HUNTON
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MAKING YOUR PITCH PERFECT: *THE ETHICS OF ATTORNEY ADVERTISING*[1]

Lawyer advertising rules and practices have undergone, and continue to undergo, many makeovers. Originally, lawyer ethics rules strongly discouraged advertising. When constitutional challenges succeeded in obtaining First Amendment protection for commercial speech, lawyer ethics rules begrudgingly acknowledged - but heavily micromanaged - lawyer advertising. In the face of continuing constitutional challenges to the micromanagement of lawyer advertising, lawyer ethics rules have evolved to simpler concepts designed to withstand constitutional scrutiny, which generally requires free speech restrictions to be narrowly tailored to meet only compelling state interests. Because there are recognized compelling state interests when it comes to lawyer marketing, "free speech" will not always mean unfettered speech.

The current version of the ABA Model Rules of Professional Conduct ("ABA Model Rule(s)") condense the advertising rules to the following concepts:

- Advertising should not be false or misleading (ABA Model Rules 7.1, 7.2(c));
- Any media is OK (ABA Model Rule 7.2(a));
- Do not pay for referrals (ABA Model Rules 7.2(b), 7.5);
- Take responsibility for the advertising (ABA Model Rule 7.2(d)); and
- Lawyers initiating communication to solicit employment with someone known to need legal services amounts to "solicitation" that merits additional boundaries:
    - Live, person-to-person solicitation is overreaching absent a personal or past professional relationship or contact with a sophisticated user of legal services (ABA Model Rule 7.3(a, b));
    - Do not solicit someone who asks not to be solicited (ABA Model Rule 7.3(c)(1)); and
    - Do not engage in solicitation (whether or not live or in-person) if it involves coercion, duress or harassment (ABA Model Rule 7.3(c)(2)).

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Notwithstanding the evolution of the ABA Model Rules to a more streamlined approach to lawyer advertising, state versions of the advertising rules still vary in the level of "safeguards" enacted or "micromanaging" that occurs. Although digital communications, remote work, and virtual practice erode the practical significance of geographic boundaries, provincial advertising rules still apply.

In terms of lawyer marketing, the "advertising rules" are not the only relevant professional rules. Today's lawyers use social and other electronic media such as blogs and podcasts to showcase their qualifications and experience. In this context, lawyers must prioritize their duty of confidentiality (ABA Model Rule 1.6) and take care not to commit the unauthorized practice of law (ABA Model Rule 5.5) or otherwise run afoul of rules governing interactions with others (ABA Model Rules 4.1 through 4.4) or those rules aimed at "maintaining the integrity of the profession" (ABA Model Rules 8.2 and 8.4).

I. EVOLUTION OF ADVERTISING RULES

Around the turn of the 20th century when lawyers in the United States began developing formalized codes of ethics, lawyer advertising was viewed as generally "unprofessional" and "intolerable" except in very limited instances as referenced in the 1908 Canons of Ethics:

> The most worth and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. **But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional**. **It is equally unprofessional to procure business by indirection through touters of any kind**, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers or in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by **furnishing or inspiring newspaper comments** concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and **all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable**.[2]

Client protection was not the stated rationale, and client education was not spared a thought. Rather, the overall impression is that "tone" and tradition" underlie this ethical canon. It was unseemly for lawyers to advertise. The practice of advertising was thought to taint the practice of law with attributes of a "trade" and brand it as a mere commercial endeavor rather than elevate the practice to a venerable and trusted "profession." But the marketplace would force a makeover.

[2] Canon 17, 1908 Canons of Ethics (emphasis added).

The 1908 Canons of Ethics were superseded in 1970 by the ABA Model Code of Professional Responsibility The evolution in the professional codes' approach to advertising began when the U.S. Supreme Court applied First Amendment protection to commercial free speech generally in the 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[3] and to lawyers' truthful and non-deceptive commercial free speech specifically in *Bates v. State Bar of Arizona* in 1977.[4] The evolution in the states' professional codes was pushed along by continuing First Amendment challenges. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (finding that the state's interest in protecting the public against in-person solicitation by lawyers is important and sufficient to justify limitation on First Amendment protection for lawyer's commercial speech); *In re Primus*, 436 U.S. 412 (1978) (finding that solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and political association was expressive and associational conduct entitled to First Amendment protection that the government may regulate only "with narrow specificity," and further finding that application of South Carolina rules to prohibit solicitation by letter violated the First and Fourteenth Amendments as applied); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (striking down attorney discipline based on advertising involving information or advice regarding a specific legal problem and inclusion of illustrations but upholding discipline based on failure to include information about contingency fee representations to avoid false and misleading advertising); *Shapero v. Kentucky Bar Assn*., 486 U.S. 466 (1988) (holding that the First and Fourteenth Amendments prohibited a state from **categorically** prohibiting lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems); *Peel v. Attorney Disciplinary Comm'n of Ill*., 496 U.S. 91 (1990) (finding that a lawyer's truthful and verifiable advertisement of a Certificate in Civil Trial Advocacy from the National Board of Trial Advocacy was not misleading and therefore protected by the First Amendment); *Ibanez v. Florida Dept. of Bus. & Prof. Reg*., 512 U.S. 136 (1994) (finding that a lawyer's truthful and verifiable advertisement as Certified Public Accountant was not misleading and therefore protected by the First Amendment); *Florida Bar v. Went For It, Inc*., 515 U.S. 618 (1995) (upholding bar rule prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster because the state's interest was substantial and the rule narrowly tailored).

