Ethical Considerations for Attorney Marketing

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Today's social media provides myriad opportunities for consumers to find services in the marketplace. Conversely, businesses have engaged in clever ways to follow and forecast consumer trends, to gain the consumer's attention, and to earn the consumer's hard-earned money.

Social media outlets like Facebook and Google+ have brought friends, family, and strangers closer together than ever before.

Twitter and YouTube are constant sources of breaking news, whether worthy of public distribution or not.

LinkedIn offers a global networking environment for businesses and professionals.

Without question, the Internet is the first choice of many consumers for information sharing/gathering, and it is always open for business and easily accessible through a widening array of digital devices.

Not surprisingly, attorneys have sought to leverage social media to advertise their practices and solicit clients. Attorneys are now able to self-publish at little cost, and generate clients by advertising on websites visited by potential clients and responding to inquiries on Twitter, LinkedIn, and Facebook. Many social media sites, as well as some attorney advertising sites, allow others to post comments and recommendations about listed attorneys. For better or worse, attorneys have also adapted to the contemporary consumer and how a potential client will be drawn to terms like "Super Lawyer" and "Best Lawyer," as opposed to the staid belief that self praise is no recommendation. Indeed, law firms, large and small, have developed marketing strategies and departments to meet the demands of today's clients.

The Rules of Professional Conduct (RPCs) govern both traditional and online advertising. The rules, however, were formulated when attorney advertising was deemed a form of commercial speech, and sought to address advertisements in the Yellow Pages and billboards, and on the radio and television. The proliferation of social media as a marketing tool has triggered a renewed emphasis on an attorney's knowledge of the Rules of Professional Conduct in order to avoid glaring ethical missteps.

This article endeavors to highlight some of the ethical considerations for attorney marketing in New Jersey. It begins with a short history of the advent of modem attorney advertising in 1977, and includes a discussion of the current rules and recent ethics opinions. It concludes with a sampling of ethical considerations raised by the prevailing social media. While this article does not comprehensively address every nuance of each potential attorney communication, it is intended to serve as a launching point for the ethical considerations for attorney marketing in New Jersey.

General Background and History of Attorney Marketing

Attorney advertising has had a varied existence in the United States. Attorney marketing was commonplace before the adoption of the Constitution, and proliferated in an unregulated manner for over a century.[1] That came to a halt when the American Bar Association, acting in response to growing ethical concerns, adopted Canon 27 in 1908, and ushered in a blanket proscription on attorney advertising.[2] The New Jersey Supreme Court punctuated the sentiment that attorney advertising was unprofessional, stating "If competitive advertising among lawyers were permitted, the conscientious ethical practitioner would be inescapably at the mercy of the braggart."[3]

The blanket limitations on attorney advertising lasted until 1977, when the United States Supreme Court held that truthful attorney advertising constituted commercial speech protected by the First Amendment.[4] Attorney advertising that was false, deceptive or misleading, however, remained subject to restraint.[5] In a subsequent decision, the United States Supreme Court held that even truthful commercial speech may be regulated by the states upon a showing that: first, the

restriction is sought in order to serve a substantial state interest; second, in fact the restriction does directly serve that interest; and third, there is no less restrictive alternative available to accomplish the same effect.[6]

Guiding Principles for Attorney Marketing in New Jersey

The requirements of RPC 7.1 govern all attorney communications, including attorney advertising, and provide:

> A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; (3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or ...

RPC 7.2 specifically addresses attorney advertising:

> Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, Internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence. (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as per- mitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for- profit lawyer referral service or other legal service organization.

RPC 7.3 governs attorney solicitation of prospective clients, and provides, in relevant part:

> A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b). (b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if: (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or (3) the communication involves coercion, duress or harassment; or (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter: (i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; and (ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and (iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625....

