ATTORNEY ADVERTISING



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STATISTICS

81% of lawyers use social media

77% of respondents reported that their firms maintain a social media presence

93% of attorney ages 40-49 have a personal presence on social media

90% of attorneys 40 and under have a social media presence

90% of lawyers have LinkedIn profile

40% of lawyers have a Facebook profile, and 26% have a Twitter account

ATTORNEY ADVERTISING

Modern Business Plans include online advertising



Lawyers are Unique in Advertising

Why?

The Professional Rules of Ethics

OVERARCHING RULE/OBLIGATION

Rule 1.1:

Requires competent representation by attorneys to their clients. Competency means keeping abreast of changes in the law and its practice, including benefits and risks associated with relevant technology.

See Comments to Rule 1.1.

Do you know "internet lingo"? Technology terms?

ADVERTISING & SOCIAL MEDIA

Advertising Rules Apply to Social Media (or ANY advertising)

Rules of Prof. Conduct 7.1 - 7.4

- Some states modified to include specifically "electronic communications" as part of acceptable advertisements (e.g. Minnesota Rule of Prof. Conduct 7.2(a)).

- Under **Indiana Rule 7.2** it provides: . . . The term "advertise" as used in these Indiana Rules of Professional Conduct refers to ***any manner of public communication*** partly or entirely *intended or expected to promote the purchase or use of the professional services* of a law, law firm, or any employee of either involving the practice of law or law-related services.

M.R. 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.

M.R. 7.2, INFORMATION RE: LEGAL SERVICES

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise 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;

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

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

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

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

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

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

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

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

RULE 7.2, COMMENTS REQUIREMENTS OF ADVERTISEMENTS



Name and office address of at least one lawyer or law firm responsible for content



Keep a copy or recording of each communication for 6 years after dissemination

RULE 7.2 – COMMENTS

- Name and contact information
- One or more fields of law in which the firm or lawyer practices
- Date and place of birth
- Date and place of admission to the bar of state and federal courts
- Schools attended, dates of graduation, degrees and other scholastic distinctions
- Academic, public or quasi-public, military, or other professional positions held
- Military service
- Legal authorship
- Legal teaching position
- Memberships and offices in legal fraternities/legal societies
- Technical and professional licenses
- Memberships in scientific, technical, and professional associations and societies
- Foreign language ability
- Names and addresses of bank references
- Professional liability insurance coverage
- Prepaid or group legal services programs in which the lawyer participates as allowed under 7.3(d)
- Whether credit cards or other credit arrangements are accepted
- Office and telephone answering service hours
- Fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services

SOLICITATION

Rule 7.3: No solicitation.

(a) Lawyers shall not by in-person, 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 . . .

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RULE 7.3 (CONTINUED)

(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**.

Written Solicitation	Telephone Solicitation	Internet Solicitation
Targeted mailings are allowed, but usually with labeling. Follow the Rules. Rule 7.3	Like face-to-face solicitation, phone solicitation is similarly prohibited	Using an Internet chat room to solicit is generally prohibited, because it is direct and occurs in real-time. Tweets directed at a person can be considered solicitation.
Some jurisdictions prohibit such mailings from being immediately sent to accident victims or family members	Pre-recorded telephone solicitation is regulated as advertising (and generally allowed)	TikTok solicitations and DMs
		E-mail solicitation is generally allowed, much like targeted mailings. Rule 7.3 – requires the advertising disclaimers ("Advertising Material") at beginning and end of email, etc.

IND. RULE 7.4, COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION (INDIANA – DELETED FROM M.R.)

a) A lawyer may communication the fact that the lawyer does or does not practice in a particular fields of law.

b) A lawyer admitted to engage in patent practice before the U.S. Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," Proctor in Admiralty" or a substantially similar designation

d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for CLE pursuant to Admission and Discipline Rule 30; and

(2) The certifying organization is identified in the communication

IND. RULE 7.4, CONTINUED

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Indiana Supreme Court hereby vests exclusive authority for accreditation of Independent Certifying Organizations that certify specialists in legal practice areas and fields in the Indiana Commission for Continuing Legal Education. The Commission shall be the exclusive accrediting body in Indiana, for purposes of Rule 7.4(d)(1), above; and shall promulgate rules and guidelines for accrediting Independent Certifying Organizations that certify specialists in legal practice areas and fields. The rules and guidelines shall include requirements of practice experience, continuing legal education, objective examination; and, peer review and evaluation, with the purpose of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization have demonstrated extraordinary proficiency within those areas of specialization. The Supreme Court shall retain review oversight with respect to the Commission, its requirements, and its rules and guidelines. The Supreme Court retains the power to alter or amend such requirements, rules and guidelines; and, to review the actions of the Commission in respect to this Rule 7.4.

IND. RULE 7.5, FIRM NAMES & LETTERHEADS (INDIANA - DELETED FROM M.R.)