As the First Amendment challenges pushed the boundaries of legitimate state interest, client education became the mantra justifying lawyer dissemination of certain forms of legal information under Canon 2, which proclaims: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Client protection became the state interest justifying micromanagement of lawyer advertising first under the Model Code and then the ABA Model Rules. Model Code EC 2-1 encapsulates the "about face" from the 1908 Canons of Ethics' expressed distaste for lawyer advertising:

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[3] 425 U.S. 748 (1976).

[4] 433 U.S. 350 (1977) (citing *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), for the proposition that commercial speech is entitled to some First Amendment protection and finding insufficient justifications – including maintaining professionalism and the allegedly inherently misleading nature of attorney advertising, the adverse effect on the administration of justice, the adverse economic effects of advertising, the difficulties of enforcement – to ban all attorney advertising).

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

As is appropriate to the topic of "advertising," the packaging of an idea matters such that "educating" members of the public as to their "legal problems" can be accepted as a service to the public. As a result of this changed focus, the right purpose of "legal information" – i.e., "advertising" – was education rather than "to obtain publicity for particular lawyers."[5]

Although "advertising" could serve a public interest, the professional codes still reflected the view that the public needed to be protected from lawyer overreaching. This view gave rise to protections against client solicitations and lawyer referrals as well as detailed regulation of the type, manner, content, and even "style" of lawyer advertising. Model Code DR 2-101 and DR 2-102 catalog the restrictions on "Publicity in General" and specify the details for "Professional Notices, Letterheads and Offices." Model Code DR 2-101 adopted the belt and suspenders approach of stating both what lawyers could not do (nothing false, fraudulent, misleading, deceptive, self-laudatory or unfair) under subpart DR 2-101(A) as well as what the lawyers could do under subpart (B). Lawyers who wanted to expand the type of information that could be made available or the manner of its dissemination would have to propose the expansion to the bar and justify whether the proposal was necessary to "facilitate the process of informed selection of lawyers by potential consumers of legal services" and accords with "standards of accuracy, reliability and truthfulness" under DR 2-101(C). DR 2-101 retained references to the avoidance of the self-laudatory, the express rejection of the purpose of "attraction of clients," and the admonition to using "dignified" references to self. Model Code DR 2-103 regulated referrals and prohibited solicitation. Public protection and education may have been the adopted "mantras" to defend against constitutional attacks on the rules, but the longstanding notion that lawyer advertising was unseemly continued to linger even in the post-*Bates* iterations of the Model Code rules on advertising.

The ABA acknowledged that the organized bar has promulgated many regulatory provisions governing the communication of legal services over the past 25 years that subsequently have been found to be unconstitutional, requiring frequent revisions of model rules.[6] Even when states had adopted professional codes based on the Model Code or ABA Model Rules, states commonly either struggled to keep up with the changes or went their own way on the level of detail and requirements in their counterpart rules. This resulted in a patchwork of lawyer advertising rules that became increasingly impractical to navigate in a world in which geographical borders were become less and less relevant to the practice of law generally and even more so to advertising, which increasingly became internet-based.

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[5] Model Code EC 2-2.

[6] "Lawyer Advertising and Solicitation Chapter from Lawyer Advertising at the Crossroads," Chapter II (The Constitutional Dimensions of Lawyer Advertising), ABA Center for Professional Responsibility, https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/crossroads/.

The ABA Model Rule approach ultimately did trend toward simplification, setting a standard against anything "false or misleading" in ABA Model Rule 7.1 and recognizing that lawyers could advertise through any media in ABA Model Rule 7.2(a). Paying for referrals or giving anything of value for recommendations is still generally prohibited with some narrow exceptions under ABA Model Rule 7.2(b). In addition, ABA Model Rule 7.3 still protects clients relative to in person solicitations, but that protection is more narrowly targeted to circumstances more prone to a lawyer's potential overreaching.

The evolution in lawyer advertising restrictions occurred as a result of lawyers' continuous and sustained constitutional challenges to restrictions.[7] Even now, the ABA's organizational view is not one that appears to warmly embrace lawyer advertising. Rather, it appears to accept that this battle is mostly over because of the constitutional limitations on the ability to regulate lawyer advertising:

> The [ABA] has been advised by those appearing before it, regardless of their points of view, that the organized bar can do no greater disservice to itself, its members or the public than to promote or encourage unconstitutional regulations governing lawyer advertising and other aspects of the communications of legal services.[8]

Lawyers should not make the mistake of viewing the simplification or scaling back of advertising and solicitation rules as the complete elimination of any standards. Since the *Bates* decision, the U.S. Supreme Court has upheld the constitutionality of the regulation of in-person solicitation as advancing an important state interest, noting that the "potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person."[9] In addition, the Supreme Court has upheld restrictions narrowly tailored to make a communication not misleading, specifically declining to ban communications about contingency fee representations but upholding a requirement to make disclosures regarding responsibility for costs in contingency fee cases advertised as "no fee" absent recovery.[10] In that same case, however, the Supreme Court did not see "dignity" of the profession or the potential for "some members of the population" to find "advertising embarrassing or offensive" to be a sufficiently strong state interest to justify suppressing it.[11]

II. VARIATION IN ADVERTISING RULES

The ABA Model Rules were adopted on August 2, 1983. By the end of the 1980's, thirty-two states had adopted versions of the ABA Model Rules.[12] Ten more states did so by the

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[7] *Id.*

[8] *Id.*

[9] *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 465 (1978).

