Effective and Ethical Use of Social Media

Presented by
Gina F. Rubel, Esq.

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5/3/2018
1:45 PM
Effective & Ethical Use of Social Media for Law Firms

Gina F. Rubel, Esq.
@GinaRubel

#ALAConf18

About the presenter

Gina F. Rubel, Esq.
► CEO of Furia Rubel Communications since 2002
► Represents law firms, government agencies, banks, and other professional service providers
► Practiced law before returning to proactive communication roots
► Manages strategic planning, integrated communications strategy, crisis planning and training, and trial publicity
► Active on social media (Twitter @ginarubel)

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### Managing law firm social media

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the firm understand the <strong>benefits</strong>?</td>
<td></td>
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<tr>
<td>Does the firm understand the <strong>risks</strong>? The <strong>ethics</strong> rule?</td>
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<tr>
<td>Are there <strong>protocols</strong> and <strong>policies</strong> to avoid risks?</td>
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<tr>
<td>What are the <strong>best practices</strong>?</td>
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#### TRENDS

- 39% of lawyers have obtained clients from blogging (ABA/MyCase)
- Mobile overtakes desktop traffic by 33% (Parse.ly)
- 62% of law firms maintain social networks
- **76%** of adults looking to hire an attorney go online (LexisNexis)
- Internet advertising budgets increase above TV & Print (ZenithOptimedia)
- Hours lawyers spend blogging weekly
- **2.1** (ABA/MyCase)
- 78% of lawyers have 1 or more social media profiles
- Social media is the No.1 driver of all website traffic (Shareaholic)
- Social distribution jumps 21% (Parse.ly)
Benefits of social media to law firms

2017 SOCIAL MEDIA STATS

<table>
<thead>
<tr>
<th>Social Media</th>
<th>Americans Online</th>
<th>Total American Population (Online and Offline)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>79%</td>
<td>68%</td>
</tr>
<tr>
<td>Instagram</td>
<td>32%</td>
<td>28%</td>
</tr>
<tr>
<td>Pinterest</td>
<td>31%</td>
<td>26%</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>29%</td>
<td>25%</td>
</tr>
<tr>
<td>Twitter</td>
<td>24%</td>
<td>21%</td>
</tr>
</tbody>
</table>

© Furia Rubel Communications, Inc.
96% of lawyers & 90% of law firms maintain a LinkedIn profile.

33% of lawyers & 52% of law firms maintain a Facebook presence.

10% of lawyers & 19% of law firms maintain a Twitter presence.

Reasons lawyers use social

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Career Development/Networking</td>
<td>75%</td>
</tr>
<tr>
<td>Education / Current Awareness</td>
<td>50%</td>
</tr>
<tr>
<td>Client Development</td>
<td>44%</td>
</tr>
<tr>
<td>Case Investigation</td>
<td>22%</td>
</tr>
<tr>
<td>Other</td>
<td>4%</td>
</tr>
</tbody>
</table>

Source: American Bar Association; MyCase
Risks of social media to law firms

- Disclosing privileged or confidential information
- Making false or misleading statements
- Prejudicing jurors
- Prohibited solicitations
- Improperly friending judges, witnesses, experts, etc.
- Communicating improperly with clients
- Inadvertently creating attorney-client relationship

ABA Model Rules of Professional Conduct

• **1.6** Confidentiality of Information
• **3.6** Trial Publicity
• **4.1 – 4.4** (Transactions with Persons Other Than Clients)
• **5.3** Responsibility Regarding Nonlawyer Assistant
• **7.1 – 7.5** (Information About Legal Services - Communications)
Confidentiality of information  
Rule 1.6  

“Lawyer shall not reveal information relating to the representation of a client…”

Exceptions: authorization, complies with Rule 3.3 and to prevent harm, death or criminal act

Truthfulness in statements to others  
Rule 4.1  

Lawyer shall not knowingly make a false statement of material fact or law or fail to disclose same to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
In April 2018, an attorney in New Jersey was sanctioned $10,000 by a judge for missing a court filing deadline. The attorney’s “excuse” was refuted by her vacation photos on Instagram.
Communication with person represented by counsel - Rule 4.2

Lawyer shall not communicate about the subject of legal representation with a person the lawyer knows to be represented by another lawyer in the matter.

**Exception:** Consent

Responsibility regarding nonlawyer assistant - Rule 5.3

A “nonlawyer” employed, retained, or associated with a lawyer is bound by the same rules of ethics.

