority to disclose confidential information in self-defense under Rule 1.6(5) will be addressed in another chapter of this textbook. *See* Rigertas, *How Do You Rate Your Lawyer?*, *supra* note 22.

31 *See* DLRPC Rule 8.4(c).

32 Josh King, *Your Business: Someone Online Hates You*, The Recorder (Aug. 16, 2013).

33 *See* Rigertas, *How Do You Rate Your Lawyer?*, *supra* note 22; Ward, *Grade Anxiety*, *supra* note 23 at 50.

34 *See generally* Wendy Wen Yun Chang, *Must I Really Turn Down That Referral Fee?*, A.B.A. GPSolo Magazine (July-Aug. 2011).

35 DLRPC Rule 1.17, comment 1.

36 DLRPC Rule 7.2(b) is phrased as prohibiting lawyers from "giving anything of value to a person for recommending the lawyer's services." The rule thus would seem to regulate referral fees only on the receipt side of the transaction. This rule, however, also implicitly prohibits lawyers from *accepting* anything of value when a lawyer serves as the referring individual, because by accepting something of value in exchange for a referral, the lawyer knowingly assists another lawyer to violate the Model Rules. *See* DLRPC Rule 8.4(a) and comment 1.

37 *Cf. Chavez v. Martinez*, 538 U.S. 760, 772–73 (2003) (explaining the prophylactic nature of the *Miranda* rule, which excludes some statements from trial that may not actually be coerced in violation of the Constitution); *City of Chicago v. Morales*, 527 U.S. 41, 73 (1998) (Scalia, J., dissenting) (observing that "[t]he citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle").

38 DLRPC Rule 7.2, comment 5.

39 *See generally* Carolyn Elefant, *Are Pay Per Lead Services and Attorney Rating Sites on a Collision Course with Themselves?* (Dec. 3, 2012), *available at* https://myshingle.com/2012/12/articles/marketing/are-pay-per-lead-services-and-attorney-ratings-sites-on-a-collision-course-with-themselves/ (last visited Feb. 17, 2014).

40 *Id.*

41 *Id.*

42 *See* DLRPC Rule 7.2(b)(1).

43 *See* American Bar Association Model Rules of Professional Conduct, Rule 7.2(b)(4) and comment 8.

44 *See e.g.*, Washington Rules of Professional Conduct, Rule 7.2(b)(4) and comment 9.

45 *See* DLRPC Rule 1.5(e).

46 *See id.*

47 *See* DLRPC 5.4(a). DLRPC 5.4(a) implicates several other business and professional issues for lawyers, which are addressed in other chapters of this textbook.

48 *See* DLRPC Rule 5.7; *cf. also* DLRPC 5.3 (explaining lawyers' ethical duties when supervising non-lawyer assistants).

49 *See* Michelle LaBorde Ghetti, *The Gingerbread Man's Run Is Over! Permanent Disbarment Is Penalty for Using Runners*, 54 La. Bar J. 80, 81 (Aug.–Sept. 2006) (explaining that a " 'runner' is a person who directly contacts an individual who may have a specific legal need and recommends a specific attorney to that person in exchange for remuneration from the attorney if the client ultimately hires that attorney" [internal footnote omitted]).

50 *See Florida Bar v. Bennett*, 897 So. 2d 1269 (Fla. 2005).

11

Solicitation

Key Concepts

- Lawyers may not directly solicit professional employment from anyone when they are significantly motived by pecuniary gain.
- Direct solicitation includes live telephone and real-time electronic contact.
- Lawyers have a disclosure duty when sending targeted solicitations to persons known to need legal services.

Introduction

Rule 7.3 regulates everyone's favorite legal animal: the ambulance-chaser. General advertising to the public can generate positive business for lawyers, but not every advertisement will connect with consumers. A personal solicitation, by contrast, provides a unique opportunity for a lawyer to communicate beyond general advertising with consumers: a direct solicitation enables a lawyer to tailor the lawyer's business message to individual legal needs. An *in-person*, or direct, solicitation enhances this business opportunity further by permitting the lawyer to persuade his or her audience one-on-one.

A solicitation's enticing business potential, however, also creates tension with the legal profession's interests in protecting consumers and maintaining standards of conduct by licensed professionals. Anyone who has envisioned the paradigmatic ambulance-chaser lawyer can imagine how a direct, in-person solicitation could invite overreaching and uninformed decision-making, incentivize baseless claims, and undermine the integrity of the legal profession.[1] Therefore, in addition to the

general advertising standards provided in Rules 7.1 and 7.2, the Rules of Professional Conduct also specifically regulate solicitations by lawyers.

The Rule

Rule 7.3 is organized into four subsections. These subsections regulate the major components of lawyer solicitations: (1) direct solicitations; (2) abusive solicitations; and (3) solicitation of vulnerable consumers with known legal needs.

1. Direct Solicitations

Rule 7.3 first addresses direct solicitations by lawyers:

THE RULE — 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.