Although RPC 7.3(b)(4) forbids attorney solicitation of potential clients for 30 days after a mass disaster, and RPC 7.3(b)(5) imposes other requirements for contacting potential clients not covered by (b)(4), the New Jersey Legislature passed A-4430/S-2316 on Jan. 5,

2012, criminalizing an attorney's attempt to contact a person involved in a motor vehicle accident before 30 days have passed.[7] Governor Chris Christie pocket-vetoed the legislation on Jan. 17, 2012. Nonetheless, a fair question remains as to whether the Legislature can criminalize attorney advertising conduct the Supreme Court has not deemed violative of the RPCs.[8] In addition, A-4430/S-2316 may offend the still-emerging law of commercial speech by criminalizing truthful statements that may otherwise be protected by the First Amendment.[9]

RPC 7.4 governs an attorney's ability to market that he or she practices in particular fields of law, and an attorney's ability to state whether he or she has been recognized or certified as a specialist in a particular field of practice, for example patent law, admiralty law, civil trials, criminal defense, matrimonial law, and municipal practice.[10]

RPC 7.5 governs attorney and firm communications relating to firm names and attorneys not admitted in New Jersey.

Subsection (a) states that firm names must conform with RPC 7.1 and Rule 1:21-1(e).[11]

Subsection (b) sets forth the required information that must be included in advertisements and letterheads when the firm name includes, or if the firm employs, attorneys not admitted to practice in New Jersey.[12]

Subsection (c) states that the firm name "shall not contain the name of any person not actively associated with the firm…other than…a person or persons who have ceased to be associated with the firm through death or retirement."[13]

Subsection (d) states that lawyers may assert that "they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.[14]

Subsection (e) states that a firm name cannot include "legal aid" in its name or any additional identifying language; may include "& Associates" only when such language is accurate and descriptive of the firm; and may include "Legal Services" only if the client is advised that the firm is not affiliated with a public, quasi-public or charitable organization.[15]

Subsection (f) states that a law firm that uses a trade name permitted by subsection (a) shall display the name or names of its principally responsible attorneys on all letterheads, signs, advertisements, cards, and wherever else the trade name is used.[16]

The New Jersey Supreme Court's Consideration of the Recent Amendments to the ABA's Model Rules 7.2 and 7.3

In 2014, the New Jersey Supreme Court established the Special Committee on Attorney Ethics and Admissions with the purpose of reviewing the American Bar Association (ABA) amendments to the Model Rules of Professional Conduct.[17] Among the proposed changes, the ABA's amendments include the addition of a comment to Model Rule 7.2 explaining that a communication "contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."[18] Additional language is recommended to clarify that as long as a lead generator does not recommend the lawyer, there is no unreasonable or improper division of fees, and no influence on the professional judgment of the lawyer, a lawyer may pay for lead generation.[19]

The ABA also recommends that the title for Rule 7.3 be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients," and that any reference to "prospective clients" be substituted with "target of solicitation."[20] The ABA recommends that "solicitation" be defined "as a targeted communication initiated by the lawyer directed to a specific person that offers to provide legal services," and that "a communication generated in response to Internet searches is not a solicitation.[21] Lastly, it is recommended that a comment be added that would permit blasted emails to solicit prospective clients, "noting that such communications do not have a potential for abuse, juxtaposed with 'real time' electronic communication."[22]

Committee on Attorney Advertising

The New Jersey Supreme Court has also created the Committee on Attorney Advertising (CAA), consisting "of seven members, five of whom shall be members of the bar and two of whom shall be public members."[23] The CAA "shall have the exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications with [RPC's 7.1, 7.2, 7.3, 7.4, and 7.5] and with any duly approved advertising guidelines promulgated by the [CAA] with the approval of the Supreme Court."[24] The CAA may adopt advertising guidelines,[25] conduct pre-publication review of certain types of proposed advertisements,[26] and provide education to the public regarding the process of selecting counsel and determining whether counsel is needed, and to the bar regarding the ethical limitations of attorney advertising.[27]

The CAA has issued several opinions that are informative in wading through the myriad issues presented by attorney advertising through social media. A brief overview of some of those opinions follows.