**Rules cannot be delegated or avoided.**
ABA releases proposed changes to lawyer advertising rules Dec. 2017, Rev. March 2018

The proposal would amend ABA Model Rules:
• 7.1: Communications Concerning a Lawyer’s Services
• 7.2: Advertising
• 7.3: Solicitation of Clients
• 7.4: Communication of Fields of Practice and Specialization
• 7.5: Firm Names and Letterheads

The key changes focus on model rule provisions related to false and misleading “communications” and solicitations by lawyers.

Why the proposed changes to Rules 7.1 to 7.5?
• To encourage national uniformity
• To increase access to justice
• To address technology, competition and cross-border practices
• To protect the public from false and misleading communications
• To relieve regulators of unnecessary burdens

ABA SCERP Proposed Changes

• Permit nominal “thank you” gifts for referrals
• Prohibit live solicitation
• Eliminate labeling requirements for targeting mailing
• Prohibit misleading, coercive, or harassing mailings.

The proposed rule uses the term “communication” rather than advertising.

www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf

Communications concerning a lawyers services – Rule 7.1

Model 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.

Proposed changes included in comments and incorporates Firm Names & Designations (Formerly Rule 7.5)

• Communications shall not:
  • Be false or misleading, or contain a material misrepresentation or omission of fact (SAME)
  • Create a likelihood that a reasonable person would believe they need to take further action when none is required (SUBSTANTIALLY EDITED)
  • Provide information about fees without indicating the client’s responsibilities of cost (NEW)
  • Create unjustified expectation of results via previous achievements without reference to specific facts and circumstances (SUBSTANTIALLY SAME)
  • Be unsubstantiated comparison of lawyer or firm’s services or fees (EDITED)
  • Be dishonest, fraudulent, deceitful or include misrepresentation (SUBSTANTIALLY EDITED)


• Comment 6: Firm names, letterhead and professional designations are communications concerning lawyers services [FORMERLY RULE 7.5 SUBSTANTIALLY EDITED]
  • Firm names may include current members, deceased members where there has been a succession in the firm’s identity, or trade name if not false or misleading.
  • May be designated by a distinctive website address, social media username or comparable professional designation that is not misleading
  • Geographical names may need to include statement that firm is NOT a public legal aid organization (i.e., Springfield Legal Clinic) and different offices may use different geographical names
Advertising – Rule 7.2

7.2 Communications Concerning a Lawyer’s Services: Specific Rules

• Shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer’s services except that a lawyer may
  1) pay the reasonable and permissible costs of advertisements or communications
  2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service (approved by regulatory authority)
  3) pay for a law practice in accordance with Rule 1.17
  4) refer clients to another lawyer (cannot have exclusive reciprocal referral agreements) with knowledge of client
  5) Give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services (NEW)
7.2 (C)

• 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 authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
  2) the name of the certifying organization is clearly identified in the communication.

Former Rule 7.4: Communication of Fields of Practice and Specialization

7.2 (Comment 9)

Communications about Fields of Practice

[9] Paragraph (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

Former Rule 7.4: Communication of Fields of Practice and Specialization
7.2 (Comments 10 & 11)

Working March 23.
[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state.

Former Rule 7.4: Communication of Fields of Practice and Specialization

7.2 (Comment 12)

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.
Solicitation of Clients – Rule 7.3

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Solicitation of Clients – Rule 7.3

(a) A lawyer shall not solicit professional employment by live person to person contact, in person, live telephone or real-time electronic contact, unless the person contacted is:

1. with a lawyer; or

2. with a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

3. with a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.
Rule 7.3: Continued

(b) 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.

Application of Rule 7.3 (Summary)

Lawyers can:
• Send letters, emails to prospective clients
• Call former clients or certain business owners to offer services
• Offer services to friends or family members at a social gathering
• Solicit in person or by mail if the retention is not for pecuniary gain (See NAACP v Button)

Lawyers cannot:
• Call or visit a stranger who has had an accident or been served with divorce papers or charged with a crime if the contact is for pecuniary gain
• Send harassing letters to any prospective client or letters/emails if the person has made known they do not want the contact

Rule specifies that communications authorized by law or court order including notice to class members, do not violate the Rule.
Firm Names and Letterhead – Rule 7.5

Proposed changes do away with Rule 7.5

HOWEVER, Rule 7.5 remains in effect as of May 2018.

