



# NEW TECHNOLOGIES AND OLD RULES: RPCs AND MARKETING IN THE DIGITAL AGE

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Television. Radio. Billboards. Phone books. For years, these were the primary methods used by attorneys to promote their law practices and obtain additional clients. In fact, these forms of media are specifically referenced in Rule of Professional Conduct 7.2(a) (Advertising).

These days, however, websites, Facebook and Twitter, along with banner, mobile and other forms of electronic advertisements are becoming as prevalent, if not more so, as the more traditional methods for marketing products and services.

## What is an Advertisement?

Unsurprisingly, many law firms now use electronic media in promoting their services. This leads to an often-asked question: what is an attorney advertisement?

In general, attorney advertisements are communications by lawyers intended to promote their law practices, in the hope of generating business.<sup>1</sup>

For example, take an attorney who has a Facebook page. Facebook, to those unfamiliar with the company, allows a user to have a public page, viewable by all, with content accessible even to those without a Facebook account. However, the user may also limit access to Facebook members who have requested access and been accepted – a practice known as “friending.”

So, if the attorney limits access to the Facebook page to family or close friends, the attorney’s communications are unlikely to be deemed advertisements, even if the attorney is telling mom that her child is the best attorney on the planet or discusses the results of a case. In this scenario, the attorney is not seeking to attract clients. As such, the advertising rules would not apply.

On the other hand, if the web page in question is visible to all (with websites being a prime example), or if the general public is allowed to view the communications hosted there, any statements promoting the firm, such as a list of results obtained by the firm or statements regarding the quality of the legal representation, are likely to be found to be advertisements.

## Rules of Professional Conduct Apply to Electronic Communications

The Rules of Professional Conduct (RPC), which are based largely upon the ABA's Model Rules of Professional Conduct, reflect an attorney's obligations to the client, the courts, the public and the legal profession.<sup>2</sup>

Most of Nevada's professional conduct rules are drafted broadly enough to apply to electronic communications without requiring any amendments. Although the attorney's obligations have not changed, applying them in the electronic age may not always be clear-cut. Still, many of the issues that have arisen with electronic forms of communication can be resolved with a relatively straightforward application of the current rules of professional conduct.

### Discussing Cases

For example, if you're promoting a case on a blog or website, RPC 1.6 (Confidentiality) applies. The rule, barring certain exceptions, prohibits an attorney from revealing information relating to the representation of a client. In 2009, Nevada's Standing Committee on Ethics and Professional Responsibility noted that RPC 1.6 applies to all information relating to the representation of a client.<sup>3</sup> With the caveat that the advisory opinions are non-binding in nature, the opinions' analysis is not limited to any particular situation.

Thus it is not surprising to read about an Illinois public defender who, in 2010, was suspended for posting confidential information regarding clients on her blog. Although there were minor attempts to disguise the client's names, they were readily identifiable.<sup>4</sup>

It also didn't help that the public defender's blog acknowledged that, although one of her clients had lied to the court about his drug use, she had failed to correct the record. This violated the equivalent of Nevada's RPC 3.3 (Candor Toward the Tribunal).

Even though blogs are a relatively new communication vehicle, the nature of blogs and social media indicate that such communications are public in nature (hence the use of the term "social"), and the attorney should be aware that any communications can be seen by virtually anyone.

Thus, attorneys should be mindful when discussing cases on their websites, blogs, Twitter accounts, etc. This also applies to communication with one's client. The lawyer should understand the technology (such as Twitter's ability to send private or public tweets) before utilizing it for firm-related purposes.<sup>5</sup>

### Testimonials from Current or Former Clients

Testimonials are a popular way for attorneys to promote their law firms, but use of client testimonials are also bound by the rules of professional conduct. As such, can an attorney ask a client to post a positive review on his or her Facebook page, or on a lawyer review site? What if the client does so unilaterally? As will be discussed below, none of these actions by themselves violate the rules of professional conduct.

But what if the testimonial contains statements that the attorney wouldn't be allowed to make directly, particularly statements that could create unjustified expectations under RPC 7.1 (Communication Concerning a Lawyer's Services)?

RPC 8.4(a) (Misconduct) states that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another. In other words, if you can't do it yourself, you can't have someone else do it for you.

A 2009 South Carolina Bar advisory opinion opined that an attorney can ask a client to post a review, but noted that such a review would also be bound by the rules of professional conduct.<sup>6</sup>

The opinion also indicated that this obligation is also attached to unsolicited client comments. Once a lawyer learns of unsolicited comments, the lawyer must tell the client to revise any comments that would contravene the professional conduct rules. Otherwise, the attorney may be found to have accepted and/or ratified such comments.