[10] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[11] *Id.* at 670.

[12] 1984: Arizona, New Jersey; 1985: Arkansas, Delaware, Minnesota, Missouri, Montana, North Carolina, Washington; 1986: Connecticut, Florida, Idaho, Indiana, Louisiana, Maryland, Nevada, New Hampshire, New Mexico, Wyoming; 1987: Mississippi, North Dakota, Pennsylvania, South Dakota,

end of the 1990's,[13] bringing the total count to forty-two (including the District of Columbia). Eight more states adopted versions of the ABA Model Rules before the close of the first decade of 2000,[14] leaving California as the hold out until it finally adopted a version of the ABA Model Rules effective November 1, 2018.[15]

The "advertising" rules are ABA Model Rules:

- 7.1 Communications Concerning a Lawyer's Services,
- 7.2 Communications Concerning a Lawyer's Services: Specific Rules,
- 7.3 Solicitation of Client, and
- 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges.

Note that the ABA Model Rules delete what were formerly ABA Model Rules 7.4 (Communication of Fields of Practice and Specialization) and 7.5 (Firm Names and Letterheads). Although these are deleted as rules, as to former ABA Model Rule 7.4, the comments indicate that "[i]ssues relating to communication of fields of practice and specialization are covered in Model Rule 7.2, paragraph (c) and Comments [9]-[11]." Issues relating to firm names and letterheads, formerly addressed in ABA Model Rule 7.5, are covered in ABA Model Rule 7.1, Comments [5]-[8].

In Part 7, the ABA Model Rules address "communications about the lawyer or the lawyer's services" generally as well as the sub-category of "solicitation," which is "directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter." Although the former might generally be referred to as "advertising" or the broader concept of "marketing," those are not terms defined or used in the text of the ABA Model Rules (although some states may incorporate definitions of "advertising" and use that term in their respective rules). The ABA Model Rules go well beyond traditional forms of "advertising" and extend to all forms of "communications" whatever the media for the communication.

With respect to legal advertising – or "information about legal services" as this grouping of rules is called – there is a great deal more variability in the language, detail, and structure of state "advertising" rules than in most other sections of the ABA Model Rules. The general tendency is for the states that vary from the ABA Model Rule versions to be somewhat more restrictive and detailed than the ABA Model Rule counterparts. Some states like California, the

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Utah, Wisconsin; 1988: Kansas, Michigan, Oklahoma, Rhode Island, West Virginia; 1989: Kentucky, Texas. *See* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.

[13] 1990: Alabama, District of Columbia, Illinois, South Carolina; 1992: Colorado; 1993: Alaska, Hawaii; 1997: Massachusetts; 1999: Vermont, Virginia. *Id.*

[14] 2000: Georgia; 2002: Tennessee; 2005: Iowa, Nebraska, Oregon; 2006: Ohio; 2008: New York; 2009: Maine; 2018: California. *Id.*

[15] *See* https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules.

District of Columbia, Massachusetts, and Virginia have kept their rules of professional conduct more consistent with the ABA Model Rules' more simplified approach, while states other states like Florida, New York, and Texas have supplemented their rules, sometimes tweaking the context in which the rule applies, sometimes expanding on the general prohibition against false and misleading statements with more detailed and specific applications of the general principle, and sometimes creating additional requirements for lawyers and law firms to follow in those states. Georgia and North Carolina fall somewhere in between the simplicity of the ABA Rules and the added detail of Florida.

A. Rule 7.1: Communications Concerning a Lawyer's Services

Both the ABA Model Rules and the ethical rules of the states in which Hunton Andrews Kurth LLP has offices[16] (hereafter "States") set forth the same foundational rule of legal advertising: a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.[17] Lawyers must make truthful statements, and those truthful statements must not be misleading in any way. Under the ABA Model Rules, a communication is considered "false" or "misleading" if it (1) contains a material misrepresentation of fact or law or (2) omits a fact necessary to make the statement considered as a whole not materially misleading.[18] The States include this definition.[19] Moreover, as noted above, certain States expand upon the definition of a "false" or "misleading" communication with specific examples and related prohibitions. As set forth in Tab 1 as to the States, the following are the types of specific examples that may be incorporated as specifical examples of false or misleading advertising (either absolutely or absent an appropriate disclaimer):

- Material misrepresentation of fact or law;
- Omission of fact necessary to make the statement considered as a whole not materially misleading;
- Guarantees, warranties, or predictions regarding the result;
- Testimonials, endorsements without disclaimer;
- Dramatization without disclaimer;
- Assertion that cannot be substantiated;
- Statements creating unjustified expectations;

[16] California, District of Columbia, Florida, Georgia, Massachusetts, New York, North Carolina, Texas, and Virginia.