ABA Webinar - Recording
Proposed Amendments to Model Rules of Professional Conduct
March 28, 2017

https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3
We’ve talked **ethics** ... 

Now let’s talk about the **effective** use of social media for law firms.

Develop a social media plan
**Determine Your Goals**

- What does the firm want to **accomplish** using social media?
- What are some of the firm’s **business goals** and can they be supported through social media engagement?

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**Conduct a Social Audit**

- Who is your engaged **target audience**?
- What **protocol & policies** do you have/need for social media engagement?
- What **types and sources of content** are available?
Implement a social media policy

Understand Ethics Rules (Model & State)

Educate (Attorneys | Staff)

Monitor (Monitor Usage)

Manage | Enforce (Address)

Note: Protected Activities under NLRB

Types of social media content for law firms

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DEVELOP A CONTENT STRATEGY

• What **type of posts** will work best to meet your goals?

• Which **social networks** will work best to reach your audience?

• **How and when** is your audience engaging on social media?

Sources of content for law firms

<table>
<thead>
<tr>
<th>Case Studies &amp; Client News</th>
<th>Memos of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLEs &amp; Seminars</td>
<td>Practice Area FAQs &amp; Myths</td>
</tr>
<tr>
<td>Client &amp; Colleague Questions</td>
<td>Supreme Court Decisions</td>
</tr>
<tr>
<td>Firm News &amp; Videos</td>
<td>Trending Issues (Google Alerts)</td>
</tr>
<tr>
<td>ALM</td>
<td>JD Supra</td>
</tr>
<tr>
<td>Media Coverage</td>
<td>Trial Briefs</td>
</tr>
<tr>
<td></td>
<td>Typical Transactions</td>
</tr>
</tbody>
</table>
CREATE ONCE PUBLISH EVERYWHERE

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COPE

EVENTS

MILESTONES

ARTICLES

Firm Website
Media
Share or Publish on LinkedIn
Facebook
Twitter
Email Alert
Blog Post

VALIDATION
THOUGHT LEADERSHIP
RETENTION
LEAD GENERATION

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VISUALS ARE VITAL TO ONLINE SUCCESS

94% Content with relevant images gets 94% more views than content without

94% equates to almost double the views, and the boost is noticed across all topics and categories

150% Tweets with images receive 150% more retweets

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Why lawyers and support staff should share content on S.M. – Employee Advocacy

- More frequent social shares when brand message is distributed by employee vs. brand (MSLGroup)
- More engagement when content is shared by employees vs. brand (Social Media Today)

Connections are held by employees on social media as compared to brand (Social Chorus)

98% Of employees use at least one social media site personally; 50% of them post about their company. (Weber Shandwick)

Implement Tactics

- Create an editorial calendar based on your content strategy.
- Use tools that streamline your social media process.
- Schedule content and corresponding social media posts.
- Engage with the target audience when appropriate or necessary.

Source: Greentarget & Zeughauser Group, 2017 State of Digital & Content Marketing Survey
Benefits of blogs

- Improved Sales: 43%
- Mkt. Profitability: 47%
- SEO Rankings: 58%
- Leads: 61%
- Loyalty: 65%
- Marketplace Insight: 69%
- Traffic: 75%
- Exposure: 89%

*Source: AIS Media*
Blogs can lead to media interviews

“I just gave an interview to Bloomberg Law .... The reporter called me because her Google search brought up my blog post on [the topic]. She said it was one of the first hits she got in her search.”

~Lauren M. Hoye, Esq. Willig, Williams & Davidson  
Message dated 2/23/18

http://www.abajournal.com/files/FO_480_FINAL.pdf
ABA’s Mar. 6, 2018 ethics opinion discussed how “public commentary” implicates Rules 1.6 (confidentiality), 3.5 (impartiality / decorum of tribunal), and 3.6 (trial publicity).

Salient point: When a lawyer participates in public commentary that includes client information, if the lawyer doesn’t have consent (express or implied), then the lawyer violates Rule 1.6(a) ... even when the information is contained in a public record.

Rule 1.6 does not provide an exception for information that is ‘generally known’ or contained in a ‘public record.’

Issue: First Amendment
Blogging best practices

Write and share EVERGREEN and TIMELY single-topic posts

Answer FAQs; quote others

Use keywords – “Ethics attorney”

Repurpose content: CLEs, brief and memo of law topics, etc.