### Communicating With Prospective Clients

Many forms of electronic communication allow clients and prospective clients to easily communicate with a law firm.<sup>7</sup> A law firm's website or Facebook page can invite prospective clients to initiate communication with the firm.

However, the attorney should be careful that a prospective client does not conclude that an attorney/client relationship has been formed. To prevent this, the attorney should seek to limit the information provided by the prospective client, given that RPC 1.18 (Duties to Prospective Clients) protects the confidentiality of a prospective client's information.

RPC 1.18 limits an attorney's ability to take adverse actions against the prospective client, and notes that the analysis contained in RPC 1.9 (Duties to Former Clients) also applies to a prospective client. RPC 1.9 prohibits a lawyer from representing a client whose interests are materially adverse to a former client if the matter is the same or substantially related to the prior representation.

Even before RPC 1.18 was enacted by the Supreme Court, the Standing Committee on Ethics and Professional Responsibility advised, in 2005, that attorneys may have a heightened duty to prospective clients who communicate with the law firm in response to a solicitation contained on an attorney's website. This duty extended to both expectations of the attorney/client relationship and to the confidentiality of the information sent.<sup>8</sup>

ABA Formal Opinion 10-457 (regarding lawyer websites), advised attorneys who encourage communications from prospective clients to place warnings or cautionary statements on their websites to limit, condition or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as to avoid misleading a website visitor into believing that (1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party. Of course, limitations, conditions or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed and not misleading.

ABA Formal Opinion 10-457 also advises that the warning be in a readable format with a meaning that can be understood by a reasonable person. If the website uses a particular language,

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any waiver, disclaimer, limitation or condition must be in the same language. The appropriate information should be conspicuously placed to assure that the reader is likely to see it before proceeding.<sup>9</sup>

These concerns also apply to other electronic formats. Some law firms offer apps for mobile devices that can be downloaded by a client or prospective client. A personal injury app, for example, may allow a prospective client to submit information and pictures directly to the law firm.

One such app that came to our attention disclaimed any attorney/client relationship, but featured no disclaimer regarding the confidentiality of the information submitted. As such, the prospective client was on notice that sending over information would not, in and of itself, establish representation. However, there was nothing to indicate that the information submitted would not be kept confidential, thereby triggering the protections of RPC 1.18.

It may be significantly easier to reach potential clients in the digital age, but it is also significantly easier for potential clients to reach you. If you invite communications, make it clear what type of information you seek and what type of information you do not wish to receive.

## When Might a Fee-Split Not Be a Fee-Split? RPCs and Deal-of-the-Day Sites

Deal-of-the-day websites, such as Groupon, have appeared over the past few years. These sites allow vendors to list a product or a service, and offer the product/service at a discounted rate, if a minimum threshold of purchasers subscribe to the deal. If a sufficient number of people agree to purchase the “deal,” the transaction is consummated. Usually there is no listing fee, but the daily coupon site generally takes a percentage of the revenue as its fee.

The question is whether or not an attorney can participate in a daily coupon site. The wrinkle is that the website takes a percentage of the revenue as a commission. If a legal service is offered, it clearly appears to involve splitting legal fees. Fee-splitting between an attorney and non-attorney violates RPC 5.4 (Professional Independence of a Lawyer), which prohibits a lawyer or law firm from splitting legal fees with a non-lawyer. Similarly, the exchange of monies could be seen as giving the site something of value for referring clients, in contravention of RPC 7.2(k).

Neither the Nevada Supreme Court or Nevada’s Standing Committee on Ethics and Professional Responsibility have discussed deal-of-the-day websites in regard to the Rules of Professional Conduct. Different bar associations have reached different conclusions as to whether such participation is permissible.

For example, the Indiana State Bar Association Legal Ethics Commission found that such “social media marketing is fraught with peril” and likely not permitted under the Indiana rules, citing concerns including, but not limited to, fee-splitting, paying for a referral, scope of representation, conflict of interest and safekeeping property.<sup>10</sup>

However, could the commission be classified as advertisement cost, rather than a fee-split? If so, would it render the conduct permissible under RPC 5.4 and RPC 7.2? New York, North Carolina and South Carolina have issued advisory opinions which concluded that the answer to these questions is “yes,” with certain caveats.<sup>11</sup> North Carolina initially leaned towards advising that paying a percentage of legal fees to a deal-of-the-day site constituted an improper fee split,<sup>12</sup> but the advisory opinion ultimately issued concluded that the payment could be considered an advertising cost.

