The Paralegal's Guide to Ethical Issues
Related to Social Media Use and Advertising

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The Paralegal's Guide to Ethical Issues
Related to Social Media Use and Advertising

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The Paralegal’s Guide to Ethical Issues Related to Social Media Use and Advertising

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Institute for Paralegal Education
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Important Foundations of Lawyer and Paralegal Ethics
Ethical Foundations

• NAIA Code of Ethics and Professional Responsibility
  • Canon 1: A paralegal must not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.
  • Canon 10: A paralegal’s conduct is guided by bar associations’ codes of professional responsibility and rules of professional conduct.

• The American Alliance of Paralegals, Inc.: Code of Ethics
  • 5. A paralegal shall follow all provisions of the rules of professional conduct for a paralegal or legal assistant of the state in which he or she is employed. If no such specific code for paralegals exists, then a paralegal shall follow the attorney’s code of ethics as it applies to paralegals within that state.

Can/Should You “Friend” a Judge on Facebook?
“Friending”

• First, it is always helpful to review the relevant ABA Model Rules of Professional Conduct and the Comments as well as the rules in the particular state where the judge and lawyer are licensed to practice as well as the codes of ethics for paralegals.
  • ABA Model Rule 3.5 Impartiality And Decorum Of The Tribunal
  • NAIA Code of Ethics and Professional Responsibility - Canon 3
• It is also helpful to review recent articles and ethics opinions that address issues related to social media from the perspective of the state where the lawyer practices.

“Friending”

• The American Bar Association recently issued Formal Opinion 462 related to a judge’s use of social media. (ABA Formal Opinion 462, Judge’s Use of Electronic Social Networking Media, Feb. 21, 2013).
  • The Opinion discusses several factors for judges to consider when using social media, including publicly endorsing or opposing candidates for public office, not giving the impression that they can be influenced by certain people or groups, avoiding ex parte communications concerning pending matters, and not using social networking sites to obtain information about matters before them.
  • Judges should also consider whether to disclose their social media relationships with lawyers or parties in pending matters, although the informal nature of these connections may not rise to the level that a personal, face-to-face relationship would.
  • “[J]udges should also be aware that their comments, images and profile information may be transmitted without their knowledge to others. If the material proves embarrassing, it has the potential to undermine public confidence in the judiciary and to compromise the independence of the judge, the opinion says.”
“Friending”

- According to Lewis, “[t]he states that have considered whether judges can use social networking sites generally have concluded that they may do so. They diverge, however, when considering whether judges must recuse themselves if they have friended a lawyer who appears before them.”
- She discusses the variety of opinions issued in Florida, Kentucky, Ohio, Maryland, California and New York. Florida is an interesting situation, since the Florida Supreme Court is being asked to consider whether being Facebook friends with a prosecutor who then appears in the judge’s courtroom for a case constitutes a conflict of interest and should be grounds for recusal.

“Friending” – Nelson and Simek

- Nelson and Simek recently provided an article about the risks to judges when they participate in social media, noting that as of a 2012 report from the Conference of Court Public Information Officers, “46.1 percent of judges use social media, with 86.3 percent of that number using Facebook and 20.6 percent using LinkedIn.”
- Obviously, judges are not going to cease using social media just because it may be risky; however, they and the lawyers, paralegals and other parties that they interact with in the delivery of legal services need to be mindful of the special role of judges in the community and avoid even the appearance of favoritism or impropriety. In terms of thinking about the larger picture of litigation, the ABA recently warned lawyers about “liking” potential jury members.
Other Social Media Activity

- LinkedIn in One Hour for Lawyers (ABA, 2013).
- Twitter in One Hour for Lawyers (ABA, 2012).
- Blogging –
  - Privacy/Anonymity when searching the Internet - from The Indiana Lawyer (July 16, 2014).
  - Researching jury or potential jury members: how far can you go in using the Internet and social media?
  - Now seeing advice for potential jury members who don’t want to be researched through social media (Grand Rapids Business Journal, July 14, 2014).
- Jury misconduct – “Googling” during the trial results in jail time for jury members (England and Wales)

Can Your Law Firm Use Group Coupon or Daily Deal Marketing?
Group Coupons/Daily Deals

• A newly published Formal Opinion from the American Bar Association provides guidance on whether attorneys are allowed to use these kinds of marketing approaches. (ABA Formal Opinion 465, Lawyers’ Use of Deal-of-the-Day Marketing Programs, Oct. 21, 2013).
  • As stated in the Conclusion, “[t]he committee believes that coupon deals can be structured to comply with the Model Rules. The committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.”
  • Several other ethical issues are identified in the Formal Opinion, including “the need to make sure the marketing statements are accurate. The scope of services offered must be clearly defined and the circumstances for refunds described, the opinion says. And the ad should explain that no client-lawyer relationship exists until a consultation takes place.”
  • However, the opinion “does not say that lawyers are forbidden to use sites like Groupon to promote themselves, but that deals need to be carefully structured to avoid problems and that it might not be possible to overcome those obstacles.”

Group Coupons/Daily Deals

• Commentary indicates that some people are concerned that the opinion has resulted in more ambiguity about what is permissible rather than clear guidance that helps attorneys comply with the ethical rules as well as the differences between coupon deals and prepaid deals.
  • On the other hand, a New York Ethics Opinion allows lawyers to offer Groupon deals, with some cautions. (Ethics Opinion 897, New York State Bar Association, 12/31/11).
  • Among the specific issues covered in the opinion are whether the money retained by the website is an improper payment for a referral, whether this constitutes an excessive fee, compliance with rules regulating advertising and premature and improper formation of a lawyer-client relationship.
Group Coupons/Daily Deals

• North Carolina and South Carolina have also issued recent opinions on ethics of using daily deal coupons.
• As stated in South Carolina Ethics Advisory Opinion 11-05, “[t]he use of daily deal websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed.”
• See the chart in the webinar manual comparing the rules in North Carolina with the ABA Model Rules, especially Rules 7.2 and 7.3.