Do not give legal advice, use generic language, don’t use legalese

GET CLIENT APPROVAL BEFORE BLOGGING ABOUT MATTER

Create once, publish everywhere; Tag all mentioned
Today, in a strongly worded and unanimous opinion, the Supreme Court of Pennsylvania delivered another crushing blow to the School Reform Commission’s continued assault on Philadelphia’s teachers and schoolchildren. Ruling in favor of the Philadelphia Federation of Teachers, the Supreme Court concluded that the SRC possesses no right to cancel its collective bargaining agreement with the PFT — as it sought to do unilaterally in October 2014.

Congratulations to the PFT and it... See More

Willig, Williams & Davidson
Published by Andrew Drenewit - August 15, 2016

www.pacourts.us
PACOURTS LUS

Andrew Mell Way to go Willig, Williams & Davidson! Let’s support our teachers and children!
Like Reply Message FY

Lisa DelCasale Congratulations! Nobody does it better! Nobody!
Like Reply Message FY
Like other cases that have permitted service via Facebook, the holding in K.A. was highly fact specific. Nonetheless, as individuals increasingly communicate exclusively through social media and other electronic means, and as courts become increasingly more comfortable with that reality, service via Facebook and other social media platforms may become more common.
Juror fined for Facebook posts about criminal court case

Technically incorrect. A New York juror seems to not know the rules, which results in a mistrial and a $5,000 fine for her.

Juror dismissed for sharing trial details on Facebook

By Frank Rosario and Jon Fiume

November 4, 2015 | 12:54am

Facebook Spoliation Costs Widower and His Attorney $700K in Sanctions

When a tipster sent us an e-mail with the subject, “Court awards $700,000+ in sanctions for destruction of FB page,” I thought it sounded like it might be interesting. Because hey, that’s a lot of money.

I didn’t realize it would also be one of the most depressing legal news stories I’ve read since this tragic murder-suicide.
# Facebook best practices

<table>
<thead>
<tr>
<th>Facebook best practices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use personable profile photo / cover photo</td>
</tr>
<tr>
<td>Include relevant contact information and type of law you practice</td>
</tr>
<tr>
<td>Use a vanity URL (choose carefully)</td>
</tr>
<tr>
<td>Verify page (in settings) – helps with SEO</td>
</tr>
<tr>
<td>Be transparent and authentic</td>
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<tr>
<td>Monitor, communicate and personally engage</td>
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</tbody>
</table>
Fox Rothschild LLP is an Am Law 100 firm whose practice spans a broad range of services and industries. Over the past 100 years, we have grown to 750 lawyers in 20 offices, counting. Our clients rely upon the depth of our resources and our ability to unfold those resources in the most effective manner.

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**Elizabeth (Donnen) Sigety**

Partner, Fox Rothschild, corporate attorney

Fox Rothschild LLP

Partner, Chair Emerging Companies Group and Franchise, Licensing and Distribution Group

**Partner, Chair Emerging Companies Group and Franchise, Licensing and Distribution Group**

Fox Rothschild LLP

July 2004 – Present (12 years 2 months) | Greater Philadelphia Area, Greater New York Area
24 hours after post ...

Morgan Lewis Takes the Heat, but Who Gets the Last Laugh?

1,732 views  15 likes  9 comments
LinkedIn best practices

- Use professional profile photo and full keyword-rich bio
- Use keywords in title – “Intellectual Property Law Partner”
- Use location descriptions – “Nashville entertainment lawyer”
- Connect with everyone that you know or want to know
- Share articles, photos, videos, quotes – all with links and attrib.
- Use LinkedIn Pulse - republish copyright-owned articles & blogs.
- Monitor, share, like and engage using keywords and hashtags
Rule 1.1, Comment (8) - Competence
“...keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, .....”

Twitter best practices

- Use personable profile photo / cover photo
- Include relevant contact information and type of law you practice
- Use a vanity URL (choose carefully)
- Verify page (in settings) – helps with SEO
- Be transparent and authentic
- Monitor, communicate and personally engage
- Use handles (@ALAbuzz & @GinaRubel) & hashtags (#ALAConf18)
• Use relevant tools and apps to track social media engagement.
• Evaluate how content is performing.
• Use data collected to measure success against goals.
• Refine plan: focus on what is working best and repeat.