Rule 7.3(a) generally prohibits lawyers from directly soliciting professional employment. However, this prohibition is subject to two exceptions. Rule 7.3(b) further exempts certain prepaid and group legal plans from the direct solicitation prohibition in subsection (a):

(b) 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.

This general prohibition reflects the judgment that direct solicitation involves "the potential for abuse,"[2] because direct solicitation "subject[s] a person to the private importuning of the trained advocate in a direct interpersonal encounter."[3] Direct solicitation thus limits the solicited individual's ability "to evaluate all available alternatives with reasoned judgment and appropriate self-interest."[4] As a result, "[t] he situation is fraught with the possibility of undue influence, intimidation, and overreaching."[5] Moreover, unlike commercial advertising, a lawyer's direct solicitation often will produce no objective record of what was communicated to permit after-the-fact review of claimed untruthfulness, deception, or other misconduct.[6]

The Rules of Professional Conduct reason that the aforementioned risks justify a complete prohibition on direct solicitation, particularly when lawyers have other means to reach potential clients.[7] Rule 7.3(a) thus constitutes a prophylactic rule: proof of a prohibited solicitation will warrant discipline without case-specific proof of undue influence, intimidation, overreaching, or other harm from the solicitation. Instead, a lawyer must honor the direct solicitation prohibition regardless of how appropriately or carefully the lawyer might solicit someone for professional employment.

The definition of prohibited direct solicitations consequently proves critical. A 2013 amendment to Rule 7.3's comments clarifies the definition of a solicitation generally:

> A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.[8]

When made in person, a solicitation violates Rule 7.3(a). In addition, live telephone and real-time electronic contact violate this prohibition in the same manner as in-person solicitation. Accordingly, Rule 7.3(a) categorically prohibits lawyerinitiated, targeted communications to a specific person that the lawyer transmits in person, by live telephone contact, or by real-time electronic contact.

Rule 7.3(a) excepts certain audiences from the definition of prohibited solicitations. These exceptions include: when the solicited person "1) is a lawyer, or 2) has a family, close personal, or prior professional relationship with the lawyer."[9] Because these individuals more effectively can engage a lawyer at arms-length, the soliciting lawyer is less able to strong-arm professional employment.[10] The Rules of Professional Conduct also take a similarly permissive view of direct solicitations by lawyers acting on behalf of prepaid and group legal services when the lawyer is not an owner or director of the service, and the lawyer does not solicit for a known legal need.[11]

Consider this problem, where a well-meaning lawyer's marketing plan implicated the ban on direct solicitations, despite her motive to improve access to her legal services:

Example. Lawyer Sarah wanted to develop her family law and immigration law practice in her local community, so Sarah prepared an accurate and non-misleading brochure advertising her legal services. Sarah's community included a large Spanish-speaking population, and Sarah was one of only a few lawyers in the area to offer fluent Spanish-language services; therefore Sarah printed her brochure in both English and Spanish. Sarah also hired local teenagers, who were fluent in Spanish, to distribute the brochures to homes and businesses in the community. Sarah instructed the teenagers to ring doorbells and enter businesses to hand the brochure to someone personally, if possible, so her brochure would not get lost in the mix. Sarah, however, gave the teenagers no information about her practice to share with recipients beyond the brochure itself, and she directed the teenagers not to communicate personally about the brochure. "Just deliver them and leave," Sarah instructed.

Analysis. Even though Sarah's accurate and non-misleading communications conformed to Rule 7.1, her marketing plans implicated Rule 7.3. Sarah is responsible for the actions of the teenagers she hired.[12] The brochure further constituted a solicitation because it was a "targeted communication initiated by the lawyer that [was] directed to a specific person and that offer[ed] to provide … legal services."[13] Delivery of the brochure to businesses or even home mailboxes nevertheless likely did not violate Rule 7.3(a) if the teenagers did not contact anyone in person.[14] But Sarah directed the teenagers to ring doorbells and enter businesses to deliver the brochure personally. Sarah thus improperly instructed the teenagers to violate Rule 7.3(a)'s direct solicitation prohibition, which permitted Sarah to violate Rule 7.3(a) through the acts of another person.[15] The fact that Sarah directed the teenagers not to communicate about her practice beyond delivering her brochures does not change the character of the prohibited solicitation, because Rule 7.3(a) prohibits inperson solicitation and Sarah's communication did not fall within any of the limited exceptions.