[17] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS'N 1983); Mass. R. Prof. C. r. 7.1; Va. R. Prof. C. r. 7.1; Cal. R. Prof. C. r. 7.1(a).

[18] MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS'N 1983).

[19] See, generally Tab 1 for a comparison of Rule 7.1 as adopted in California, the District of Columbia, Florida, Georgia, Massachusetts, New York, North Carolina, Texas, and Virginia.

- Reference to past results unless objectively verifiable (or accompanied by disclaimer);
- Comparisons of lawyers unless objectively verifiable;
- References to areas of practice in which lawyer is not engaged;
- Suggestion that lawyer will act unethically or unlawfully;
- Falsely implying practice in association with others;
- Unduly manipulative, including offering an economic incentive to employ or review advertising other than fee discounts;
- Firm name implying connection with government agency, deceased lawyer not a former member;
- Incomplete description of fee and costs a client might owe; and
- Firm name including lawyer in public office if not actively and regularly practicing with firm.

Several States have chosen to expand upon what information must be included in an advertisement. Under the Model Rules, only the name and contact information of at least one lawyer or law firm responsible for the communication is required.[20] Neither the rule nor its comments explain what contact information must be included to satisfy this requirement; thus, many of the States have written rules that clarify what type of contact information must be included. Georgia, for instance, specifies that an advertisement must include the name, physical location, and telephone number of each lawyer or law firm who paid for and takes responsibility for the advertisement.[21] New York, similarly, requires the name, principal law office address, and telephone number of the lawyer or law firm whose services are being offered.[22] Texas, California, and Florida do not require a telephone number but do require an office address of the lawyer responsible for the advertisement or the lawyer who will perform the services.[23]

Fees are another key area of difference. Unlike the Model Rules, which do not provide any specific guidance for how fees must be presented, several of the States have established specific requirements related to the advertisement of attorney's fees. In the case of fixed fees for specified legal services, Georgia requires lawyers and law firms to provide a written statement clearly describing the scope of each advertised service.[24] New York requires the same disclosure

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[20] MODEL RULES OF PRO. CONDUCT r. 7.2(d) (AM. BAR ASS'N 1983).

[21] Ga. R. Prof. C. r. 7.2(c)(1).

[22] N.Y. R. Prof. C. r. 7.1(h).

[23] Tex. R. Prof. C. r. 7.02(a); Cal. R. Prof. C. r. 7.2(c); Fla. R. Prof. C. r. 4-7.12(a).

[24] *See* Ga. R. Prof. C. r. 7.2(c)(4) (requiring a "written statement clearly describing the scope of each advertised service" be made available at the time of fee publication); *see also* Ga. Formal Advisory Op. 01-1 (May 2001) (finding it materially misleading for a lawyer to only explain that he would bill a client on a time expended basis without also explaining any standard unit billing practice too); *id.* (finding that in order to comply with Georgia Rule 1.5(b), the attorney must communicate the basis for the fee to

but goes one step further in prohibiting lawyers or law firms from charging more than was advertised.[25] In fact, once an advertisement is released into circulation, New York lawyers and law firms are bound by the fee structure in those disseminated advertisements for a period of at least thirty (30) days.[26] Texas also binds lawyers or law firms to their advertised fee structures.[27]

Some of the States also mandate that certain disclosures be included in legal advertisements, despite such disclosures not being required by the Model Rules. These disclosures include, for example, disclosing if the intention is for the client's legal matter to be referred to another lawyer or law firm to perform the services[28] or whether the ad involved the use of a non-attorney spokesperson, actor, or model.[29] Since depictions, such as the use of actors or models to portray a client, lawyer, or law firm, are highly likely to mislead, states like Texas and New York often encourage the use of a disclaimer in order to prevent the advertisement from violating the rule against false or misleading communications.[30]

In an effort to enforce these rules and regulate legal advertising as a whole, some of the States have implemented requirements that mandate lawyers or law firms keep copies of advertisements for a specified period of time, as well as records of when and where the advertisements were used. Georgia, for instance, requires lawyers or law firms keep copies of advertisements and communications for two (2) years after their dissemination,[31] while New

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the client, and in order to comply with Georgia Rule 7.1(a), the communication must include an explanation of any standard unit billing practice).

[25] *See* N.Y. R. Prof. C. r. 7.2(g) (requiring written statement disclosing the scope of each advertised service; N.Y. R. Prof. C. r. 7.2(l) (mandating that a "lawyer or law firm shall not charge more than the fee advertised for such services").

[26] *See* N.Y. R. Prof. C. r. 7.2(m) ("[I]f a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication.").

[27] *See* Tex. R. Prof. C. r. 7.02(d) (requiring a lawyer who advertises a specific fee or range of fees for an identified service to conform to the advertised fee or range of fees "for the period "during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients").

[28] Ga. R. Prof. C. r. 7.2(c)(2); Fla. R. Prof. C. r. 4-7.12(b); Tex. R. Prof. C. r. 7.1 cmt. 4. *See, e.g.*, Ga. Formal Advisory Op. 05-6 (May 2007) (finding it improper for an attorney to advertise legal business that they intend to refer without disclosing in the communication that it is the intent to refer the business to another lawyer or law firm).