SOCIAL SHARING | MEASUREMENT
--- | ---
Buffer | Cision
ClearView Social | Google Analytics
CoSchedule | Meltwater
Hootsuite | Mention
PostBeyond | Nuvi
| SEMRush
| TrackMaven
| Trendkite
Social media rules of engagement

- Use a marketing strategy, target relevant audience
- Post relevant and timely content with purpose
- Share blogs, articles, news, videos and images regularly
- Drive traffic back to original content on your blog or website
- Engage in relevant and ethical discourse
- Incorporate rich-media and thoughtful use of visuals

Common social media mistakes

- Not taking social media seriously for the practice of law, legal marketing and business development
- Forgetting content marketing / social media is subject to professional ethics rules
- Believing that anything posted on social media is private
- Misusing social media as a discovery and investigation tool
- Failing to counsel clients about THEIR use of social media
- Condemning social media as a passing fad
Your opinion matters.

Please take a moment now to evaluate this session.

Thank you.
Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.¹

Introduction

Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs,² listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that “followers” (people who subscribe to a writer’s online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively “public commentary”).³

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer’s public commentary may also implicate the lawyer’s duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

Online public commentary provides a way to share knowledge, opinions, experiences, and news. Many online forms of public commentary offer an interactive comment section, and, as such, are also a form of social media.⁴ While technological advances have altered how lawyers

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016 [hereinafter the “Model Rules”]. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² A “blog” is commonly understood to be a website consisting of written entries (posts) regularly updated and typically written in an informal or conversational style by an individual or small group. As recently described in a California State Bar advisory opinion, “[b]logs written by lawyers run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promotional descriptions of the attorney’s legal practice and courtroom successes to overt advertisements for the attorney or her law firm.” State Bar of Cal. Comm’n on Prof’l Responsibility & Conduct Op. 2016-196 (2016).

³ These are just examples of public written communications but this opinion is not limited to these formats. This opinion does not address the various obligations that may arise under Model Rules 7.1-7.5 governing advertising and solicitation, but lawyers may wish to consider their potential application to specific communications.

⁴ Lawyers should take care to avoid inadvertently forming attorney-client relationships with readers of their public commentary. Although traditional print format commentary would not give rise to such concerns, lawyers interacting with readers through social media should be aware at least of its possibility. A lawyer commenting publicly about a legal matter standing alone would not create a client-lawyer relationship with readers of the commentary. See Model Rule 1.18 for duties to prospective clients. However, the ability of readers/viewers to make comments or to
communicate, and therefore may raise unexpected practical questions, they do not alter lawyers’ fundamental ethical obligations when engaging in public commentary.5

**Duty of Confidentiality Under Rule 1.6**

Model Rule 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

As Comment [2] emphasizes, “[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

This confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”6 In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.7 Rule 1.6(b) provides other exceptions to Rule 1.6(a).8 However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a

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5 Accord D.C. Bar Op. 370 (2016) (stating that a lawyer who chooses to use social media must comply with ethics rules to the same extent as one communicating through more traditional forms of communication).

6 MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [3] (2017). There is also a general principle noted in the Restatement (Third) of the Law Governing Lawyers that “[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients.” AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS §59, cmt. e (1998). It is beyond the scope of this opinion to define what specific elements will be considered to distinguish between protected client information and information about the law when they entwine.


8 See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1)-(7) (2017).
lawyer’s public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.9

Significantly, information about a client’s representation contained in a court’s order, for example, although contained in a public document or record, is not exempt from the lawyer’s duty of confidentiality under Model Rule 1.6.10 The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.11

A violation of Rule 1.6(a) is not avoided by describing public commentary as a “hypothetical” if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.12 Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client’s informed consent or the disclosure is

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9 For ethical issues raised when a lawyer is participating in an investigation or litigation and the lawyer makes extrajudicial statements, see infra at page 6.