Opinion 15 addresses client testimonials and endorsements, and concludes that, subject to certain conditions, lawyers may use such statements in

their advertising.[28] Specifically, Opinion 15 requires that testimonials be first-hand expressions of satisfaction by actual clients of the attorney's services, and must include the following disclaimer: "Results may vary depending on your particular facts and legal circumstances."[29] Opinion 15 further states that "the attorney should include this disclaimer in any general or targeted direct-mail solicitation letter and/or make certain that it is included and prominently displayed in the body of the testimonial letter itself."[30]

The CAA sought to supersede Opinion 15 with Opinion 33, which concluded that attorneys may not advertise using client testimonials.[31] The New Jersey Supreme Court, however, stayed Opinion 33 on Sept. 14, 2005, and there have been no further pronouncements from the Court. Thus, Opinion 15 remains in effect.

In Opinion 36, the CAA held permissible an attorney's payment of a flat fee for listing the attorney's website on a website run by a private commercial advertising and marketing enterprise, and the attorney's receipt of an exclusive listing for a particular county in a specific practice area.[32] Such an arrangement was acceptable provided that "the listing or advertisement contains a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that 'all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.' With such disclosure, the proposed activity is permissible, as long as it otherwise complies with RPC 7.1 and 7.2..."[33]

In Opinion 38, the CAA reiterated the longstanding prohibition against participation in private for-profit referral services, including 1-800-U.S. Lawyers and l800USLawyer.com:

> Private for-profit referral services are barred by RPC 7.3(d). This Rule prohibits attorneys from "compensat[ing] or giv[ing] anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client...." Further, RPC 7.2(c) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services," with limited exceptions for not-for-profit legal referral services or organizations listed in RPC 7.3(e), such as certain legal aid offices. Accordingly, assuming New Jersey lawyers have paid or given something of value to be included in the roster of attorneys of 1-800-U.S.Lawyer and/or 1800US Lawyer.com, attorney participation with services offered by this entity is strictly prohibited.[34]

In the much-publicized Opinion 39, the CAA concluded that "advertisements describing attorneys as 'Super Lawyers,' 'Best Lawyers in America,' or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2)."[35] Less than a month after it was released, the Supreme Court stayed Opinion 39 and appointed a special master, the Hon. Robert Fall, J.A.D. (retired), to conduct hearings and issue a report.[36] Following the lead of Judge Fall's comprehensive June 2008 report, the Court vacated Opinion 39 and concluded that the RPCs required review, and that RPC 7.1(a)(3), at a minimum, must be modified, "because of the constitutional concerns identified in the Report and in light of the emerging trends in attorney advertising."[37] Subsequent to that remand, amendments to RPC 7.1(a)(3) were proposed, and ultimately, on Nov. 2, 2009, the Supreme Court adopted the version reproduced in this article, together with the Court's official comment.

Opinion 42 best summarizes the impact of the Super Lawyers litigation and the Supreme Court's subsequent rulemaking on attorney advertising.[38] In Opinion 42, the CAA reaffirms that "attorneys may communicate that they are included in ranking lists only if the factual basis for the comparison of attorneys' services can be substantiated or verified, and the comparing organization has made appropriate inquiry into the attorney's fitness."[39] Next, "the attorney must include in the communication the name of the comparing organization and a description of the standard or methodology on which the honor or accolade is based."[40] The advertisement must state that it "has not been approved by the Supreme Court."[41]

The attorney is further directed to include "the year the honor or accolade was conferred and the specialty, if any, for which the attorney was listed."[42]

Opinion 42 further provides that if the list contains a superlative in its title, such as "super," "best," "leading," "top," or "elite," the attorney must state and emphasize only his or her inclusion in the list, and must not state that he or she is "super," "best," "leading," "top," or "elite."[43] Similarly, an attorney may not state that the list in which he or she is included reflects "the best" attorneys or a "top percentage" of attorneys, or that he or she belongs to an organization comprising an "elite percentage" of attorneys, because "[s]uch statements cannot be substantiated and are inherently misleading."[44]

