Ethical Advertising in the Digital Age

By Kim E. Rinehart

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Social media and other electronic forms of communication provide unprecedented opportunities to reach current and potential clients, enhance your reputation, and build your business. But as you venture into these waters, it is important to keep the attorney ethics rules in mind. The speed, informality, and potential for direct connection with clients or potential clients afforded by electronic communications can pose unique compliance challenges. So stop, think, and consult the Rules before you tweet, blog, friend, click send, or update your LinkedIn profile.

The Rules

Connecticut Rules of Professional Conduct 7.1-7.5 provide the parameters of permissible attorney advertising and solicitation. More general rules, such as the restrictions on the use of confidential client information in Rule 1.6, also must be observed. Additionally, practitioners should consult Practice Book § 2-28A to determine what advertisements must be filed with the Statewide Grievance Committee. The scope of this article is too limited to provide a comprehensive review of these requirements. Instead, it will touch on several issues that arise frequently in the era of digital communications.

Is My Communication Covered by the Rules?

The answer may depend on *which* Rule. Rule 7.1 prohibits making a "false or misleading communication about the lawyer or the lawyer's services." This provision is broadly worded and sweeps well beyond a typical definition of advertising. By contrast, Rule 7.2, which sets out preservation and filing obligations and imposes other specific requirements, applies to communications "advertis[ing] services." The Official Commentary to the Rule indicates that "[a]dvertising involves an active quest for clients." Thus, Rule 7.2 likely applies only to those communications aimed at generating business. Whether a specific communication is subject to a given Rule will turn on the substance of the communication rather than the method of delivery. The Rules specifically apply to electronic communications.[1]

To File or Not to File

Practice Book § 2-28A requires attorneys to file with the Statewide Grievance Committee a copy of each "advertisement" prior to or concurrently with the attorney's first dissemination of the advertisement, subject to certain exceptions. The section does not define advertisement and a strong argument can be made that the term should be read, consistent with Rule 7.2 and the First Amendment, to apply only to communications designed to generate business. However, the Statewide Grievance Committee has stated that the term captures "any communication made by a lawyer or law firm concerning the legal services offered by the lawyer or law firm."

A banner advertisement or YouTube video touting your firm's successes or explaining the types of cases you handle clearly must be filed.[2] But what about an Internet video that provides general information regarding a specific area of law? Arguably, this type of video, similar to many legal blogs, would not be covered as it does not "concern services offered by the lawyer" and is instead editorial or informational in nature.[3] However, if a video or blog is really window dressing for talking about a lawyer's victories, it will be considered advertising.[4]

With respect to websites, attorneys need not file the content itself, but are required to quarterly file "a list of domain names used by the attorney primarily to offer legal services." The Statewide Grievance Committee has confirmed that "[a]ttorneys need not provide the domain names for websites that are not used primarily to advertise legal services; this includes social media used for personal purposes." The, key, then is the definition of "primarily." If you use Twitter or FaceBook to connect with friends and follow your favorite bands, you're probably in the clear even if you post a work-related status update once in a blue moon. But if you have a LinkedIn site that reads like a resume and is chock full of endorsements about your legal skills, the Statewide Grievance Committee may come to a different conclusion. Likewise, if you tweet about case victories, rather than your favorite sports team, you may need to file. The determination of whether a site must be filed may also hinge on whether the site is open to the general public or only to invited "friends." Practitioners must consider each site independently.

The filing requirements do not extend to, among other things, communications sent only to current or former clients, communications requested by a prospective client, or communications sent to other professionals, businesses, or organizations. For example, an electronic newsletter or client alert sent only to current clients,

businesses, and individuals who have requested to receive it would not need to be filed.[5]

Police the Truth

Rule 7.1's requirement that a lawyer may not say anything false or misleading sounds straightforward enough. But in a world of speedy and informal communications, often not reviewed by a central firm ethics or marketing officer, it is important to remember the basics: Don't make unverifiable assertions, such as touting one's "excellence,"[6] don't report positive results in a way that might lead someone to expect the same result,[7] and don't claim you are a specialist or an expert, unless you are certified and permitted to do so under Rule 7.4.

Even if you've mastered the basics, the interactivity of social media presents additional issues. What if a friend visits your LinkedIn site and endorses you for five skills, only three of which you actually have? What if a client posts a testimonial saying you are the "best" lawyer in the Northeast? Do you have an obligation to remove (or attempt to remove) this material? Maybe. Advisory opinions in South Carolina and Ohio have concluded that lawyers have an affirmative obligation to remove items posted by others on sites they control if the posts are misleading.[8] Agreeing to make reciprocal recommendations is another no-no, as it violates Rule 7.2's prohibition on "giv[ing] anything of value to a person for recommending the lawyer's services." If you are concerned and not sufficiently tech savvy to police your social media sites' recommendation features, your best bet may be to just turn them off.

Keep it Confidential

We all know the rules, but it is so easy to break them. Consider Betty Tsamis, who received a negative client review on Avvo. She succeeded in getting Avvo to remove the initial review, but the undeterred client posted again. This time she responded—and then promptly got grieved for revealing confidential client information.[9] Just eliminating client names isn't enough. If you say enough that someone could determine who your client is, you have probably violated Rule 1.6.[10]

The Takeaways

Lawyers will increasingly turn to social media and other electronic forms of communicate to generate business. The key is using good judgment:

- Separate your professional and personal online social networking activities as much as possible.
- File the URLs of your social networking sites quarterly if their primary purpose is business generation.
- Pay attention to recommendation features of social networking sites.
- Don't disclose details about a client matter.
- Finally, before you press send, ask yourself, "Would I want this on the front of *The New York Times*...or on a judge's iPad?" It might be, so choose your words with care. **CL**

Notes

1. *E.g.*, Rule Official Commentary to Rule 7.1 (covering "all means" of communication); Rule 7.2 (expressly including "electronic communications").
2. *E.g.,* Statewide Grievance Committee Advisory Opinion #10-03032-A (regarding one-minute internet promotional video).
3. *E.g.,* Kentucky Attorney Advertising Commission, Frequently Asked Questions at p. 10, available at http://www.kybar.org/documents/obc/aac_faq.pdf (stating that blogs need not be registered unless they reference an offer to render legal services).
4. *Hunter v. Virginia State Bar*, Record No. 121472 (Feb. 28, 2013) (blog posts "are an advertisement in that they predominantly describe cases where [the lawyer] received a favorable result for his client" and is hosted on his firm's website).
5. *E.g.*, Statewide Grievance Commmittee Advisory Opinion #09-04874-A.
6. Statewide Grievance Committee Advisory Opinion 10-03032-A (finding that phrase "Tradition. Excellence." was misleading because it was not objectively verifiable).
7. Rule 7.1 and Commentary thereto.
8. South Carolina Bar Ethics Advisory Opinion 09-10 (2009); Ohio Board of Commissioners on Grievances and Discipline No. 2000-6 (2000).
9. *In the Matter of Betty Tsamis,* Illinois Attorney Registration and Disciplinary Commission Hearing Board, No. 6288664 (Joint Stipulation and Recommendation for Reprimand) (Jan. 14, 2014), available at: http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221.
10. However, that at least one court has found that the First Amendment protects an attorney's right to communicate the already public facts of a closed case. *See Hunter v. Virginia State Bar*, supra n. 4.