The rapidly developing landscape of communication technology will present lawyers with some of the greatest opportunities, but also challenges, in the area of solicitation. Social media, blogs, and other online communication portals can connect lawyers to previously inaccessible potential clients and raise lawyers' profiles in a market.[16] But these portals also permit lawyers to initiate professional contact in manners that Rule 7.3 does not entirely clarify as constituting either prohibited direct solicitation, a proper solicitation, or no solicitation at all.[17]

This challenge in applying the Rules of Professional Conduct to the moving target of technology is illustrated by the seemingly simple question of whether the definition of a prohibited "real-time electronic contact" includes something as ubiquitous as a text message. Rule 7.3 and its comments do not answer this question

explicitly, even though people may text message nowadays more than they talk.[18] Rather, jurisdictions, and therefore lawyers, are left to judge whether a text message is more analogous to a permissible email message,[19] or instead to an impermissible chat room communication.[20]

One jurisdiction's Supreme Court has concludedthat a text message is more analogous to an email and therefore does not constitute a prohibited real-time electronic contact.[21] The opinion, however, cautioned lawyers against using "voice-texting apps" that would allow lawyers to combine live voice and text messages[22]—evincing the technological limitations of this kind of opinion, as the nature of a "text message" evolves. But for the moment, so long as lawyers follow the other ethics rules applicable to lawyer advertising, lawyers in this jurisdiction ethically may "cull accident or police reports for the cell phone numbers of prospective clients and send text messages that 'contain direct solicitations for professional employment.' "[23] Lawyers in other jurisdictions nevertheless would be well-advised to remain cautious before engaging in this kind of solicitation with confidence that text messages definitively do not constitute real-time electronic contact under Rule 7.3(a).

Consider whether Lawyer Sarah again crossed any lines established by Rule 7.3 in her effort to use social media technology to market her legal practice:

Example. Lawyer Sarah maintained a combined personal and professional page on Facebook. On this Facebook page, in addition to posting about personal matters, Sarah posted blog-style updates about her law practice, and included information about her legal services. This information was accurate and not misleading. Sarah had over 500 "friends" on Facebook, so when Sarah updated her Facebook status, her posts automatically would populate numerous individuals' news feed. In several of Sarah's Facebook

posts about her practice and legal services, Sarah invited friends to "Call or email me for more information!" Do Sarah's marketing plans violate Rule 7.3?

Analysis. Sarah's Facebook page likely implicated the Rules of Professional Conduct. Although Sarah used Facebook in part for personal purposes, Sarah also posted about her availability and qualifications for professional employment. Sarah's Facebook posts about her practice and legal services thus likely constituted a communication subject to regulation under the Rules of Professional Conduct.[24]

Sarah's Facebook posts, however, likely were not real-time contacts in violation of Rule 7.3(a). Even though Sarah's "call me" posts automatically populated friends' news feeds,[25] the posts were more analogous to an email message,[26] or to a newsreader to which someone subscribes to follow blogs or other media. As in the e-mail and newsreader contexts, Facebook users can control both when they receive posted information and whether and how to respond to it. Moreover, although Sarah's Facebook page was not directed to the general public,[27] followers subscribed to her dedicated professional page on their own volition. To the extent anyone friended Sarah because of her professional identity, Rule 7.3 does not apply when the lawyer responds to inquiries about the lawyer or the lawyer's services. Alternatively, Sarah's Facebook friends conceivably could constitute individuals with a "close personal … relationship" to Sarah.[28] Sarah, however, would need to be careful to remain within the Rules of Professional Conduct when using Facebook professionally. For instance, Sarah could violate Rule 7.3 if she instant-messaged friends with whom she had a more tenuous personal or professional relationship, or if she communicated at all about professional employment with someone who expressed a desire not to be contacted for legal business.[29]

Rule 7.3(a)'s prohibition on direct solicitation, moreover, applies only when the lawyer's solicitation is significantly motivated by pecuniary gain. In the view of the Rules of Professional Conduct, lawyers will be less likely to engage in abusive practices when motivated by interests other than pecuniary gain.[30] This exception also accounts for the In re Primus case,[31] which held that solicitation for political advocacy constitutes protected political speech under the First Amendment.[32] A State therefore may discipline this kind of solicitation only when the individual solicitation presents a compelling justification for regulation, such as when a lawyer solicits with untruthful or misleading information.[33]

The precise line where pecuniary gain significantly motivates a lawyer's direct solicitation of a consumer is not defined by the Rules of Professional Conduct. Judge whether this lawyer was ambulance-chasing or engaging in a protected solicitation for political advocacy:

Example. Lawyer Anders learned that Joanne Jetta, an immigrant farm worker, had been severely injured at work. Anders specialized in immigrant worker advocacy, and used both litigation and public education strategies to improve unsafe working conditions for immigrant workers. Anders believed that Jetta's case would be a great test case for this cause, because Jetta's employer was notorious for short-changing worker safety in the name of profit. Jetta's employer also was a deep pocket, however, so Jetta's injury also could offer a big payday to whoever represented Jetta. Concerned that the personal injury bar might get to Jetta first, Anders visited Jetta in the hospital to pitch himself as her lawyer. Is Anders subject to discipline?