Example of Legal Services Offered through Groupon
Example of Legal Services Offered through Groupon

[Image of a computer screen with a Groupon deal for legal services]

Dynamic Lawyers

The fine print:
- Up to one hour of consultation
- Drafting of legal documents
- Legal advice and representation

Reviews:
- 4.5 out of 5 stars
- 84% of residents would recommend

Dynamic Lawyers

Example of Legal Services Offered through Groupon

[Image of a computer screen with another Groupon deal for legal services]

Dynamic Lawyers

Our promise to you:
- Personalized attention
- Comprehensive legal advice
- Representation in court

Dynamic Lawyers
Can You Use Text Messages to Solicit Prospective Clients?

Solicitation through Texting

• Again, it is always helpful to review the relevant ABA Model Rules of Professional Conduct and the Comments as well as the rules in the particular state where the judge and lawyer are licensed to practice as well as the codes of ethics for paralegals.
  • Rule 7.3 Solicitation of Clients

• Note that some specific state rules may have additional provisions that are even more restrictive, such as Indiana.
  • Rule 7.3. Direct Contact with Prospective Clients
What Are the Ethical Duties When Using an Internet Directory or Client-Lawyer Matching Site?

Internet Directory or Matching Service

• According to Wikipedia,
  • Attorney-client matching (ACM), which has sometimes been referred to as online legal matching, is a subset of legal advertising that allows participating attorneys to be matched with potential clients seeking legal representation. ACM websites allow users to submit their legal needs online by practice area and location. Law firms or lawyers that opt to use these services are then matched with clients by need and location.
  • Wikipedia notes that one concern with these matching services is client confidentiality. (Id.)
  • A number of these ACM services now exist.
Example of Attorney-Client Matching (ACM) Service
Ethical Issues

• According to its website, a number of states have reviewed LegalMatch favorably from an ethical perspective and the FTC has provided an opinion endorsing online legal matching.

• Its Ethics FAQ page addresses a number of ethical issues, including whether the service is a pre-paid legal plan, whether the service violates the rules of attorneys giving something of value for recommending an attorney’s services, whether LegalMatch violates the rule against solicitation, whether LegalMatch prevents running a conflicts check and whether LegalMatch is a bid or auction system.

• This page also discusses the ethics opinions from six states (South Carolina, Texas, Rhode Island, Ohio, North Carolina and Utah).
The LegalMatch Bar Association Program

In 2004, the Utah State Bar signed an agreement to replace its traditional lawyer referral service.
Ethical Issues

• The ethics of participating in an online attorney-client matching service are discussed from the perspective of California’s Rules of Professional Conduct by Borodkin and Gagnier.

• Among the ethical issues covered in this article are that users are bound by the terms of service agreement, thus the burden is on the attorney to be sure that the terms are in compliance with a number of rules, including ABA Model Rule 5.5 regarding multijurisdictional practice, Rule 7.1 on false and misleading communications, Rule 7.4 on promotion of practice area specialization and Rule 1.18 on duties to prospective clients (confidentiality).

What the Public Sees When Searching for an Attorney
Ethical Issues

- Carolyn Elefant has been a leader in the development of solo/virtual law practice and her blog, myShingle.com, is one of the highest rated blogs (blawgs) in the legal profession.
- Her recent blog addressed some important considerations with respect to using attorney-client matching services.
- Not only is Ms. Elefant skeptical of the power of algorithms, data mining and data aggregators to construct a good match and concerned about confidentiality, but she also notes that “lawyers often get the clients they market for.”
- A blogpost that is generally favorable to the concept of lawyer matching services notes that such sites would be even more effective if they went beyond matching to actually screen the good lawyers from the bad.
- Unfortunately, the blog ends with some disturbing commentary on the quality of legal services available.
Ethical Issues

• Attorneys who are interested in participating in attorney-client matching services should first review the applicable rules in the state where they are licensed and then compare these rules with the terms of service of the vendor to be sure that they are in compliance.
• Reviewing the ethical opinions from other states provided through the LegalMatch website may also be helpful.
• ABA Model Rule 7.2 on Advertising and its Comment are especially relevant.

Internet Directory/Client-Lawyer Matching

• See article from Res Gestae on “Law Tigers” (June 2014).
What Are the Ethical Rules of Linking the Law Firm Site to a Non-Legal Entity and Vice Versa?

Linking and Other Website Issues

• ABA Formal Opinion 10-457 covers websites for lawyers. (ABA Formal Opinion 10-457, Lawyer Websites, Aug. 5, 2010).
• The opinion discusses website content (information about lawyers, their law firms or their clients), information about the law, inquiries from visitors to the website and warnings or cautionary statements that are intended to limit, condition or disclaim a lawyer’s obligations to website visitors. (Id.)
• Of course, the world of the web has changed significantly since 2010, with law firms and every other kind of company, non-profit organization or government agency now relying nearly exclusively on websites and other technology-enabled venues for communication with current and future clients, colleagues and the public as a whole.
Linking and Other Website Issues

• One of the major considerations with website development is search engine optimization (SEO), which is intended to boost the position of a website to the top of a list when a user searches Google or another search engine.
• It is unlikely that a user, unless very motivated or clear about what he/she is looking for, will go beyond the first list of websites delivered through a search engine.
• Links are an important factor in search engine optimization and there are many resources for using links strategically in website development.
  • Links are the “money” of the Internet; you want lots of links. Inbound links show that your site is reputable -- something which Google likes. The more inbound links you have, the higher your site will be ranked in search. Getting your website listed on business directories and in media coverage (blogs, online magazines, and news sources) are great ways to build up inbound links.