10 See ABA Formal Op. 479 (2017). See also In re Anonymous, 932 N.E.2d 671 (Ind. 2010) (neither client’s prior disclosure of information relating to her divorce representation to friends nor availability of information in police reports and other public records absolved lawyer of violation of Rule 1.6); Iowa S. Ct. Attorney Disciplinary Bd. v. Marzen, 779 N.W.2d 757 (Iowa 2010) (all lawyer-client communications, even those including publicly available information, are confidential); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) (“[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it”); State Bar of Ariz. Op. 2000-11 (2000) (lawyer must “maintain the confidentiality of information relating to representation even if the information is a matter of public record”); State Bar of Nev. Op. 41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers; Pa. Bar Ass’n Informal Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent’s misconduct to disciplinary board even though it is recited in court’s opinion); Colo. Formal Op. 130 (2017) (“Nor is there an exception for information otherwise publicly available. For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news.”); But see In re Sellers, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because “mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6”); Hunter v. Va. State Bar, 744 S.E.2d 611 (Va. 2013) (rejecting state bar’s interpretation of Rule 1.6 as prohibiting lawyer from posting on his blog information previously revealed in completed public criminal trials of former clients). See discussion of Hunter, infra, at note 20.

11 ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 04-433 (2004) (“Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.”)

12 MODEL RULES OF PROF’L RESPONSIBILITY R. 1.6 cmt. [4] (2017). The possibility of violating Rule 1.6 using hypothetical facts was discussed in ABA Formal Opinion 98-411, which addressed a lawyer’s ability to consult with another lawyer about a client’s matter. That opinion was issued prior to the adoption of what is now Rule 1.6(b)(4) which permits lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer’s compliance with these Rules. However, the directive provided in Formal Opinion 98-411 remains sound, namely, that a lawyer use caution when constructing a hypothetical. For an illustrative case, see In re Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010). Peshek was suspended for sixty days for violating Rule 1.6. Peshek served as a Winnebago County Public defender for about 19 years. After being assaulted by a client, Peshek began publishing an Internet blog, about a third of which was devoted to discussing her work at the public defender’s office and her clients. Peshek’s blog contained numerous entries about conversations with clients and various details of their cases, and Peshek referred to her clients by either first name, a derivative of their first name, or their jail ID number, which were held to be disclosures of confidential information in violation of Rule 1.6. She was suspended from practice for 60 days.
not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is “generally known” or contained in a “public record.” Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).

First Amendment Considerations

While it is beyond the scope of the Committee’s jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals’ right to free speech, this right is not without bounds. Lawyers’ professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer’s free speech rights are limited.

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13 We again note that Rule 1.6(b) provides other exceptions to Rule 1.6(a).
14 Model Rule 1.9 addresses the duties lawyers owe to former clients. Rule 1.9(c)(1) permits a lawyer, who has formerly represented a client, to use information related to the representation that has become generally known to the disadvantage of a former client, and Rule 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules permit or require with respect to a current client. This opinion does not address these issues under Model Rule 1.9. The generally known exception in Rule 1.9(c)(1) is addressed in ABA Formal Opinion 479.
15 Lawyers also have ethical obligations pursuant to Rules 5.1 and 5.3 to assure that lawyers and staff they supervise comply with these confidentiality obligations.
16 In addition to the requirements of Rules 1.6(a), a lawyer may consider other practical client relations and ethics issues before discussing client information in public commentary to avoid disseminating information that the client may not want disseminated. For instance, Model Rule 1.8(b) reads: “A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.” Rule 1.8(b) could be read to suggest that a lawyer may use client information if it does not disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer’s ethical obligations. See RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 60(2) (1998) (“a lawyer who uses confidential information of a client for the lawyer’s pecuniary gain other than in the practice of law must account to the client for any profits made”). Accord D.C. Bar Op. 370 (2016) (“It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client’s consent in a written form.”)
18 See In re Snyder, 472 U.S. 634 (1985) (a law license requires conduct “compatible with the role of courts in the administration of justice”); U.S. Dist. Ct. E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) (“once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct”); In re Shearin, 765 A.2d 930 (Del. 2000) (lawyers’ constitutional free speech rights are qualified by their ethical duties); Ky. Bar Ass’n v. Blum, 404 S.W.3d 841 (Ky. 2013) (“It has routinely been upheld that regulating the speech of attorneys is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of [t]he license granted by the court.” [citing Snyder]); State ex rel. Neb. State Bar Ass’n v. Michaelis, 316 N.W.2d 46 (Neb. 1982) (“A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into
The plain language of Model Rule 1.6 dictates that information relating to the representation, even information that is provided in a public judicial proceeding, remains protected by Model Rule 1.6(a).\textsuperscript{19} A lawyer may not voluntarily disclose such information, unless the lawyer obtains the client’s informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies.\textsuperscript{20}