[29] Ga. R. Prof. C. r. 7.2(c)(3); N.Y. R. Prof. C. r. 7.1(c)(2)-(3); Tex. R. Prof. C. r. 7. 1 cmt. 3. *See, e.g.*, N.Y. Eth. Op. 661 (permitting attorneys to use dramatized testimonials provided the presentation is not fictional but accurately reflects an actual experience); N.Y. Eth. Op. 792 (allowing the use of celebrity endorsements or testimonials so long as they are not false, deceptive, or misleading but with the caveat that the celebrity may not be compensated or given anything of value for making the endorsement or testimonial, including compensation for the celebrity's time and services in making the television ad).

[30] *See* N.Y. R. Prof. C. r. 7.1 cmt. 4 (discussing why disclosures are helpful for advertisements involving actors); Tex. R. Prof. C. r. 7. 1 cmt. 3 (emphasizing the importance of disclaimers in ensuring advertisements are not misleading).

[31] Ga. R. Prof. C. r. 7.2(b).

York requires the copies be retained for no less than three (3) years after initial dissemination.[32] Florida mandates that "any lawyer who advertises services must file with The Florida Bar a copy of each advertisement at least 20 days prior to the lawyer's first dissemination of the advertisement."[33] Florida, therefore, requires approval of advertisements before they may be disseminated, even offering lawyers the opportunity to seek out a preliminary opinion regarding the ethics of a proposed advertisement before it is reviewed for compliance.[34]

Florida's rules on legal advertising are arguably the most extensive, spelling out exactly what constitutes a "misleading," "deceptive," and "potentially misleading" advertisement.[35] Florida not only mandates that advertisements must not be false or misleading but also forbids lawyers or law firms from engaging in unduly manipulative or intrusive advertisements, which it carefully defines.[36] For instance, lawyers and law firms in Florida may not use an authority figure, such as a police officer, to endorse or act like a spokesperson in an advertisement nor can they use any image, sound, video, or dramatization that appeals to a prospective client's emotions rather than to a rational evaluation of the lawyer's suitability to represent the client.[37]

While firm names are not generally thought of as advertisements or solicitations in their own right, they are considered "communications" under the Model Rules and the States' rules of professional conduct; thus, they are held to the false or misleading standard.[38] As mentioned above, the issue of firm names and partnerships was formerly addressed separately in ABA Model Rule 7.5, but the 2018 revisions relocated the ABA's guidance on this topic to ABA Model Rule 7.1, comments [5]-[8]. One of the key limitations imposed by the ABA Model Rules on firm names is that a firm may not use in the firm name or any communication on the firm's behalf the name of a lawyer holding public office during any substantial period in which the lawyer is not actively and regularly practicing with the firm.[39] Virginia and California are unique in that they do not appear to incorporate this rule into each state's ethical rules. California

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[32] N.Y. R. Prof. C. r. 7.1(k).

[33] Fla. R. Prof. C. r. 4-7.19(a); *see* Fla. R. Prof. C. r. 4-7.19 (outlining the submission requirements for evaluation of advertisements).

[34] *See* Fla. R. Prof. C. r. 4-7.19(a)-(b) (requiring advertisements be reviewed by The Florida Bar before dissemination); Fla. R. Prof. C. r. 4-7.19(c) (permitting a lawyer to seek an advisory opinion concerning the compliance of a contemplated advertisement prior to its production).

[35] *See* Fla. R. Prof. C. r. 4-7.13 (discussing what constitutes deceptive or inherently misleading advertising); Fla. R. Prof. C. r. 4-7.14 (discussing what constitutes a potentially misleading advertising).

[36] *See* Fla. R. Prof. C. r. 4-7.15 (defining and discussing what constitutes unduly manipulative or intrusive advertising).

[37] *Id.*

[38] *See* MODEL RULES OF PRO. CONDUCT r. 7.1 cmt. 5 (AM. BAR ASS'N 1983) (explaining how firm names are communications subject to the false or misleading standard set forth in Model Rule 7.1); Ga. Formal Advisory Op. 16-3 (June 2016) (refusing to allow a sole practitioner to use the terms "group" or "& Associates" in a firm name because both terms would incorrectly imply the practitioner works with other lawyers).

[39] *See id.* at cmt. 8 ("It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").

at one time did prohibit the use of names of attorneys holding public office, but the state has since changed their rules to eliminate that as an express prohibition.[40] Likewise, the Virginia Rules of Professional Conduct contain no such limitation explicitly; however, one legal ethics opinion suggests Virginia may nevertheless restrict the use of such attorneys' names.[41] Thus, it cannot be assumed that elimination of the express language opens the door to what was formerly prohibited. The test remains whether use of such attorneys' names would be false or misleading.

The Model Rules also permit firms with multiple offices in multiple jurisdictions to use the same firm name in each jurisdiction.[42] Georgia and Florida have expanded upon this rule and require that firms indicate the jurisdictional limits on those not licensed to practice in the jurisdiction where an office is located.[43] For instance, an international law firm with an office in Atlanta would have to indicate on its website if one of its associate attorneys in its Atlanta office is not licensed to practice in Georgia. Although this jurisdictional disclosure may not be expressly required by the advertising rules in the other States, lawyers must still consider both the general "false and misleading" standard as well as rules governing the unauthorized practice of law (which include "holding out" as authorized to practice under ABA Model Rule 5.5) in determining how to present their credentials and practice limitations.