Analysis. Anders solicited Jetta in person for professional employment. Anders had no preexisting personal or professional relationship with Jetta, so Anders' solicitation seemingly violated Rule 7.3(a). Anders, however, was motivated to solicit Jetta for reasons other than pecuniary gain: Anders' desire to advocate for immigrant worker rights. Rule 7.3(a) does not apply unless pecuniary gain was a "significant motive" for Anders' solicitation of Jetta. Indeed, Anders' motive relating to immigrant worker advocacy may have brought his solicitation into the First Amendment protections of the *Primus* case.[34] Yet, at the same

time, Anders knew of the potential payday in representing Jetta, which also may have motivated Anders' solicitation. The issue will turn on the factual question of whether the payday was a "significant" motive for Anders' solicitation. Unfortunately, neither Rule 7.3 nor Rule 1.0 defines "significant."[35] If, however, the payday significantly motivated Anders, he is subject to discipline. If pecuniary gain did not significantly motivate Anders, he is not subject to discipline, so long as Anders' solicitation was truthful and not misleading,[36] Jetta did not make known to Anders her desire not to be solicited,[37] and Anders' solicitation did not involve coercion, duress, or harassment.[38]

2. Abusive Solicitations

The second part of the Rule extends the prohibition in subsection (a) to all solicitations where the lawyer's communication proves abusive by ignoring a request to desist, or by harassing or coercing anyone:

THE RULE — Rule 7.3

Solicitation of Clients

(c) A lawyer shall not solicit professional employment 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;

Rule 7.3(b) precludes even otherwise permissible solicitations if the lawyer in fact employs abusive practices. The Rules divides these abusive practices into two categories: (1) where the target of the solicitation communicates a desire not to be solicited by the lawyer,[39] and (2) where the solicitation involves coercion, duress,

or harassment.[40] Importantly, this Rule does not apply only to direct solicitations. Rather, this Rule can apply to *any* lawyer communication—including otherwise permissible advertising under Rule 7.2—that overreaches or ignores a request that the lawyer desist.[41]

3. Disclaimers and Vulnerable Consumers

Rule 7.3(c) recognizes that some communications by lawyers that solicit business remain outside the direct solicitation prohibition, but nevertheless target potentially vulnerable individuals. The Rule therefore imposes a disclaimer requirement with any solicitation targeting persons with a known legal need who are not lawyers or who do not have a family, close personal, or professional relationship with the lawyer:

> **(d)** 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, or at the beginning and the ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

This part of Rule 7.3 is limited in scope to solicited persons "known to be in need of legal services in a particular matter."[42] Notice that the Rule does not categorically prohibit lawyers from communicating with these individuals. Rather, the Rule merely requires lawyers to include the disclaimer "Advertising Material" with every written, recorded, or electronic communication targeting these individuals, unless the targeted individual is a lawyer or has a close personal or professional relationship with the soliciting lawyer. This disclaimer helps to ensure that individuals targeted for a known legal need do not misperceive the solicitation as something other than a lawyer's pitch for business.

With targeted solicitations sent by traditional mail, the disclaimer must appear on the outside of the envelope.[43] With recorded solicitations, like a voicemail message,

or electronic solicitations, such as an email, the disclaimer must appear at the beginning and ending of the communication.[44]

This Rule of Professional Conduct does not define with laser-beam precision who is a person "known to be in need of legal services in a particular matter." Evaluate whether this lawyer communicated with persons who fell under this Rule, and whether the disclaimer requirement applied at all in light of the *nature* of the lawyer's communication:

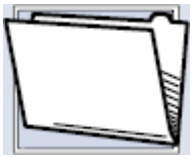
Example. Lawyer Mauricio recently moved his law practice from an old, rundown office space to a spiffy new location in the center of downtown. Eager to parley the new work digs into some business, Mauricio prepared an elegant printed announcement, including professional photos of the new office and location information. At the same time, Mauricio purchased a mailing list from a debt counseling service. Mauricio believed the people on this mailing list might be interested in his practice in mortgage protection, foreclosure, and consumer protection. Mauricio mailed the announcement to his existing clients and to the individuals on the mailing list he purchased. Did Mauricio's announcement violate Rule 7.3?

Analysis. Mauricio's announcement likely constituted a solicitation under Rule 7.3, because it communicated to specific persons in a manner that reasonably could be understood to offer legal services.[45] Yet, the announcement did not solicit business directly, because Mauricio sent it by mail.[46] In any event, the announcement to existing clients likely would have fallen outside Rule 7.3(a) altogether, because Mauricio already had a professional relationship with those individuals. Not so, however, with the individuals on the debt counseling mailing list. Moreover, Mauricio targeted these individuals due to their potential need for specific legal services. In that circumstance, Mauricio typically would need to include the disclaimer "Advertising Material" on the envelope containing the announcement.[47] But, the comments to Rule 7.3 note that "[g]eneral announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within

> the meaning of this Rule."[48] Therefore, Mauricio's announcement was proper both as to his existing clients and as to the individuals on the mailing list, so long as no one made known to Mauricio a desire not to be solicited,[49] and Mauricio's announcement did not involve coercion, duress, or harassment.[50]

The lesson from Rule 7.3 is that while the Rules of Professional Conduct permit lawyer advertising generally, lawyers must remain very careful when that advertising involves what the Rules characterize as a "solicitation." Direct solicitations are verboten, and targeted solicitations require a disclaimer.