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

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in Indiana if the name or other designation does not violate paragraph (a) and the identification of the lawyers in an office of the firm indicates the jurisdictional limitations on those not licensed to practice in Indiana.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing in the firm. A member of a part-time legislative body such as the General Assembly, a county or city council, or a school board is not subject to this rule.

(d) Lawyers may state or imply that they practice in partnership or other organization only when they in fact do so.

FOOD FOR THOUGHT . . .

Should advertising be "dignified"?

Should all states be required to include a requirement of "dignity" to the Rules of Professional Conduct?

**Indiana Rules used to include a dignity requirement.

**ABA recommends dignified Ads.

TIPS

Use Natural Language

Unique/Authentic to your practice area and personality

Do not end videos with "contact me to learn more"

INSTEAD USE "reach out with any questions"

The former implies more of an unsolicited marketing

The goal is to get the audience to trust you

Incorporate personal tidbits – humanize yourself and the profession

When you create an account on the app, your first video is feature multiple times on the front page, main hub for trending videos – so, make it memorable!

POTENTIAL ADVERTISING FORUMS

Blogs: If the blog is being used (whole or in part) to try and get clients to hire you, it is advertising and subject tot the Rules. It should contain the "Advertising Material" disclaimer and all other required disclosures.

Lawyer Listings: Information contained here cannot be false or misleading. Pay attention to practice areas and memberships listed. No direct guidance but conservation approach is to add the "Advertising Material" disclaimer and all other required disclosures.

YouTube: Acts like television commercials. All advertising rules apply.

Social Media Platforms (TikTok, LinkedIn, Twitter, Facebook, Instagram, Snapchat, etc.): Keep your personal life professional. Your personal page, if advertise, or post about your work could be considered attorney advertising (even Facebook). All endorsements must be truthful and not misleading. It is **YOUR** responsibility to comply and monitor you own accounts even if you are not the one that posted it (but tagged). It should contain the "Advertising Material" disclaimer and all other required disclosures.

Newspapers/Print Media/Billboards/Bus /Television Advertisements

ADVERTISING LANDMINES

- False or Misleading Communications
  - Endorsements/Testimonials/Tags [Rule 7.1, Comment [2](8)]
  - Specialties/Expert/Certifications [Rule 7.4]
  - Big adjectives to describe your practice [Rule 7.1]

- Do not hide behind screen names/anonymous posts [Rule 7.2]

- No solicitation – Yes, this applies online too! [Rule 7.3]

- Trade Names [Rule 7.5, more recently changed in Indiana]

Indiana Advisory Opinion #1-20, issued July 2020

USE CONTROL FEATURES/DISCLAIMERS

- **Disclaimers**: if a personal or professional site MAY contain content viewed as advertising, a disclaimer should be included.

- **Ideas for where to place the disclaimers:**
  - **Facebook**: impressum, or statement of ownership. The disclaimer placed there.
  - **LinkedIn:** includes and "about" section, where the disclaimer can be included.
  - **Twitter**: a promotional post may need to include the disclaimer within the 280 character limit for tweets. The NY State Bar suggested the following: "***This tweet contains attorney advertising. Prior results do not guarantee similar outcome***." See NY State Bar Assoc., *Social Media Ethics Guidelines* (May 11, 2017).

USING CONTROLS ON SOCIAL MEDIA ACCOUNTS

LinkedIn



- Ability to control what you share
- Control what people view
- Block people
- Restrict viewing connections
- Narratives may appear publically or visible only to connections or specific connections
- Parts of profile that are public or only to connections
- Allow others to see if you viewed their profile
- Hide endorsements – **BEST FUNCTION**

USING CONTROLS ON SOCIAL MEDIA ACCOUNTS

Facebook:



- Control who can view your posts and parts of profi
- Allow access to all your posts in "public" setting
- None of your posts in "Only me" setting
- Customize viewing posts to only selected users or selected posts
- Change privacy settings on individual posts
- Choose who can send you a friend request
- Control who can post on your Timeline – **BEST FUNCTION**

USING CONTROLS ON SOCIAL MEDIA ACCOUNTS



Twitter:

- **Unfollow**.
- **Filter Notifications**. If receive unwanted replies or mentions from accounts you do not follow
- **Show less often**. When you make a tweet "show less often" it helps Twitter better understand the types of Tweets you would like to see less of in your timeline.
- **Mute**. Muting another Twitter account means you will not see the account's Tweets on your timeline. Stay connected, but you do not have to see all the Tweets from the person.
- **Block**. Restrict the account's ability to interact with your account. This is best for handling unwanted interactions from accounts you do not want to engage.
- **Report.** If you think another account in violation of the Rules.
- **Protect your Tweets.** Make visible to only certain people.
- **Photo Tagging.** Pick you will allow to tag you or if need approval.
- **Discoverability**. Use restrictions for others to find you, e.g. phone number.
- **Sharing your location in Tweets.** Risk of stalking.
- **Media Settings**. You can flag own Tweets with sensitive media warnings.