Linking and Other Website Issues

• Likewise, Tsakalaskis offers a number of suggestions for selecting links for a law firm's website, including a top-down approach for prospecting for links, competitive intelligence, local linking opportunities and developing content that other sites will want to link to.
• A recent study indicates that LinkedIn may be the biggest way to generate traffic to law firm websites, although Twitter is gaining in influence.
Linking and Other Website Issues

• Giroux notes that to be successful, a law firm should integrate its offline relationships with its online presence.

• Among the suggestions he makes for developing links are the firm’s individual, professional and community relationships, its involvement with charities and non-profit organizations and its brand authority, which he defines as the collective knowledge, skills expertise, and image that the lawyer, the firm and the firm’s employees possess and display.

• While striving to be at the top of a search list is an important goal, the attorney may still want to be mindful of the saying that “you are judged by the company that you keep.”

Linking and Other Website Issues

• While there is little control over websites that choose to link to the law firm’s website, an attorney will want to make sure that listings of - or links to - its website in any marketing, matching or directory-type sites are not only worth the financial investment required (and be able to measure the ROI), but that they are in compliance with the whatever rules of professional conduct regarding advertising apply to the lawyer and the law firm.

• In terms of links on the law firm’s own website, these should be chosen with care, not only for search engine optimization (SEO), but also so that they are consistent with the image that the law firm wants to portray and that these sites contain high-quality information that will be helpful to clients and potential clients.

• It is also important to avoid linking to websites that appear to be violating copyright law.
Social Media Marketing

• In terms of using social media as a marketing tool for the law firm, Meinke provides some excellent recommendations.
  • Create a Facebook page – since Facebook has more than 1.25 billion active users and more than 128 million daily users in the United States.
  • Make your page look professional.
  • Provide complete information.
  • Build an online community.
  • Likes for options – with suggestions for how to increase “likes” that the law firm’s page receives, which provides more options, features and tools.
  • Use analytics to improve.

Social Media Marketing

• Given that a variety of bar associations and commentators are examining some of the ethical issues with social media, including some of its specialized features and tools, the lawyer may want to review his or her profile on LinkedIn.
  • Some of the particular issues being raised are endorsements (which could appear to be testimonials) and skills/expertise (which could appear to be implying fields of practice or a specialty. (See ABA Model Rule Rule 7.4 Communication of Fields of Practice and Specialization).
  • Fortunately, LinkedIn in One Hour for Lawyers, now in a second edition, provides lots of helpful guidance in designing the most comprehensive profile possible while avoiding running afoul of ethical issues.
  • There is a similar book for lawyers who are interested in using Twitter.
What Must You Include in Testimonials to Make Them Ethically Compliant Advertising?

Testimonials

- Attorneys must be especially careful when using testimonials as part of an advertising plan.
- One of the risks of testimonials is that they can create expectations in the client’s or other party’s mind about the results that can be achieved by using the attorney’s or law firm’s services.
- There are so many nuances to cases that may appear similar or situations that may be comparable, which attorneys appreciate, but which may be difficult for those without legal training to comprehend.
- ABA Model Rule 7.1 and Comment does not address testimonials.
- However, the Comment certainly cautions lawyers about the risks of even truthful communications.
Testimonials – State Rules

• Individual states may take a more conservative and restrictive view about the use of testimonials.
• The risks with testimonials as well as other popular advertising methods, such as endorsements and dramatizations, are illuminated in the Comments to Rule 7.1 in the Indiana Rules of Professional Conduct.
• Although the focus is on California, King provides a brief history of attorney advertising and provides a discussion of how this impacts social media, including online testimonials, requirements for disclaimers, blogging, communication about prior results and the interplay between the First Amendment and the regulation of attorney speech.
• His conclusion is that “[p]rovided that California attorneys aren’t engaging in deception, they should have few concerns that a technicality will trip up their constitutionally protected right to express themselves via social media.”
• But see disciplinary action taken against Indianapolis attorney and blogger Paul Ogden.

Any Questions?

Thank you for participating in today’s IPE audio webinar!
A. Can/Should You “Friend” a Judge on Facebook?

First, it is always helpful to review the relevant ABA Model Rules of Professional Conduct as well as the rules in the particular state where the judge and lawyer are licensed to practice.

**Rule 3.5 Impartiality And Decorum Of The Tribunal**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

1. the communication is prohibited by law or court order;
2. the juror has made known to the lawyer a desire not to communicate; or
3. the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

**Comment**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.
The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m). *(http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_5_impartiality_decorum_of_the_tribunal.html, accessed 7/1/2014).*

In terms of the responsibilities of and restrictions on the conduct of paralegals as it relates to friending a judge, we can review the NAIA Code of Ethics and Professional Responsibility:

A paralegal must adhere strictly to the accepted standards of legal ethics and to the general principles of proper conduct. The performance of the duties of the paralegal shall be governed by specific canons as defined herein so that justice will be served and goals of the profession attained.