Quick Summary



Rule 7.3(a) restricts a lawyer's ability to advertise, even when otherwise proper under Rules 7.1 and 7.2, if the lawyer solicits business directly by in person, live telephone, or real-time electronic contact. The rapid pace of technology development will test this Rule in coming years, but lawyers must exercise care when new modes of communication bring lawyers into direct contact with persons they are soliciting. Rule 7.3(a)'s prohibition on direct solicitation importantly does not apply to solicitations of other lawyers or persons with whom the lawyer has a family, close personal, or professional relationship. But any solicitation remains improper if the lawyer coerces or harasses the person being solicited, or ignores a request to desist.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

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1 *See generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457–461 (1978) (discussing these legitimate interests of the State in regulating lawyer solicitations).

2 DLRPC 7.3, comment 2.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Cf.* DLRPC Rule 7.3, comment 4.

7 *See* DLRPC Rule 7.3, comment 3.

8 DLRPC Rule 7.3, comment 1.

9 *See* DLRPC Rule 7.3(a)(1) and (a)(2).

10 *See* DLRPC Rule 7.3, comment 5.

11 *See* DLRPC Rule 7.3(d) and comment 9.

12 *See* DLRPC Rules 5.3 and 8.4(a).

13 DLRPC Rule 7.3, comment 1.

14 *Cf.* WA Advisory Op'n 2193 (2008).

15 *See id.*; DLRPC 5.3(a) and 8.4(a).

16 *See generally e.g.*, Kevin O'Keefe, *Four Reasons Google+ Is Important for Blogging Lawyers*, Real Lawyers Have Blogs, available at http://kevin.lexblog.com/2014/02/17/three-reasons-google-is-important-for-blogging-lawyers/ (last visited March 20, 2014).

17 *Cf.* James Podgers, *Legal Ethicists Are Playing Catch-Up to Create Social Media Guidelines for Lawyers, Judges*, A.B.A. Journal (Aug. 10, 2013).

18 *See* Jeffrey Kluger, *We Never Talk Anymore: The Problem with Messaging*, Time Tech (Aug. 16, 2012), available at http://techland.time.com/2012/08/16/we-never-talk-anymore-the-problem-with-text-messaging/ (last visited March 20, 2014).

19 *See* DLRPC Rule 7.3, comment 3 (approving of email as not real-time electronic contact).

20 *See* Samson Habte, *Lawyers May Solicit Clients by Text Messages if Specific Rules on Advertising Are Followed*, Bloomberg BNA (April 24, 2013) available at http://www.bna.com/lawyers-may-solicit-n17179873553/ (collecting state authorities holding that chat room communications violate the real-time electronic contact prohibition) (last visited March 20, 2014).

21 *See* Ohio Ethics Opinion 2013–2, at 4–5 (2013).

22 *See id.* at 5.

23 Habte, *Lawyers May Solicit Clients by Text Messages if Specific Rules on Advertising Are Followed*, *supra* note 20; *see also* Mark Williams, *Personal Injury Lawyers Can Now Pitch Accident Victims Services Via Text Message*, The Columbus Dispatch (Dec. 22, 2013).

24 *See* The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Aug. 16, 2013); CA Formal Op'n 2012–186 (2012).

25 *Cf.* Dean R. Deitrich, *Ethics: Rules for Marketing with Social Media*, 84 Wisc. Lawyer (May 2011) (opining that "[a] posting to a Facebook page likely would not constitute real-time electronic contact").

26 *See* DLRPC Rule 7.2, comment 3 (commenting that email does not constitute real-time electronic contact).

27 *Cf.* DLRPC Rule 7.3, comment 1.

28 *See* DLRPC 7.3(a)(2).

29 Sarah's use of Facebook for professional purposes also could implicate other Model Rules, such as the Duty of Confidentiality. These issues relating to the use of social media and other online technology are addressed in Chapter 32 of this textbook.

30 DLRPC Rule 7.3, comment 5.

31 *See In re Primus*, 436 U.S. 412 (1978).

32 *See* Chapter 8 *supra*.

33 *See* DLRPC Rule 7.1.

34 *See In re Primus*, 436 U.S. 412.

35 *Compare* DLRPC 1.0(l) (defining "substantial" to "denote[] a material matter of clear and weighty importance").

36 *See* DLRPC Rule 7.1.

37 *See* DLRPC Rule 7.3(b)(1).

38 *See* DLRPC Rule 7.3(b)(2).

39 *See* DLRPC Rule 7.3(b)(1).

40 *See* DLRPC 7.3(b)(2).

41 *See* DLRPC 7.3, comment 6.

42 DLRPC Rule 7.3(c).

43 *See id.*

44 *See id.*

45 *See* DLRPC 7.3 comment 1.

46 *See* DLRPC 7.3 comment 3.

47 *See* DLRPC 7.3(c).

48 DLRPC 7.3 comment 8.

49 *See* DLRPC 7.3(b)(1).