Additionally, while the Model Rules are quite broad in what constitutes a permissible or impermissible firm name,[44] several of the States have taken a more explicit approach in outlining specific terms or phrases that a firm may or may not use in its firm name. New York, in particular, has heavily defined the contours of what is permissible versus impermissible in a firm name.[45] For instance, the New York rules have forbid a law firm from using the phrases "legal aid," "legal service office," "legal assistance office," and "defender office" unless the law firm is in fact a bona fide legal assistance organization.[46] Florida, on the other hand, permits lawyers in private practice to use the terms "legal clinic" or "legal services" in conjunction with the lawyer's own name so long as the lawyer's practice is devoted to providing routine legal services

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[40] For a redline comparison highlighting the current versus previous versions of California's Rule 7.5 "Firm Names and Trade Names," please visit: https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_7.5-Exec_Summary-Redline.pdf.

[41] *See* Va. Legal Ethics Op. 277 (prohibiting a law firm from retaining in its name the name of an attorney who "ceases to practice law, no longer shares space in the law office, but is otherwise engaged full-time in the operation of a business venture").

[42] *See* MODEL RULES OF PRO. CONDUCT r. 7.1 cmt. 6 (AM. BAR ASS'N 1983) ("A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.")

[43] Ga. R. Prof. C. r. 7.5(b); Fla. R. Prof. C. r. 4-7.21(d).

[44] *See* MODEL RULES OF PRO. CONDUCT r. 7.1, cmt. 5 (AM. BAR ASS'N 1983) (outlining the ABA's unrestrictive approach to permissible firm names).

[45] *See* N.Y. R. Prof. C. r. 7.5(b) (specifying what terms and phrases can and cannot be used in a firm name).

[46] *Id.* at r. 7.5(b)(2)(i); *see also* N.Y. State 1107 (forbidding a law firm that was not a qualified legal assistance organization from using the name "Jane Doe Legal Services, PLLC").

for fees lower than the prevailing rate in the community.[47] New York also has a special requirement that states that the terms "PC," "LLC," and "LLP" to be included in the name of a firm if such is the firm's designation that way others are alerted about possible limitations on liability.[48] New York has even gone so far as to explain which parts of a person's name may be used in a firm name and in what manner.[49]

All the States are consistent with the ABA Model Rule against stating or implying a partnership of attorneys when there really is no partnership since such would violate the rule against false or misleading communications.[50]

B. Rule 7.2: Communications Concerning a Lawyer's Services - Specific Rules

ABA Model Rule 7.2 contains more specific rules that apply to "communications concerning a lawyer's services." There are four key elements to ABA Model Rule 7.2:

- Lawyers can use any media to communication information about the lawyer's services (ABA Model Rule 7.2(a));
- A lawyer cannot pay for referrals (with some limited exceptions) (ABA Model Rule 7.2(b));
- A lawyer cannot state or imply certification as a specialist (with some limited exceptions) (ABA Model Rule 7.2(c)); and
- Lawyer advertising must include contact information for a lawyer responsible for its content (ABA Model Rule 7.2(d)).

The first three are discussed further below while the fourth was generally addressed above.

1. Any Media

ABA Model Rule 7.2(a)'s express allowance for lawyers to "communicate information regarding the lawyer's services through any media" is an outgrowth of the historic context in which lawyers were first banned from advertising altogether and then limited to print media. Various First Amendment challenges to restrictions on media opened the door for lawyers to advertise by radio and television. The options for communicating information about legal services along with geographic boundaries exploded through the internet and various forms of social media. Some States track the language of ABA Model Rule 7.2(a) exactly or substantially while others omit the rule. In either case (or somewhere in between), none of the States attempt prohibit "communications" (or "advertising") based on the media.[51] As discussed further below with respect to "solicitation," the media or method of contact and what a lawyer knows about the

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[47] Fla. R. Prof. C. r. 4-7.21(b).

[48] N.Y. R. Prof. C. r. 7.5(b)(2)(v).

[49] *Compare* N.Y. State 1152 (prohibiting a lawyer from using solely the lawyer's first name as the name of a law firm), *with* N.Y. State 1003 (allowing a lawyer to use law firm name that only includes the lawyer's middle initials and last name). *See* N.Y. State 1138 (forbidding a firm name including an English translation of the lawyer's actual surname).

[50] *See* MODEL RULES OF PRO. CONDUCT r. 7.1, cmt. 6 (AM. BAR ASS'N 1983); Ga. R. Prof. C. r. 7.5(d); Va. R. Prof. C. r. 7.1 cmt. 6; Tex. R. Prof. C. r. 7.01(f).

[51] See Tab 1.

legal needs of the intended audience can impact the nature of the restrictions or safeguards on the interaction.

2. Paid Referrals

The law is a referral business and lawyers continue to search for ways to both encourage and reward them. Subject to certain exceptions, ABA Model Rule 7.2(b) prohibits paid referrals: "A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services." The exceptions include:

- Paying the reasonable costs of advertisements or permitted communications,
- Paying the usual charges for a legal service plan or non-for-profit or qualified lawyer referral service,
- Paying for a law practice under ABA Model Rule 1.17,
- Non-exclusive reciprocal referral arrangements with disclosure to client, and
- Nominal gifts.