**Canon 3.**

A paralegal must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety. *(NAIA Code of Ethics and Professional Responsibility, http://www.nala.org/code.aspx, accessed 7/2/14)*

It is also helpful to review recent articles and ethics opinions that address issues related to social media from the perspective of the state where the lawyer practices. For example, a good overview on the ethics of social media use was provided by the Indiana State Bar Association’s Legal Ethics Committee. *(Legal ethics involved in online social media and networking: An overview. Res Gestae, 54(7), p. 29, March 2011).* Among the issues that an attorney needs to consider when “friending”, including for investigation someone (plaintiff, witness, judge) or for networking, are the duty of candor, *ex parte* communications and the appearance of impropriety.
Barone also discusses the need for care when “friending” between attorneys and judges. (Barone, P.T. Judges and lawyers must exercise caution as Facebook “friends”. SADO: Michigan State Appellate Defender Office and Criminal Resource Center, http://www.sado.org/articles/Article/100, accessed 7/2/14). Another issue may be whether there is a difference between various social media vendors. For example, the premise of LinkedIn and its overall content is intended for professional purposes while Facebook and other sites may tend to contain more personal information and perhaps less formality about the kinds of information that are shared and caution in making connections.

The American Bar Association recently issued Formal Opinion 462 related to a judge’s use of social media. (ABA Formal Opinion 462, Judge’s Use of Electronic Social Networking Media, Feb. 21, 2013, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf, accessed 7/1/14). After a thorough examination of the issue, the Opinion clarified that, “although judges may utilize electronic social networking sites, they must comply with the relevant provisions of the Code of Judicial Conduct and avoid conduct that would undermine their independence, integrity, impartiality and/or create any appearance of impropriety. In particular, it cautioned the extent of their participation. Depending on their interaction with other contacts in the legal profession who have pending or impending matters before the court, they might be compelled to disclose such relationships.” (E-Discovery Resource Database, http://ediscoveryresourcedatabase.com/2013/02/21/aba-formal-opinion-462-judges-use-of-electronic-social-networking-media/, accessed 7/1/14). The Opinion discusses several factors for judges to consider when using social media, including publicly endorsing or opposing...
candidates for public office, not giving the impression that they can be influenced by certain people or groups, avoiding ex parte communications concerning pending matters, and not using social networking sites to obtain information about matters before them. (Weiss, D.C. Should judges disclose Facebook friends? “Context” is significant, ABA Ethics Opinion says. *ABA Journal*, Feb. 26, 2013, [http://www.abajournal.com/news/article/should_judges_disclose_facebook_friends_context_is_significant_aba_ethics_o/, accessed 7/1/14].) Judges should also consider whether to disclose their social media relationships with lawyers or parties in pending matters, although the informal nature of these connections may not rise to the level that a personal, face-to-face relationship would. (Id.) In addition to these concerns, “[j]udges should also be aware that their comments, images and profile information may be transmitted without their knowledge to others. If the material proves embarrassing, it has the potential to undermine public confidence in the judiciary and to compromise the independence of the judge, the opinion says.” (Id.)

According to Lewis, “[t]he states that have considered whether judges can use social networking sites generally have concluded that they may do so. They diverge, however, when considering whether judges must recuse themselves if they have friended a lawyer who appears before them.” (Lewis, S.C. When judges “friend” lawyers: must recusal necessarily follow? *Rivkin Radler*, June 18, 2013, [http://www.rivkinradler.com/publications.cfm?id=1184, accessed 7/1/14].) She discusses the variety of opinions issued in Florida, Kentucky, Ohio, Maryland, California and New York. Florida is an interesting situation, since the Florida Supreme Court is being asked to consider whether being Facebook friends with a prosecutor who then appears in the judge’s courtroom for a case constitutes a conflict of interest and should be grounds for recusal. (Stone, R. Is Facebook friending between judges and trial lawyers improper? Even in

Two of my favorite authors are Sharon Nelson and John Simek, who have been on the cutting edge of security, digital forensics, electronic discovery and legal technology for many years through their company, Sensei Enterprises. ([Sensei Enterprises, Inc.,](http://www.senseient.com/) accessed 7/2/14). I use their materials extensively in several of the courses I teach at the School of Informatics and Computing (Indiana University). One suggestion is that all paralegals and lawyers register for their free article distribution service. Nelson and Simek recently provided an article about the risks to judges when they participate in social media, noting that as of a 2012 report from the Conference of Court Public Information Officers, “46.1 percent of judges use social media, with 86.3 percent of that number using Facebook and 20.6 percent using LinkedIn.” (Nelson, S.D. and Simek, J.W. The perils of social media for judges. *Res Gestae*, March 2014, pp. 26-28). Obviously, judges are not going to cease using social media just because it may be risky; however, they and the lawyers, paralegals and
other parties that they interact with in the delivery of legal services need to be mindful of the special role of judges in the community and avoid even the appearance of favoritism or impropriety. In terms of thinking about the larger picture of litigation, the ABA recently warned lawyers about “liking” potential jury members. (Odehdahl, M. ABA warns against “liking” potential jurors. Indiana Lawyer, May 7-20, 2014, p. 7; See ABA Formal Opinion 466, Lawyer Reviewing Jurors’ Internet Presence, April 24, 2014, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf, accessed 7/2/14)