50 *See* DLRPC Rule 7.3(b)(2).

12

Fields of Practice and Specialization

Key Concepts

- Lawyers may communicate practice areas when advertising, including specialization in particular fields of law.
- Lawyers may not claim certification as a specialist unless the certifying entity is identified clearly and approved by the bar association.

Introduction

Like anyone competing for business in a limited market, lawyers want to distinguish themselves from competitors. One common business method to distinguish a service from competitors is to tout the experience or specialization of the person providing that service. You can imagine the advertising slogans: "Four out of five dentists agree—the most experienced medical malpractice lawyer in the State!" Rule 7.4 governs how lawyers as licensed professionals may advertise about particular areas of expertise and practice specialty.

The Rule

1. Practice Areas

Rule 7.4 includes three provisions addressing communications by lawyers about their practice areas:

THE RULE Rule 7.4

Communication of Fields of Practice and 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 substantially similar designation.

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

Rule 7.4 generally authorizes lawyers to advertise practice areas, including information about matters that the lawyer will *not handle*.[1] Moreover under this authority to identify practice areas, the Delaware Lawyers' Rules of Professional Conduct permit advertisements that "the lawyer is a 'specialist,' practices a 'specialty,' or 'specializes in' particular fields."[2] All these kinds of communications, however, "are subject to the 'false and misleading' standard applied in Rule 7.1 to communications concerning a lawyer's services."[3] Therefore, before advertising as a "specialist" in a particular area, a lawyer should consult Rule 1.1's competence standards and assess the norms of that field of law carefully—being competent in intellectual property law may well not be the same thing as being a "specialist" in intellectual property litigation, for instance. Because of this concern, some jurisdictions restrict a lawyer's ability subjectively to state or imply that they are a "specialist," and generally limit the lawyer to identifying practice areas.[4]

In contrast to a lawyer self-identifying as a "specialist" in a particular field, sometimes external entities or organizations may identify the lawyer as a specialist or expert. Rule 7.4 contains a fourth provision that prohibits lawyers from representing that they are certified specialists in particular fields, absent two conditions:

THE RULE Rule 7.4

Communication of Fields of Practice and Specialization

(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.

(2) The name of the certifying organization is clearly identified in the communication.

2. Specialization Certification

Rule 7.4(d) distinguishes a lawyer's claim to a particular specialty from a lawyer's claim to being a *certified* specialist. For a lawyer to claim that he or she is a certified specialist: (1) the lawyer must be certified by an organization that is "approved by an appropriate state authority" or "accredited by the American Bar Association,"[5] and (2) the lawyer clearly must identify the name of the certifying organization in the communication.[6] This Rule recognizes that consumers can benefit from learning whether an objective and established entity in a particular field of law has certified a lawyer as possessing greater experience, knowledge, and proficiency than what is required for general licensure to practice law.[7]

Consider whether this lawyer's LinkedIn profile violates the rules governing communication of legal specialization:

Example. Lawyer Ramona, an attorney practicing in New York State, maintained a profile on LinkedIn. Ramona's LinkedIn connections regularly endorsed Ramona's skills and experience in a wide range of practice areas. Ramona was careful to publicize only endorsements that were truthful and not misleading about her legal skills and experience. Another lawyer viewing Ramona's LinkedIn profile complained to the State bar

that Ramona improperly was advertising herself as a specialist in all these fields of law.

Analysis. This problem demonstrates how language and localization of ethics rules can matter greatly as to whether a lawyer's communication violates the rule governing specialization claims. Ramona's LinkedIn profile likely did not violate Rule 7.4, so long as her LinkedIn profile's Skills and Experience section remained truthful and not misleading and did not state or imply that Ramona had been certified as a specialist in those areas.

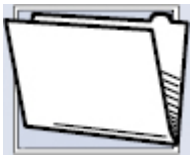
New York State's version of Rule 7.4 does not allow a lawyer to claim that the lawyer is a specialist in a particular field of law at all absent an approved certification under the Rule.[8] LinkedIn's online endorsement feature previously identified user "specialties" in their profile. In response, the New York State Bar Association opined that LinkedIn's endorsement feature violated New York's rule absent an approved certification.[9] But, in March of 2012, LinkedIn replaced the "specialties" option in user profiles with "Skills and Experience."[10] What is the ethics upshot of this seemingly small change in language? As one expert on lawyers and social media recently observed, "I don't see anything in Rule 7.4 that would prevent lawyers from using the Skills and Experience section of LinkedIn. New York's version of Rule 7.4 only prevents lawyers who aren't certified from listing themselves as specialists."[11]

Note, however, that LinkedIn's change in language may not matter much in states like South Carolina. South Carolina also prohibits lawyers from claiming any specialization without an approved certification.[12] But, "[t]o avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statement [lacking an approved certification] … shall not contain any form of the words "certified," "specialist," "*expert*," *or "authority*."[13] Following LinkedIn's change, South Carolina apparently alerted bar members of the continuing

> prohibition on lawyers publicly displaying the Skills and Experience section of LinkedIn without an approved certification.[14]

The same expert on lawyers and social media has argued that inconsistencies of this sort demonstrate that Rule 7.4 provides only "a lot more confusion for lawyers—and little if any protection of consumers."[15] Regardless of the merit of this argument, lawyers must learn local rules before communicating specialization or expertise through LinkedIn, other social media, or any other online media. Otherwise, a fairly clear ethics complaint may follow.