The reasoning was based, in part, upon a conclusion that the impersonal nature of setting up a listing and the payment was unlikely to impact a lawyer’s professional judgment. The New York opinion noted that a change in the nature of the interaction could result in a different conclusion.

Nevertheless, these opinions also raised additional concerns beyond fee splitting, and these opinions did not necessarily agree on their resolution.<sup>13</sup> For example, what if the purchaser fails to submit the coupon before it expires? North Carolina’s advisory opinion states that the money must be returned to the purchaser. The New York advisory opinion, however, states that such a fee could be kept by the attorney.

Still, Alabama’s Office of General Counsel, which considered all of the above opinions, rejected the notion that paying a percentage of legal fees based on the number of participants could constitute a reasonable advertising cost.<sup>14</sup> Its opinion noted that a flat fee for the service might be permissible, but even then the service implicated numerous other ethical concerns.

In conclusion, the public policies underlying the RPCs remain relevant to the practice of law in the digital age. New technologies may bring new and previously unthought-of marketing possibilities, but the “old” rules still have something to say about them, even if a fee-split might not always be a fee-split. ■



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1. See, e.g., Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, ABA Journal, February 2011. Available at [http://www.abajournal.com/magazine/article/seduced\\_for\\_lawyers\\_the\\_appeal\\_of\\_social\\_media\\_is\\_obvious\\_dangerous/](http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/).
2. See American Bar Association Standards for Imposing Lawyer Sanctions, Center for Professional Responsibility, 1991.
3. See Formal Op. 41, June 25, 2009.
4. See Debra Cassens Weiss, *Legal Ethics: Blogging Assistant PD Gets 60-Day Suspension for Posts on Little-Disguised Clients*, ABA Journal, May 26, 2010, at [http://www.abajournal.com/news/article/blogging\\_assistant\\_pd\\_gets\\_60-day\\_suspension\\_for\\_posts\\_on\\_little-disguised/](http://www.abajournal.com/news/article/blogging_assistant_pd_gets_60-day_suspension_for_posts_on_little-disguised/).
5. Former New York Congressman Anthony Weiner's 2011 troubles provide an example of what can go wrong when you confuse a public tweet for a private one. See Leslie Meredith, *How to avoid your own Weingate on Twitter; Here's what's public and what's private — and how to keep them that way*, June 8, 2011, available at [http://www.msnbc.msn.com/id/43331911/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/how-avoid-your-own-weingate-twitter/#\\_T\\_HBBZHy18E](http://www.msnbc.msn.com/id/43331911/ns/technology_and_science-tech_and_gadgets/t/how-avoid-your-own-weingate-twitter/#_T_HBBZHy18E).
6. South Carolina Bar Ethics Advisory Opinion 09-10 (2009).
7. Nevada, like most, if not all, states, prohibits the direct solicitation of clients, and RPC 7.2(a) and RPC 7.3 are worded broadly enough to encompass electronic real-time communications.
8. See Formal Op. 32, March 25, 2005.
9. This admonition also applies to disclaimers in general. If the disclaimer cannot be readily seen or understood by the prospective client, it's considered to be ineffective. For example, in *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 445 (M.D.N.C. 2001), the size, lightness, and brevity of the disclaimer at issue rendered it "entirely ineffective."
10. Indiana State Bar Ass'n Legal Ethics Comm. Op. 1 (2012).
11. See, New York State Bar Association Committee on Professional Ethics Opinion 897 (December 13, 2011); South Carolina Ethics Advisory Opinion 11-05; North Carolina Formal Ethics Opinion 10 (October 21, 2011).
12. Debra Cassens Weiss, *Legal Ethics: Proposed NC Ethics Opinion Says Lawyers Can't Ethically Offer Groupon Deals*, January 19, 2011, available at: [http://www.abajournal.com/news/article/proposed\\_n.c.\\_ethics\\_opinions\\_says\\_lawyers\\_cant\\_ethically\\_offer\\_groupon\\_deal/](http://www.abajournal.com/news/article/proposed_n.c._ethics_opinions_says_lawyers_cant_ethically_offer_groupon_deal/).
13. Stephanie Francis Ward, *Coupon, You're On: 3 Opinions Say Lawyers May Participate in Daily-Deal Websites*, ABA Journal, May 2012, available at [http://www.abajournal.com/magazine/article/coupon\\_youre\\_on\\_3\\_opinions\\_say\\_lawyers\\_may\\_participate\\_in\\_daily-deal\\_web/](http://www.abajournal.com/magazine/article/coupon_youre_on_3_opinions_say_lawyers_may_participate_in_daily-deal_web/).
14. See Alabama Office of General Counsel Op. 2012-01, available at <http://www.alabar.org/ogc/fopList.cfm>.