B. Can/Should You Use Group Coupon or Daily Deal Marketing?

A newly published Formal Opinion from the American Bar Association provides guidance on whether attorneys are allowed to use these kinds of marketing approaches. (ABA Formal Opinion 465, Lawyers’ Use of Deal-of-the-Day Marketing Programs, Oct. 21, 2013, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_465.authcheckdam.pdf, accessed 7/1/14). As stated in the Conclusion, “[t]he committee believes that coupon deals can be structured to comply with the Model Rules. The committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.” (Id.) Several other ethical issues are identified in the Formal Opinion, including “the need to make sure the marketing statements are accurate. The scope of services offered must be clearly defined and the circumstances for refunds described, the opinion says. And the ad should explain that no client-lawyer relationship exists until a consultation takes place.” (Weiss, D.C. Can lawyers use Groupon-type marketing? ABA ethics opinion sees problems with prepaid deals. ABA Journal,
Oct. 21, 2013, http://www.abajournal.com/news/article/can_lawyers_use_groupon-type_marketing_aba_ethics_opinion_sees_problems/, accessed 7/1/14). However, the opinion “does not say that lawyers are forbidden to use sites like Groupon to promote themselves, but that deals need to be carefully structured to avoid problems and that it might not be possible to overcome those obstacles.” (Gershman, J. Lawyers and Groupon deals may be a difficult mix. The Wall Street Journal Law Blog, Oct. 21, 2013, http://blogs.wsj.com/law/2013/10/21/lawyers-and-groupon-deals-may-be-a-difficult-mix/, accessed 7/1/14). Commentary indicates that some people are concerned that the opinion has resulted in more ambiguity about what is permissible rather than clear guidance that helps attorneys comply with the ethical rules as well as the differences between coupon deals and prepaid deals. (Lawyers on Groupon: The ABA adds to the confusion. The Cyber Advocate, Oct. 25, 2013, http://www.thecyberadvocate.com/2013/10/25/lawyers-on-groupon/, accessed 7/1/14).

On the other hand, a New York Ethics Opinion allows lawyers to offer Groupon deals, with some cautions. (Ethics Opinion 897, New York State Bar Association, 12/31/11, http://lawyersusaonline.com/wp-files/pdfs-3/opinion-no-897.pdf, accessed 7/1/14). Among the specific issues covered in the opinion are whether the money retained by the website is an improper payment for a referral, whether this constitutes an excessive fee, compliance with rules regulating advertising and premature and improper formation of a lawyer-client relationship. (Id.) According to the opinion,

A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the rules governing

North Carolina and South Carolina have also issued recent opinions on ethics of using daily deal coupons. As stated in South Carolina Ethics Advisory Opinion 11-05, “[t]he use of daily deal websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed.” (Harris, M.D. Coupons for lawyers: three ethics opinions approve daily deal advertising for lawyers. Litigation News, 37(2), pp. 1-3, Winter 2012). In terms of North Carolina’s stance on this issue and others as compared with the ABA’s Model Rules,

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<tr>
<th>ABA Model Rule Update</th>
<th>NC Ethics Opinion</th>
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<td><strong>Rule 1.6</strong> – Attorneys must protect confidential information from unauthorized 3rd party access; must make “reasonable efforts” to keep confidential information secure</td>
<td><strong>RPC 215</strong> (1995) – protecting confidential information in wireless transmissions <strong>2008 FEO 5</strong> – regarding web-based management of client information</td>
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<td><strong>Rule 1.18</strong> – Attorney-client relationship likely established where person submits representation-related information in response to specific attorney inquiry or where no disclaimer provided Attorney-client relationship likely <strong>not</strong> established where submission is response to general attorney advertisement or attorney only provides legal info of general interest</td>
<td><strong>2000 FEO 3</strong> – regarding whether attorney posting responses to questions on permanent internet bulletin board establishes attorney-client relationship <strong>2011 FEO 8</strong> – regarding “live chat” services on attorney website</td>
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| **Rule 4.4** – Extending definition of documents sent inadvertently to opposing counsel to electronic documents, emails and attachments. | **2009 FEO 1** – More strict rule in NC regarding metadata (treats metadata the same as any other electronic document; holds that attorney who
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<th>Narrows requirements to avoid review and use of metadata sent by opposing counsel unless attorney knows/should know that info sent inadvertently</th>
<th>searches metadata of electronic documents in search of confidential information is in violation of Rules), otherwise same as ABA*</th>
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<td><strong>Rule 5.3</strong> – Extends attorney’s duty regarding external non-legal assistance to use of 3rd party companies for document management, cloud storage, and other software that has access to client information. Extent of duty is situational and fact specific</td>
<td><strong>2007 FEO 12</strong> – addresses generally a lawyer’s duties when outsourcing any work, to lawyers and non-lawyers alike <strong>2011 FEO 6</strong> – addresses lawyer’s duties when contracting with Software-as-Service companies for retention and management of client information</td>
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<td><strong>Rule 7.2</strong> – Lawyers may pay 3rd party customer-generation companies, but ads created by 3rd parties subject to same rules as attorney advertising alone</td>
<td><strong>2011 FEO 10</strong> – Essentially the same rule, but specifically addressing an attorney’s ability to advertise in group coupon (aka Groupon)-like services (it is permitted, provided the ads, and the payment therefore, comply with rules regarding attorney advertisement and payments to non-lawyers)</td>
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<tr>
<td><strong>Rule 7.3</strong> – Addressing improper attorney solicitation, specifically that use of advertising systems that automatically generate an ad based on particular search terms (read: user inputs) is NOT improper solicitation, absent other factors</td>
<td><strong>2010 FEO 14</strong> – Essentially the same rule, but establishes that the specific search terms the ad relies on must comply with ethical duty not to mislead (The example is an attorney ad that uses a competing attorney’s name as a trigger to bring up the ad – such conduct is deemed misleading)</td>
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Here is an example of an offer for legal services provided through Groupon:
Dynamic Lawyers - Ottawa

C$24

$24 for a Create-Your-Own Custom Will Package from Dynamic Lawyers ($109.61 Value)

In a Nutshell

Easy-to-use online program guides users through customizing a will while offering helpful information about the process.