USING CONTROLS ON SOCIAL MEDIA ACCOUNTS

Instagram: Has parental control features. E.g. privacy settings, check followers list.

- Fake accounts – ethical?

SnapChat: Has parental control features





EXAMPLE

Scenario #1:

A lawyer posted on her personal page: "Another great victory today in court today! My client is delighted. Who wants to be next?" and, "Won a million dollar verdict. Tell your friends and check out my web site."

EXAMPLE

Example #2: A lawyer got all excited about winning a case against the parents of a disabled child and took to Twitter to gloat about it. The Tweets read, "a great 'win' last week which sent some parents into a storm!" Tweets were from founding partner who served as firm's managing director.

What ethical implications come into play here?



CONFIDENTIALITY

Rule 1.6:

A lawyer may not reveal information relating to a client's representation unless the client gives informed consent. Includes public information, e.g. on the docket information.

What about former clients?

Rule 1.9, exception.

Meaning of "publically known"



EXAMPLE

Scenario #3:

A lawyer just moved to a small town and hung his own shingle. Sole practitioner in a new, small town. Posted on his personal LinkedIn and Facebook pages: ”Big city experience, small town service. I just moved to this wonderful small town. Let me help you with your legal needs. You will be getting big city experience! I am experienced in your local farming legal needs.”

COMPARISONS

Rule 7.1:

Truthful statements that are misleading are prohibited.

Comparisons are prohibited unless they can be factually substantiated.

See Rule 7.1, Comment [2](5).

Any comparison that is unverified is inappropriate. Even words such as "experienced" and phrases such as "quickly becoming recognized as a premier personal injury law firm" have been found to be inappropriate because difficulty of verification.

Spencer v. Honorable Justices of Superior Court, 579 F. Supp. 880 (E.D. Pa. 1984); and

In Re Anonymous, 637 N.E.2d 131 (Ind. 1994).

EXAMPLES

Scenario #4: Lawyer advertised online (professional and personal sites) by using his name and the phrase "and Affiliates". However, the attorney was a sole practitioner who just "shared" office space with other lawyers. Rules 7.1 and 7.5(d), Comment 2.

Scenario #5: A lawyer posted on his personal webpage "Come see me for your legal needs. If there is no recovery, no legal fees are owed by my clients. This is the best deal in town." Rule 7.1, Comment [2](5)

Scenario #6: A lawyer wrote in his personal LinkedIn page: "... my background provides me with a strong basis of knowledge with which to protect your interests as to your medical malpractice claims ..." – The lawyer had only been practicing for 2 years, and never taken a medical malpractice case. Rule 7.1, Comments [2](2), [2](6), and [2](8)

EXAMPLE



Scenario #7: You Tube! – We knew it was coming.

A You Tube ad was run by a lawyer that showed a car accident, a couple in a hospital waiting room, the husband/father kissing his daughter goodbye for the last time, and then the lawyer arguing before a jury in the courtroom.

Sounds okay, right?

The lawyer never took cases to trial as a matter of firm policy and never tried a personal injury case.

Misleading now?

See Rule 7.1, Comments [2](2), [2](6), and [2](7), and [2](8)

EXAMPLE

Scenario #8: In part of promoting itself the firm of Allen, Allen, Allen, & Allen includes on its webpages and other advertisements the statement that out of the four lawyers who practice in personal injury law listed in *The Best Lawyers in America,* three of them are from their firm.

Competitors thought it was unlawful advertising. Commission first held unethical advertising, but then reversed itself.

Check out http://www.allenandallen.com/

Scroll to bottom of first page, left column.

EXAMPLE

Scenario #9: A lawyer stated that the local prosecutor was "in my pocket" and that "he does what I ask he does."

See Rule 7.1, Comment [3]; and *In the Matter of: William M. Laufer, an Attorney at Law*, Case Number 082094 Supreme Court of New Jerse



EXAMPLE (CURVE BALL)

Scenario #10: Website Content. A lawyer incorporated content from another website that the Court found to be deceptive and prejudicial to the administration of justice because it advocated that parents in special education mediations lie and use improper tactics like making false demands. So, when a lawyer incorporates Website content from other sources, on his/her Website, is the lawyer accountable for that content? Even if the content is on the Website via a link?

See *Matter of Philpot*, 820 N.E.2d 141 (Ind. 2005).

EXAMPLE

Scenario #11: Talk about a Rainmaker – This lawyer created his own cloud cover, but is this solicitation?



OTHER CASE EXAMPLES/STORIES

If Time Permits. . . More Ethical Violations. . .





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WHAT ABOUT 3RD PARTY PAID MARKETING?

FINAL WORDS OF WISDOM

Be Professional.

Maintain consistent awareness that your personal social media feed is a window into your professional life.

If you are unkind, overly casual, exaggerate misleadingly, use poor grammar or word choice (including expletives), express points of view that are intolerant, or conflict with the stated positions of your firm, it may not necessarily violate the rules but will reflect poorly upon your comportment as a professional advocate for clients.

QUESTIONS?