Opinion 42 also notes that popularity contests such as those conducted by newspapers to anoint 'top' attorneys do not reflect a process that can substantiate or verify the quality of a winning attorney's services, and as such, "attorneys may not refer to such honors or accolades in any communications about

the attorney's services."[45]

Opinion 40 provides guidance on advertising to out-of-state attorneys eligible to practice before a federal agency in New Jersey, and to law firms employing such attorneys.[46] Opinion 40 provides, in material part:

> An attorney not licensed in New Jersey may not advertise his or her availability to provide legal services to New Jersey residents.... [However], an attorney licensed in another United States jurisdiction is permitted to represent persons in the federal immigration agency in New Jersey. If the out-of-state attorney is associated with New Jersey attorneys in a New Jersey law firm and solely engages in immigration law, then the attorney may practice from that law firm's offices in New Jersey....Any advertising by the out-of-state attorney or the law firm, however, must be accurate and not misleading. Hence, all communications (including the firm's letterhead, business cards, website, and advertising materials) must specifically state that the attorney is not licensed in New Jersey and that the attorney's practice is limited to immigration matters....[47]

Opinion 43 addresses several overlapping topics, namely Internet advertising, misleading content, and impermissible referral services in the context of attorneys seeking to purchase exclusive rights to geographical locations from which client contacts may emerge.[48] Consistent with RPC 7.1, Opinion 43 reiterates that "the content and operation of Internet advertising websites must not be misleading."[49] Internet websites that offer exclusivity for client contacts "must make the methodology for the selection of the attorney's name clear, especially if the website limits participation of attorneys by geographical area or practice area."[50] If participation is limited to a certain number of attorneys, "all requirements for attorneys to participate in the website must be specified."[51]

Websites may state that the participating attorneys meet these requirements, but "must refrain from making statements vouching for the quality of the participating attorneys or comparing participating attorneys to other attorneys. Internet websites must make a full list of participating attorneys readily accessible."[52] Websites must provide this information to consumers in plain language, not convoluted "legalese," and the information cannot be countermanded or undermined by contrary statements or suggestions.[53] The language "attorney advertisement" and "not an attorney referral service" must still be prominently displayed on the website.[54]

Opinion 43 also obliquely discusses whether websites that use a fee scheme that requires participating attorneys to "pay-per-lead," "pay-per-click," or "pay-per-contact" constitute an impermissible referral service. Answering in the negative, Opinion 43 focuses on whether "[t]he payment is based only on the contact, not on the retention of the attorney by the client or the establishment of an attorney-client relationship."[55] The CAA then concludes with a somewhat cryptic message: "Attorneys are responsible for the language and methods of websites on which they advertise. A New Jersey attorney who participates in a website that is misleading violates Rule of Professional Conduct 7.1(a)."[56]

In addition to the opinions, the CAA has also adopted three advertising guidelines. Guideline 1, as amended in 2013, provides that, "In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm." The deletion of the requirement that a *bona fide* address be included with an advertisement is a nod to the fact that the use of a "virtual office" is now permitted. Guideline 2, as amended in 2013, sets forth specific requirements for attorney solicitations governed by RPC 7.3(b)(5):

> The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) must be at least two font sizes larger than the largest size used in the advertising text. (b) The font size of notices required by RPC 7.3(b)(5)(ii and iii) must be no smaller than the font size generally used in the advertisement. (c) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) on the face of the outside of the envelope must be at least one font size larger than the largest font size used on the envelope. If any words on the outside of the envelope are in bold, the word "ADVERTISEMENT" must also be in bold. Pursuant to Committee Opinion 20, if the envelope contains a message relating to subject matter of the correspondence to be found inside, the attorney must ensure that the face of the envelope also includes the notices required by RPC 7.3(b)(5)(ii) and (iii).
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> Guideline 3, adopted in 2012, provides that "An attorney or law firm may not include, on a website or other advertisement, a quotation or excerpt from a court opinion (oral or written) about the attorney's abilities or legal services. An attorney may, however, present the full text of opinion, including those that discuss the attorney's legal abilities, on a website or other advertisement."