The Fine Print

Wills help people pass on property to trusted beneficiaries, so that their loved ones can enjoy the fruits of their labor. With today's deal, you'll have the peace of mind that comes from ensuring that your affairs are in order.

$24 for a Create-Your-Own Custom Will ($109.61 Value)

The Will-O-Matic Wizard is an online platform that guides users through the process of customizing their last will and testament, aided by a video tutorial and two written guides. After working through the decision points of other available will kits, lawyer Michael Carabash specifically designed the Will-O-Matic software to adapt to the nuances of provincial laws and leverage clear language. At every step through the program, it offers helpful information on each option, giving them the chance to name legal representatives for any minor children, add their own clauses, and otherwise customize the document.

Diverse finished, the will is available in PDF format on Dynamic Lawyers' website, and users can go back and edit it for free during the following year. Users don't have to finish in one sitting. Wills are often recommended for anyone with financial assets, but can be especially useful for new parents, new families, those traveling abroad, and those with special financial or family situations.

Dynamic Lawyers
C. Can/Should You Use Text Messages to Solicit Prospective Clients?

**Rule 7.3 Solicitation of Clients**

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

1. is a lawyer; or
2. has a family, close personal, or prior professional relationship with the lawyer.

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

1. the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
2. the solicitation involves coercion, duress or harassment.

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

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

Rule 7.3 Solicitation of Clients - 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 lawyer’s communication 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] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject 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 fully to 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. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. 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 direct in-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 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 against a former client, or a person with whom the lawyer has a close personal or family 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. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) 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 which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which 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 is not intended 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 requests of 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.

[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). (ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients.html, accessed 7/2/14)

Note that some specific state rules may have additional provisions that are even more restrictive:

Indiana Rules of Court
Rules of Professional Conduct
Including Amendments made through January 1, 2013
(http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf, accessed 7/2/14)

Rule 7.3. Direct Contact with prospective Clients

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

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

(b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
(2) the solicitation involves coercion, duress or harassment;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter shall include the words “Advertising Material” conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both 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). A copy of each such communication shall be filed with the Indiana Supreme Court
Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars ($50.00) payable to the “Supreme Court Disciplinary Commission Fund” shall accompany each such filing. In the event a written, recorded, or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

In terms of whether the paralegal can use text messages and other electronic media to solicit prospective clients, we can review the NAIA Code of Ethics and Professional Responsibility:

**Canon 1.**

A paralegal must not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.

**Canon 10.**

A paralegal's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct.

(NAIA Code of Ethics and Professional Responsibility, [http://www.nala.org/code.aspx](http://www.nala.org/code.aspx), accessed 7/2/14) See also The American Alliance of Paralegals, Inc.: Code of Ethics, 5. A paralegal shall follow all provisions of the rules of professional conduct for a paralegal or legal assistant of the state in which he or she is employed. If no such specific code for paralegals exists, then a paralegal shall follow the attorney's code of ethics as it applies to paralegals within that state. (AAPI Code of Ethics, [http://www.aapipara.org/Ethicalstandards.htm](http://www.aapipara.org/Ethicalstandards.htm), accessed 7/2/14)

**D. What Are Your Ethical Duties When Using an Internet Directory or Attorney-Client Matching Site?**

According to Wikipedia,

Attorney-client matching (ACM), which has sometimes been referred to as online legal matching, is a subset of legal advertising that allows participating attorneys to be matched with potential clients seeking legal representation. ACM websites allow users to submit their legal needs online by practice area and location. Law firms or lawyers that opt to use these services are then matched with clients by need and location. (Attorney-Client Matching, *Wikipedia*, [http://en.wikipedia.org/wiki/Attorney%E2%80%93client_matching](http://en.wikipedia.org/wiki/Attorney%E2%80%93client_matching), accessed 7/1/14).
Wikipedia notes that one concern with these matching services is client confidentiality. (Id.) A number of these ACM services now exist. An example of one of these ACM services is LegalMatch. The following screenshots are from this company’s website. (http://www.legalmatch.com/m.html, accessed 7/1/14).
According to its website, a number of states have reviewed LegalMatch favorably from an ethical perspective and the FTC has provided an opinion endorsing online legal matching.
Its Ethics FAQ page addresses a number of ethical issues, including whether the service is a pre-paid legal plan, whether the service violates the rules of attorneys giving something of value for recommending an attorney’s services, whether LegalMatch violates the rule against solicitation, whether LegalMatch prevents running a conflicts check and whether LegalMatch is a bid or auction system. This page also discusses the ethics opinions from six states (South Carolina, Texas, Rhode Island, Ohio, North Carolina and Utah).
Here is what the public sees when beginning to search for an attorney:
The ethics of participating in an online attorney-client matching service are discussed from the perspective of California’s Rules of Professional Conduct by Borodkin and Gagnier. (Borodkin, L.J. and Gagnier, C.M. The ethics of online referrals. California Lawyer, Nov. 2011, http://www.callawyer.com/clstory.cfm?pubdt=201111&eid=918775&evid=1, accessed 7/1/14). Among the ethical issues covered in this article are that users are bound by the terms of service agreement, thus the burden is on the attorney to be sure that the terms are in compliance with a number of rules, including ABA Model Rule 5.5 regarding multijurisdictional practice, Rule 7.1 on false and misleading communications, Rule 7.4 on promotion of practice area specialization and Rule 1.18 on duties to prospective clients (confidentiality). (Id.) The authors caution that:

The potential efficiency of these revolutionary websites may tempt attorneys to be less vigilant about ethical issues. In an economy that has left many lawyers searching for work - especially young lawyers new to the profession - such sites seem like a tantalizing way to find clients. But they may inadvertently leave the relationship element of the attorney-client interaction by the wayside. Also, the pro forma contractual service terms of sites like LawPivot and Shpoonkle may leave participating lawyers with more liability than they counted on. So refresh your command of the ethics rules, not just your browser. (Id. at 2).