This rule is frequently considered alongside ABA Model Rule 5.4(a), which generally prohibits fee-sharing with non-lawyers (with some exceptions), Rule 5.4(c), which admonishes lawyers not to allow someone who recommends the lawyer to direct or regulate the lawyer's professional judgment, and Rule 1.5(e), which addresses a division of fees between lawyers in different firms.

As with other aspects of the advertising rules, there is a fair amount of variance in language addressing giving compensation or value to others for recommending a lawyer's services as addressed in ABA Model Rule 7.2(b). While California and Massachusetts are the same as the ABA Model Rule, variations (as set forth in Tab 1) include:

- Omitting reference to an exception for nominal gifts (DC, FL, GA, NY),
- Omitting reference to an exception for non-exclusive reciprocal referral arrangements (FL, GA, NY, NC, VA),
- Adding prohibition against paying for advertising for another lawyer (FL),
- Adding prohibition against having non-lawyer pay for advertising by a lawyer (FL),
- Adding requirement to disclose when a lawyer gives value for a public communication (GA), and
- Adding prohibition against paying or giving value for inclusion in a news item (NY).

ABA Model Rules 5.4 and 1.5 also backstop Rule 7.2's prohibition on giving value for referrals by prohibiting fee sharing with non-lawyers (Rule 5.4) and constraining the circumstances for a division of fees between lawyers in different firms (Rule 1.5).

The States include ABA Model Rule 5.4's prohibition against sharing legal fees with non-lawyers in their respective versions of the rule (except that New York, Texas, and Virginia do not include an exception for sharing court-awarded legal fees with nonprofit organization and North Carolina and Virginia include exceptions to allow for payment of credit card fees). The biggest departure from ABA Model Rule 5.4 comes in the District of Columbia, which allows lawyers to form a partnership with non-lawyers for the practice of law and thus share legal fees

provided that the arrangement complies with DC Rule 5.4(b). Otherwise, DC Rule 5.4 tracks the ABA Model Rule 5.4's other exceptions to a bar on sharing legal fees with non-lawyers.

ABA Model Rule 1.5(e) backstops Rule 7.2's prohibition on giving value for referrals by prohibiting a division of a fee between lawyers who are not in the same firm unless (i) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibilities for the representation, (ii) the client agrees (in writing), and (iii) the total fee is reasonable. See Tab 1. The States also generally address the division of fees between lawyers in a different firm in accordance with ABA Model Rule 1.5(e), except that there is some variance in whether the States' rules require the lawyers' division of fees to be proportional to the services performed or, alternatively, for the lawyers to each assume joint responsibility for the representation.

California, Massachusetts, and Virginia omit the requirement that the division of fees be proportional, or in the alternative, that the lawyers assume joint responsibility for the representation. For lawyers looking to find a path to compensating another lawyer for referrals, that path might exist under the lawyer division of fees provisions in Rule 1.5 of those jurisdictions – like California, Massachusetts, and Virginia – that eliminate at least the "proportionality" requirement. It may not be necessary for the jurisdiction to eliminate the "joint responsibility" aspect to allow for what amounts to a referral fee. However, it likely is far less desirable to take a referral fee if doing so requires taking full responsibility for the representation. In any event, this "division of fee" (or effectively a referral fee) would still be subject to disclosure and consent requirements so that the client is fully aware of the arrangement an can factor the arrangement into the decision to accept the recommendation or referral or not.

3. Specialists/Experts

Lawyers and law firms are permitted under the Model Rules and the rules of all the States to indicate areas of practice of a lawyer or law firm, provided the advertising lawyer or law firm does in fact practice in the advertised area of law.[52] For example, a law firm that practices predominantly in the area of personal injury law may communicate such so long as that fact remains true of the firm. Conversely, lawyers or law firms are also permitted to indicate those areas of the law which they do not practice.

While the ethical rule governing the communication of practice areas is consistent state-to-state, the ethical rule governing if and when a lawyer may state that he or she is certified as a specialist varies greatly. ABA Model Rule 7.2(c) prohibits a lawyer from stating or implying that the "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." Georgia and Virginia follow the Model Rules on this point,[53] but many of

[52] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 7.2 cmt. 9-10 (AM. BAR ASS'N 1983) (permitting lawyers to communicate practice areas); Ga. R. Prof. C. r. 7.4; Mass. R. Prof. C. r. 7.2 cmt. 9-10; Va. R. Prof. C. r. 7.1 cmt. 4.

[53] Ga. R. Prof. C. r. 7.4; Va. R. Prof. C. r. 7.1 cmt. 4. *See, e.g.*, Va. Legal Ethics Op. 979 (permitting the statement "professional experience and expertise in the defense of juveniles" in an attorney's

the States have a different rule for communicating certification albeit similar to the Model Rules version.