At least since the adoption of the ABA Canons of Ethics, the privilege of practicing law has required lawyers to hold inviolate information about a client or a client’s representation beyond that which is protected by the attorney-client privilege. Indeed, lawyer ethics rules in many jurisdictions recognize that the duty of confidentiality is so fundamental that it arises before a lawyer–client relationship forms, even if it never forms,\textsuperscript{21} and lasts well beyond the end of the professional relationship.\textsuperscript{22} It is principally, if not singularly, the duty of confidentiality that enables and encourages a client to communicate fully and frankly with his or her lawyer.\textsuperscript{23}

**Ethical Constraints on Trial Publicity and Other Statements**

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge, juror, prospective juror, or other official by means prohibited by law. Although using public commentary with the client’s informed consent may be appropriate in certain circumstances, lawyers should take care not to run afoul of other limitations imposed by the Model Rules.\textsuperscript{24}

\textsuperscript{19} See ABA Formal Op. 479 (2017). See also cases and authorities cited supra at note 10.

\textsuperscript{20} One jurisdiction has held that a lawyer is not prohibited from writing a blog that includes information relating to a representation that was disclosed in an open public judicial proceeding after the public proceeding had concluded. In Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013) the Supreme Court of Virginia held that the application of Virginia Rule of Professional Conduct 1.6(a) to Hunter’s blog posts was an unconstitutional infringement of Hunter’s free speech rights. The Committee regards Hunter as limited to its facts. Virginia’s Rule 1.6 is different than the ABA Model Rule. The Virginia Supreme Court rejected the Virginia State Bar’s position on the interpretation and importance of Rule 1.6 because there was “no evidence advanced to support it.” But see People vs. Isaac which acknowledges Hunter but finds a violation of Colorado Rule 1.6. We note, further, that the holding in Hunter has been criticized. See Jan L. Jacobowitz & Kelly Rains Jesson, Fidelity Diluted: Client Confidentiality Give Way to the First Amendment & Social Media in Virginia State Bar ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. 75, 98-106 (2013).

\textsuperscript{21} See MODEL RULES OF PROF’L CONDUCT R. 1.18(b) (2017) (Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation except as permitted by the Rules). Implementation Chart on Model Rule 1.18, American Bar Ass’n (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf.

\textsuperscript{22} See MODEL RULES OF PROF’L CONDUCT R. 1.9 (2017); see also D.C. Bar Op. 324 (Disclosure of Deceased Client’s Files) (2004); Swidler & Berlin v. United States, 524 U.S. 399 (1998). See also GILLERS, supra note 4, at 34 (“[w]hether the [attorney-client] privilege survives death depends on the jurisdiction but in most places it does”).


\textsuperscript{24} See, e.g., In re Joyce Nanine McCool 2015-B-0284 (Sup. Ct. La. 2015) (lawyer disciplined for violation of Rule 3.5 by attempting to communicate with potential jurors through public commentary); see also The Florida Bar v. Sean William Conway, No. SC08-326 (2008) (Sup. Ct. Fla.) (lawyer found to have violated Rules 8.4(a) and (d) for posting on the internet statements about a judge’s qualifications that lawyer knew were false or with reckless disregard as to their truth or falsity).
Lawyers engaged in an investigation or litigation of a matter are subject to Model Rule 3.6, Trial Publicity. Paragraph (a) of Rule 3.6 (subject to the exceptions provided in paragraphs (b) or (c)) provides that:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Thus any public commentary about an investigation or ongoing litigation of a matter made by a lawyer would also violate Rule 3.6(a) if it has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, and does not otherwise fall within the exceptions in paragraphs (b) or (c) of Model Rule 3.6.25

Conclusion

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.

25 Pa. Bar Ass’n Formal Op. 2014-300 (2014) (lawyer involved in pending matter may not post about matter on social media). This opinion does not address whether a particular statement “will have a substantial likelihood of materially prejudicing an adjudicative proceeding” within the meaning of Model Rule 3.6.
Model Rule 1.0: Terminology

(l) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person reasonably believed to need legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(l) (m) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) (n) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) (o) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
Model 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.

Comment

[1] This Rule governs all communications about a lawyer’s services including advertising permitted by Rule 7.2, that is constitutionally protected commercial speech. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that leads a reasonable person to believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] An advertisement A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with the services or fees of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
Firm Names and Designations

[4] Firm names, letterhead and professional designations are communications concerning a lawyer’s services. A trade name may be used by a lawyer in private practice if it is not false or misleading. A trade name is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, or with a public or charitable legal services organization.