Quick Summary



Under the Rules of Professional Conduct, lawyers may identify practice areas in advertising. This authority extends to truthful and non-misleading claims of specialization—such as "Trial Specialist." Lawyers further may distinguish themselves by communicating about certifications of specialization in particular fields of law, if the certifying entity is identified clearly and approved by the Bar. But, lawyers must remain careful about how they communicate unique skills or experience to avoid deception or unjustified expectations. Moreover, many jurisdictions more significantly limit how lawyers may communicate about specialization, so lawyers must learn these rules.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

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1 *See* DLRPC Rule 7.4, comment 1.

2 *Id.*

3 *See* DLRPC Rule 7.4, comment 1.

4 *See e.g.*, Washington Rules of Professional Conduct, Rule 7.4(d).

5 DLRPC Rule 7.4(d)(1).

6 *See* DLRPC Rule 7.4(d)(2).

7 *See* DLRPC Rule 7.4, comment 3.

8 *See* N.Y. RPC 7.4(a) and (c).

9 *See* Carolyn Elefant, Why New York's Recent Ethics Opinion on LinkedIn Shows the Folly of Regulating the Minutia of Social Media, myShingle.com (Aug. 30, 2014), available at http://myshingle.com/2013/08/articles/ethics-malpractice-issues/why-new-yorks-recent-ethics-opinion-on-linkedin-shows-the-folly-of-regulating-the-minutia-of-social-media/ (last visited March 20, 2014).

10 *See id.*

11 *Id.*

12 *See* S.C. RPC 7.4(a).

13 S.C. RPC 7.4(b) (emphasis added).

14 Elefant, Why New York's Recent Ethics Opinion on LinkedIn Shows the Folly of Regulating the Minutia of Social Media, myShingle.com, *supra* note 8, linking to Jim Dedman, South Carolina and the LinkedIn "Loophole", abnormaluse.com (March 4, 2013), available at http://abnormaluse.com/2013/03/the-south-carolina-bar-and-thelinkedin-loophole.html (last visited March 20, 2014).

15 Elefant, Why New York's Recent Ethics Opinion on LinkedIn Shows the Folly of Regulating the Minutia of Social Media, myShingle.com, *supra* note 8.

13

Firm Names and Letterhead

Key Concepts

- Lawyers may use trade and firm names that are truthful and not misleading.
- Lawyers' firm or trade names must indicate jurisdictional practice limitations, may not use the name of a lawyer who holds public office, and may not suggest that lawyers practice in a partnership, unless that fact is true.

Introduction

Like many participants in competitive markets, lawyers often want to create a brand identity for their practice. You can visualize a lawyer's advertisement illustrating that lawyer's brand identity: "Monster Verdict Law!" flashing on the screen with a low-budget Godzilla-like monster squashing miniature insurance company offices overlaid with the slogan: "Squashing insurance companies since 1995. Call 555-CASH."

This kind of advertisement seeks to market a legal practice through a trade name. Further, the advertisement may also communicate on behalf of a number of lawyers who have partnered professionally into the firm being marketed as Monster Verdict Law. Also imagine that Monster Verdict Law has offices or a comparable professional presence in multiple states, each of which requires individualized licensing to practice there.

The practice by lawyers of communication through trade or firm names and the practice of communicating as a firm of multiple lawyers, presents some unique regulatory concerns for the legal profession. Rule 7.5 governs "firm names and letterhead."

The Rule

1. Firm and Trade Names

Rule 7.5 begins by confirming that law firm branding cannot be untruthful or misleading and by authorizing trade names under certain conditions:

THE RULE — Rule 7.5

Firm Names and Letterhead

(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.

Under Rule 7.5(a), a law firm may employ a trade name, or otherwise name itself as a law firm, so long as the trade name is truthful and not misleading. The comments provide that a firm name may include the names of some or all of the firm's lawyers.[1] The firm name also may include the names of deceased lawyers "where there has been a continuing succession in the firm's identity."[2] The names of non-lawyers in the firm, however, may not be used., nor may the names of lawyers be used who are not associated with the firm.[3] This Rule's branding authority further extends to distinctive web site addresses and comparable professional designations to allow lawyers to market themselves, so long as the designation does not mislead.[4] The comments note, for example, that geographical firm names may be misleading because they can imply that the firm is a type of public legal aid or services office.[5] Therefore, these designations may require a disclaimer to avoid misleading the public.