Carolyn Elefant’s myShingle.com blog addressed some important considerations with respect to using attorney-client matching services. (Elefant, C. Are data-driven matches between lawyers and clients always made in heaven? myShingle.com, http://myshingle.com/2013/01/articles/trends/are-data-driven-matches-between-lawyers-and-clients-always-made-in-heaven/, accessed 7/1/14). Not only is Ms. Elefant skeptical of the power of algorithms, data mining and data aggregators to construct a good match and concerned about confidentiality, but she also notes that “lawyers often get the clients they market for.”

In other words, if you label yourself as a “bargain basement lawyer,” don’t be surprised when most of your clients complain about your rates or haggle over price. If you bill
yourself as a pit bull lawyer who doesn’t take no for an answer, you may attract strident clients who won’t take no for an answer when you try to explain why a particular strategy won’t work. Still, an enormous space lies between the ideal client and clients from hell — and we may find a way to effectively represent many of the clients in that middle space even though a computer program wouldn’t necessarily have matched us. After all, as lawyers, that’s what we do: find a way to work with people — from opposing counsel to judges who don’t necessarily share our life views, personality or skills — so that we can effectively represent our clients. (Id. at 2-3).

A blogpost that is generally favorable to the concept of lawyer matching services notes that such sites would be even more effective if they went beyond matching to actually screen the good lawyers from the bad. (Camara, K.A.D. Lawyer matching services. Discovery: The DISCO Blog, Mar. 17, 2013, http://blog.csdisco.com/2013/03/17/lawyer-matching-services/, accessed 7/1/14). Unfortunately, the blog ends with some disturbing commentary on the quality of legal services available:

A few words about quality control for nonlawyers: checking for bar membership and bar discipline is nowhere near enough. Unfortunately, in the United States, it is easy to become a lawyer and there is little or no postgraduate specialization or training as there is for doctors. The kinds of things that can be routinely checked are not adequate indicia of quality. And clients can judge bedside manner, but not the quality of the surgery; unlike real surgery, the results of bad lawyering may not show for years in litigation and longer in transactions. This is why the quality-control function of law firms is so important, because, until better technology is developed, only senior lawyers who are themselves good can tell what lawyers are good and can teach them how to be better. (Id.)

Attorneys who are interested in participating in attorney-client matching services should first review the applicable rules in the state where they are licensed and then compare these rules with the terms of service of the vendor to be sure that they are in compliance. Reviewing the ethical opinions from other states provided through the LegalMatch website may also be helpful.

Here are the ABA Model Rules of Professional Conduct that are especially relevant:

**Rule 7.2 Advertising**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

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

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

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

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

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

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

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

Rule 7.2 Advertising - 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.

[2] This Rule permits public dissemination of information concerning a lawyer'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.

[3] 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.

[4] 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

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. 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. 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 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 service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such 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] 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 not 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. (ABA Rules of Professional Conduct,

E. What Are the Ethical Rules of Linking the Law Firm Website to a Non-Legal Entity and Vice Versa?

ABA Formal Opinion 10-457 covers websites for lawyers. (ABA Formal Opinion 10-457, Lawyer Websites, Aug. 5, 2010,
http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf, accessed 7/1/14). The opinion discusses website content (information about lawyers, their law firms or their clients), information about the law, inquiries from visitors to the website and
warnings or cautionary statements that are intended to limit, condition or disclaim a lawyer’s obligations to website visitors. (Id.) Of course, the world of the web has changed significantly since 2010, with law firms and every other kind of company, non-profit organization or government agency now relying nearly exclusively on websites and other technology-enabled venues for communication with current and future clients, colleagues and the public as a whole. One of the major considerations with website development is search engine optimization (SEO), which is intended to boost the position of a website to the top of a list when a user searches Google or another search engine. It is unlikely that a user, unless very motivated or clear about what he/she is looking for, will go beyond the first list of websites delivered through a search engine. Links are an important factor in search engine optimization and there are many resources for using links strategically in website development.

Links are the "money" of the Internet; you want lots of links. Inbound links show that your site is reputable -- something which Google likes. The more inbound links you have, the higher your site will be ranked in search. Getting your website listed on business directories and in media coverage (blogs, online magazines, and news sources) are great ways to build up inbound links. (Khorasanee, G. Law firm website SEO 101: Tags, keywords, links and more. Strategist: The FindLaw Law Firm Business Blog, Sept. 30, 2013, http://blogs.findlaw.com/strategist/2013/09/law-firm-website-seo-101-tags-keywords-links-and-more.html, accessed 7/1/14).