[5] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a succession in the firm’s identity, or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm also may be designated by a distinctive website address, electronic social media “handle,” or comparable professional designation. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid agency may be required to avoid a misleading implication.

A firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers in such an office should indicate where they are admitted to practice.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

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Rule 7.2: Advertising Communications Concerning a Lawyer’s Services: Specific Rules

(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 any media.

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

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

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

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

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

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

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

   (5) give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

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

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case
of persons of moderate means who have not made extensive use of legal services. The interest in 
expanding public information about legal services ought to prevail over considerations of tradition. 
Nevertheless, advertising by lawyers entails the risk of practices that are misleading or 
overreaching.

[1] This Rule permits public dissemination of information concerning a lawyer’s or law firm’s 
name, or firm name, address, email address, website, and telephone number; the kinds of services 
the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices 
for specific services and payment and credit arrangements; a lawyer’s foreign language ability; 
names of references and, with their consent, names of clients regularly represented; and other 
information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective 
judgment. Some jurisdictions have had extensive prohibitions against television and other forms 
of advertising, against advertising going beyond specified facts about a lawyer, or against 
"undignified" advertising. Television, the Internet, and other forms of electronic communication 
are now among the most powerful media for getting information to the public, particularly persons 
of low and moderate income; prohibiting television, Internet, and other forms of electronic 
advertising, therefore, would impede the flow of information about legal services to many sectors 
of the public. Limiting the information that may be advertised has a similar effect and assumes 
that the bar can accurately forecast the kind of information that the public would regard as relevant. 
But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic 
exchange initiated by the lawyer.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to 
members of a class in class action litigation.

Paying Others to Recommend a Lawyer

Except as permitted under paragraphs (b)(1)-(b)(4)(5), lawyers are not permitted to pay 
others for recommending the lawyer’s services. A communication contains a recommendation if it expresses, implies or 
suggests value as to the lawyer’s services or if it endorses or vouches for a lawyer’s credentials, 
abilities, competence, character, or other professional qualities. Directory listings and group
advertisements that list lawyers by practice area, without more, do not constitute impermissible
“recommendations.”

[3] Paragraph (b)(1) however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers.²

[4] Paragraph (b)(5) permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must 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. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral

² This comes from cmt. [5] to current Rule 7.2. The revision simply breaks former cmt. [5] to Rule 7.2 into three cmts, i.e. [2], [3], and [5] to new 7.2.
service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such Qualified referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [7] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by
agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Model Rule 7.3: Solicitation of Clients

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

(1) with a lawyer; or

(2) with a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) with a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(b) 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.

(c) Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(c) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(d) Notwithstanding the prohibitions in this Rule 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 enroll memberships or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] 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 Paragraph (a) prohibits a lawyer from soliciting professional employment by live person to person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. See Rule 1.0(l) for a definition of solicitation. A lawyer’s communication is typically 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.

[2] “Live person to person contact” means in person, face to face, telephone and real-time person to person communications such as Skype or Facetime, and other visual/auditory communications where the prospective client may feel obligated to speak with the lawyer. Such person to person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is a potential for abuse overreaching exists when a solicitation involves a lawyer, seeking pecuniary gain, direct in person, live telephone or real-time electronic contact solicits a person by a lawyer with someone known to be in need of legal services. These forms of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.
[3] The potential for abuse inherent in live person to person contact justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person to person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of live person to person direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices—overreaching against a former client, or a person with whom the lawyer has a close personal, or family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or is known to be an experienced user of the type of legal services involved for business purposes. For instance, an “experienced user” of legal services for business matters may include constituents of a business entity who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small proprietorships that hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations. An experienced user of legal services would
not ordinarily include someone who has hired lawyers on multiple occasions for family law matters, criminal matters or personal injury claims. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(e) are not applicable in those situations. Also, Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains false or misleading information which is false or misleading within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule does not intend to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to request so potential clients or their spokespersons or sponsors. General 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.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).
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 a substantially similar designation.

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

(b) (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 of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

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

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office has a long-established policy of designating for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that the designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[3] Paragraph (d) This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state
authority of a state, the District of Columbia, or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the state authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer’s recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.
Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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

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

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

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing 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 law together in a firm.