2. Jurisdictional Limitations

The Rule next clarifies how lawyers in a firm that practices in more than one jurisdiction may communicate about the firm's legal services:

THE RULE — Rule 7.5

Firm Names and Letterhead

(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 the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

A law firm may use its professional brand across multiple jurisdictions where it maintains offices. Lawyers, however, may not establish a professional presence in jurisdictions where they are not licensed to practice law.[6] Accordingly, if the law firm maintains a professional presence across several jurisdictions, and not all lawyers in the firm are admitted to practice in all the jurisdictions, the law firm's communications must identify the practice limitations of all lawyers in the firm.[7] For instance, a lawyer's business card may identify her as a member of a law firm with offices in states A, B, and C, but the business card will note that the individual lawyer "is not licensed in states B and C."

3. Public Official Membership

Rule 7.5 further restricts how law firms may communicate when one of the lawyers in the firm is a public official:

THE RULE Rule 7.5

Firm Names and Letterhead

(c) The name of a lawyer holding 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.

This Rule prevents lawyers from trading inaccurately on the name of a public official by marketing that the official is an active firm member when he or she in fact is not.

4. Partnerships

Finally, Rule 7.5 addresses how lawyers may represent that they practice as partners:

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

Rule 7.5 makes clear that lawyers who "share[] office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, 'Smith and Jones,' for that title suggests that they are practicing together in a firm."[8] This Rule is rooted in the fact that lawyers who are partners, or otherwise associated with each other by law, share professional and financial responsibility for client matters. Lawyers who simply share office space and resources but maintain different practices, by contrast, generally do not bear mutual responsibility for a client matter unless they agree to an appropriate fee-sharing arrangement where the lawyers "assume[] responsibility for the representation as a whole." [9] An advertisement that states or implies otherwise is misleading.

Example. Did Monster Verdict Law's firm name and marketing violate Rule 7.5?

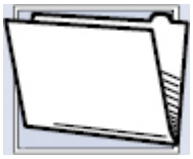
Analysis. Monster Verdict Law was not prohibited from employing a trade name generally.[10] Nor did "Monster Verdict Law" likely suggest that its lawyers were associated with a government agency, public legal service, or charitable legal service.[11] But, the trade name may be potentially misleading under Rule 7.1.[12]

Trade names that employ artifices to entertain, grab attention, and make a law firm more memorable do not necessarily violate Rule 7.5(a).[13] In this advertisement, however, the law firm did not merely describe itself as "Monster Law" with a visual depiction of a Godzilla-like creature. The firm coined itself "Monster Verdict Law." This name may invite unjustified expectations about case outcomes.[14] Combined with the advertisement language about squashing insurance companies and the telephone designation "555-CASH," the firm name "Monster Verdict Law" even more likely could create unjustified expectations about case outcomes.[15] Monster Verdict Law's trade name therefore arguably could violate Rule 7.5(a).

Moreover, Monster Verdict Law practiced in multiple jurisdictions. Yet, Monster Verdict Law's advertisement did not identify any practice limitations of its lawyers. If any Monster Verdict Law lawyers were not admitted in a jurisdiction where Monster Verdict Law had an office, the firm violated Rule 7.5(b).

According to Rule 7.5, law firms who advertise through firm or trade names must ensure that those names remain truthful and do not mislead, including not misleading as to the professional relationship between lawyers in the firm. Moreover, lawyers must ensure that advertising accurately offers jurisdictional practice limitations when lawyers in a firm practice across multiple jurisdictions.

Quick Summary



Law firms may employ trade names and other professional designations to advertise and brand the firm. The trade name or designation, however, may not be untruthful or misleading. Law firms that practice in multiple jurisdictions through a single law firm name must be careful to identify lawyers who cannot practice in all of the firm's jurisdictions. And, lawyers cannot communicate that they practice as partners or in a professional organization unless that fact is true.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *See* DLRPC Rule 7.5, comment 1.

2 *Id.*

3 *See id.*; *cf.* Utah Advisory Ethics Op'n 04–3 (2003) (opining that solo practitioner may not use the firm name "Doe & Associates" if he has no associated lawyers, even if the firm previously had associated counsel or if the firm employs associated non-lawyers, such as investigators or paralegals).

4 *See* DLRPC Rule 7.5.

5 *See id.*

6 *See* DLRPC Rule 5.5(a).

7 *See* DLRPC Rule 7.5(b).

8 DLRPC Rule 7.5, comment 2.

9 *See* DLRPC1.5(e) and comment 7.

10 *See* DLRPC Rule 7.5(a).

11 *See id.*

12 *See id.*

13 *Cf. Alexander v. Cahill*, 598 F.3d 79, 83–84 (2d Cir. 2010) (reviewing law firm advertisements that depicted lawyers as giants towering over local buildings and providing legal services to aliens).

14 *Cf.* DLRPC Rule 7.1, comments 2 and 3.

15 Contrast e.g., Alexander, 598 F.3d at 94–95 (emphasizing "dearth of evidence" that firm monikers like "Heavy Hitters," standing alone, would be misleading).