Illustrative Ethical Concerns Raised by Attorney Use of Social Media

It is beyond dispute that a New Jersey-licensed attorney may be disciplined in New Jersey for violations of the state's Rules of Professional Conduct.[57] The Internet, however, provides unprecedented ability for attorneys to market across a broad geographic audience.

That ease of access presents a double-edged sword, in that clients outside of New Jersey can have access to the attorney. As a result, a New Jersey-licensed attorney is subject to discipline in New Jersey "regardless of where the lawyer's conduct occurs."[58] Should an ethics infraction occur outside of New Jersey, the choice of law in any subsequent ethics proceeding may be "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction."[59] Accordingly, marketing through social media greatly expands the jurisdictions whose rules may apply to an attorney's marketing efforts, even though he or she only practices in New Jersey and sought to abide by its attorney advertising rules.

In 2011, the Supreme Court did not punish an attorney whose website designer inadvertently used a seal reserved for attorneys authorized by Rule 1:39. However, the Court made clear that, going forward, "Whether a website is created by an outside consultant or developed and maintained by an attorney or his or her staff, all language and design that appears on it should be reviewed frequently for compliance with Rule 1:39 and all Rules of Professional Conduct," and that an offending website would subject the attorney to discipline.[60]

A question has recently arisen regarding whether an attorney's use of GroupOn (group coupon) is permissible under the rules of professional conduct. GroupOn is among a growing trend of deal-of-the-day websites that rely on the user's location to offer discounts on goods and services in the area. GroupOn negotiates the discounts with businesses on a case-by-case basis; however, GroupOn's fee is a percentage of each 'daily deal' or coupon sold. In the past year, ethics authorities in New York,[61] North Carolina,[62] and South Carolina[63] have condoned an attorney's use of GroupOn and like websites, as long as there is a true discount being provided to the consumer, and cautions the subscribing attorney to ensure compliance with RPC 7.1 and RPC 7.2.

The respective authorities in North Carolina and South Carolina have also concluded that GroupOn's collection of fees is not a violation of RPC 5.4(a), which prohibits the sharing of legal fees with non-lawyers.[64]

The New York decision summarized the ethical considerations for an attorney pursuing a GroupOn deal as follows:

> 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 attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.[65]

The use of websites like GroupOn is also addressed in the American Bar Association Formal Opinion 465, "Lawyers' Use of Deal-of-the-Day Marketing Programs."[66] The opinion draws a distinction between a "coupon deal" and a "prepaid deal."[67] In a coupon deal, for example, a lawyer may sell a $25 coupon for a discount of 50 percent on up to five hours of legal services.[68] In a prepaid deal, a lawyer may charge $500 for up to five hours of legal services with a value of up to $1,000. In the first option, the coupon purchaser must "make additional payment to the lawyer commensurate with the number of hours actually used."[69] In the second option, "all of the money would be collected by the marketing organization, with no additional payment collected by the lawyer no matter how many of the five hours of legal services were actually used."[70]

Preliminarily, ABA Formal Opinion 465 advises that "a coupon deal can meet the requirements of the Model Rules," but "[l]ess clear is whether a prepaid deal can be structured to be consistent with the Model Rules."[71] According to the opinion, in a coupon deal no legal fees are paid until an attorney-client relationship is formed.[72] In other words, the lawyer will render legal services and discounted fees will then be paid.[73] However, in a prepaid deal "the money that a lawyer receives from the marketing organization constitutes advance legal fees, because the marketing organization collects all of the money to which the lawyer will be entitled."[74] The opinion advises that "[t]hose advance legal fees need to be identified by purchaser's name and deposited into a trust account."[75] More problematic for the lawyer, the opinion advises that the lawyer must "obtain sufficient information about deal buyers in order" to comply.[76]

ABA Formal Opinion 465 also clarifies "that marketing organizations that retain a percentage of payments are obtaining nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services."[77] However, "[t]he one caveat is that the percentage retained by the marketing organization must be reasonable."[78]

Interestingly, the opinion suggests that where a coupon deal is purchased but then is never used, the lawyer may retain the proceeds.[79] The opinion