Likewise, Tsakalaskis offers a number of suggestions for selecting links for a law firm’s website, including a top-down approach for prospecting for links, competitive intelligence, local linking opportunities and developing content that other sites will want to link to. (Tsakalaskis, G. Law firm link sources. Lawyerist, Jul. 11, 2011, http://lawyerist.com/law-firm-link-sources/, accessed 7/1/14. See also Ramsey, M. How to design the best law firm website. Attorney at Work, Sept. 11, 2013, http://www.attorneyatwork.com/how-to-build-the-best-law-firm-website-design/, accessed 7/1/14). A recent study indicates that LinkedIn may be the biggest way to generate traffic to law firm websites, although Twitter is gaining in influence. (O’Keefe, K. LinkedIn

Giroux notes that to be successful, a law firm should integrate its offline relationships with its online presence. (Giroux, J. Build your law firm website links naturally. *LawWebMarkeing.com*, Dec. 5, 2012, [http://www.lawwebmarketing.com/2012/12/build-your-law-firm-website-links-naturally](http://www.lawwebmarketing.com/2012/12/build-your-law-firm-website-links-naturally), accessed 7/1/14). Among the suggestions he makes for developing links are the firm’s individual, professional and community relationships, its involvement with charities and non-profit organizations and its brand authority, which he defines as the collective knowledge, skills expertise, and image that the lawyer, the firm and the firm’s employees possess and display. (Id.) While striving to be at the top of a search list is an important goal, the attorney may still want to be mindful of the saying that “you are judged by the company that you keep.” While there is little control over websites that choose to link to the law firm’s website, an attorney will want to make sure that listings of - or links to - its website in any marketing, matching or directory-type sites are not only worth the financial investment required (and be able to measure the ROI), but that they are in compliance with the whatever rules of professional conduct regarding advertising apply to the lawyer and the law firm. In terms of links on the law firm’s own website, these should be chosen with care, not only for search engine optimization (SEO), but also so that they are consistent with the image that the law firm wants to portray and that these sites contain high-quality information that will be helpful to clients and potential clients. It is also important to avoid linking to websites that appear to be violating copyright law.
In terms of using social media as a marketing tool for the law firm, Meinke provides some excellent recommendations. (Meinke, S. Using Facebook for your law firm. *Michigan Bar Journal* 93(6):56-57, June 2014) Among the recommendations are to:

- Create a Facebook page – since Facebook has more than 1.25 billion active users and more than 128 million daily users in the United States.
- Make your page look professional.
- Provide complete information.
- Build an online community.
- Likes for options – with suggestions for how to increase “likes” that the law firm’s page receives, which provides more options, features and tools.
- Use analytics to improve.

Given that a variety of bar associations and commentators are examining some of the ethical issues with social media, including some of its specialized features and tools, the lawyer may want to review his or her profile on LinkedIn. Some of the particular issues being raised are endorsements (which could appear to be testimonials) and skills/expertise (which could appear to be implying fields of practice or a specialty. *(See ABA Model Rule Rule 7.4 Communication of Fields of Practice and Specialization, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_4_communication_of_fields_of_practice_specialization.html, accessed 7/2/14).* Fortunately, LinkedIn in One Hour for Lawyers, now in a second edition, provides lots of helpful guidance in designing the most comprehensive profile possible while avoiding running afoul of ethical issues. *(Kennedy, D. and Shields, A.C. *LinkedIn in One Hour_for Lawyers, Second Edition*.)*
Hour for Lawyers, 2nd ed. Chicago: American Bar Association, 2013). There is a similar book for lawyers who are interested in using Twitter.

F. Can Testimonials Be Considered Ethically-Compliant Advertising?

Attorneys must be especially careful when using testimonials as part of an advertising plan. One of the risks of testimonials is that they can create expectations in the client’s or other party’s mind about the results that can be achieved by using the attorney’s or law firm’s services. There are so many nuances to cases that may appear similar or situations that may be comparable, which attorneys appreciate, but which may be difficult for those without legal training to comprehend. The ABA Model Rule 7.1 does not address testimonials:

**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.

However, the Comment certainly cautions lawyers about the risks of even truthful communications:

**Rule 7.1 Communications Concerning A Lawyer's Services - Comment**

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. 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.

[3] An advertisement 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 comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison 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. (ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services.html, accessed 7/1/14)

Individual states may take a more conservative and restrictive view about the use of testimonials. The risks with testimonials as well as other popular advertising methods, such as endorsements and dramatizations, are illuminated in the Comments to Rule 7.1 in the Indiana Rules of Professional Conduct.

Indiana Rules of Court

Rules of Professional Conduct

Including Amendments made through January 1, 2013
(http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf, accessed 7/2/14)

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.

Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. 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. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) contains statistical data or other information based on past performance or an express or implied prediction of future success;
(3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;

(4) appeals primarily to a lay person’s fear, greed, or desire for revenge;

(5) compares the services provided by the lawyer or a law firm with other lawyers’ services, unless the comparison can be factually substantiated;

(6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;

(7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;

(8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person’s legal rights;

(9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;

(10) is prohibited by Rule 7.3.

Although the focus is on California, King provides a brief history of attorney advertising and provides a discussion of how this impacts social media, including online testimonials, requirements for disclaimers, blogging, communication about prior results and the interplay between the First Amendment and the regulation of attorney speech. (King, J. Social media and attorney advertising. *California Lawyer*, June 2012, [http://www.callawyer.com/clstory.cfm?pubdt=201206&eid=922755&evid=1](http://www.callawyer.com/clstory.cfm?pubdt=201206&eid=922755&evid=1), accessed 7/1/14). His conclusion is that “[p]rovided that California attorneys aren't engaging in deception, they should have few concerns that a technicality will trip up their constitutionally protected right to express themselves via social media.” (Id.) (See also Hudson, D.L., Jr. Commercial ahead: Virginia Supreme Court holds that advertising rules may be applied to a lawyer’s blog. *ABA Journal*, Nov. 2013, pp. 20-21, and Abrogi, R. Do LinkedIn endorsements violate legal ethics? *Robert Ambrogi’s LawSites*, May 20, 2013, [http://www.lawsitesblog.com/2013/05/dolinkedin-endorsements-violate-legal-ethics.html](http://www.lawsitesblog.com/2013/05/dolinkedin-endorsements-violate-legal-ethics.html), accessed 7/24/14).
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