Many of the States with a different rule on specialization are different because they limit the scope of permissible certifying organizations to those approved by the state or an authority within the state, such as the state bar. Texas, for instance, prohibits a lawyer from including a statement that he or she has been certified by an organization unless the organization is one that has been accredited by the Texas Board of Legal Specialization or the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised.[54] California has a similar rule, only allowing a lawyer to state that he or she is certified as a specialist if the lawyer has been certified by the California Board of Legal Specialization or any other entity accredited by the California State Bar to designate specialists.[55] Massachusetts, uniquely, has a somewhat broader rule than the Model Rules or the other States. Under Massachusetts's ethical rules, a lawyer is allowed to state that he or she is "certified as a specialist" so long as the communication states that the certifying organization is "a private organization whose standards for certification are not regulated by a state authority or the American Bar Association."[56]

New York, on the other hand, places stringent requirements on when and how a lawyer may communicate a specialty. A lawyer licensed in New York may state that he or she is a specialist only if they have been certified as a specialist (1) by a private organization approved for that purpose by the ABA and prominently display a disclaimer that says, "This certification is not granted by any governmental entity," or (2) by an authority having jurisdiction over specialization under the laws of another state or territory and prominently display a disclaimer that says, "This certification is not granted by any governmental authority within the State of New York."[57] New York even goes one step further in defining when a statement is considered prominently displayed, clearly indicating the state's concern with ensuring certification statements are displayed to the public properly.[58]

Florida's approach to making claims of specialization is unique among the States. In Florida, a lawyer who wishes to make a claim of specialization is not required to be certified in the claimed field of specialization or expertise or to have met specific criterion for certification so long as the lawyer can demonstrate that he or she has the education, training, experience, or substantial involvement in the practice area commensurate with specialization or expertise.[59] It is certainly not misleading to state a lawyer is certified if they have in fact been certified under the Florida Certification Plan or an organization accredited by the ABA, The Florida Bar, or another state bar. But, under Florida's rule, a Florida lawyer is not limited to these certifications

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advertisement since it does not go so far as to hold the lawyer out as being a "recognized" or "certified" specialist).

[54] Tex. R. Prof. C. r. 7.02(b).

[55] Cal. R. Prof. C. r. 7.4(a).

[56] Mass. R. Prof. C. r. 7.2(c).

[57] N.Y. R. Prof. C. r. 7.4(c).

[58] *See* N.Y. R. Prof. C. r. 7.4(c)(3) (explaining when a statement is considered "prominently made").

[59] Fla. R. Prof. C. r. 4-7.14(a)(4)-(5).

to advertise a field of specialization if backed up by the lawyer's education, training, experience, or substantial involvement in the practice area to support that claim of specialization.

C. Rule 7.3: Solicitation of Clients

"Solicitation" is a subcategory of "lawyer communications" under the Model Rules as well as the rules of the States. While "advertising" or general "communications" occur when lawyers offer or promote their qualifications or legal services to the public in general, "solicitation" is aimed at persons "known to need legal services in a particular matter." ABA Model Rule 7.3(a). While "solicitation" is generally subject to more stringent regulation, it is completely banned under Model Rule 7.3(b) for "live person-to-person" solicitations. The category of "solicitation" and the further sub-category of "live person-to-person" solicitation is exists to narrowly tailor the restrictions to withstand First Amendment scrutiny. There appears to be consensus that a state has a heighted interest in the potential for lawyer overreaching and undue influence when the lawyer engages in "solicitation," and more particularly in "live person-to-person solicitation" as opposed to mere "advertising."

Under ABA Model Rule 7.3(b), lawyers are strictly prohibited from soliciting professional employment via live person-to-person contact when a significant motive for the lawyer's doing so is for the lawyer's or law firm's pecuniary gain.[60] Although there are a few exceptions to that rule, such as when the target of the solicitation is a close family friend or another lawyer,[61] lawyers are absolutely barred under ABA Model Rule 7.3(b) from solicitation when the target has made known to the lawyer or law firm that they do not desire to be solicited or the solicitation involves coercion, harassment, or duress. Unlike live person-to-person contact, many of the States permit written solicitations, such as letters or mailed recordings, [62] although States may require some additional safeguards, such as labeling.[63]

Several of the States have added a third or fourth category to the list of absolutely prohibited circumstances under which a lawyer may solicit professional employment. Massachusetts, for example, added that a lawyer cannot solicit when he or she knows or reasonably should know that the physical, mental, or emotional state of the target is such that the target cannot exercise reasonable judgment in employing a lawyer.[64] Similarly, Georgia added the same prohibition but also further added a prohibition against solicitation when it concerns an

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[60] MODEL RULES OF PRO. CONDUCT r. 7.3(b) (AM. BAR ASS'N 1983).

[61] *See id.* at r. 7.3(b)(1)-(3) (outlining when a lawyer may solicit professional employment by live person-to-person contact). *But see* Cal. R. Prof. C. r. 7.3(a) (not including "persons who routinely use for business purposes the type of legal services offered by the lawyer" as an appropriate person to solicit by live person-to-person contact).

[62] Tex. Comm. On Professional Ethics, Op. 414 (allowing an attorney to send non-clients personalized direct-mail letters soliciting legal business, provided (1) the attorney takes all necessary steps to prevent the solicitation from going to someone that could not exercise reasonable judgment in employing a lawyer or who made known a desire not to receive such mailings, (2) the letter does not involve coercion, duress or harassment, and (3) the limitations also applicable to advertising are complied with); N.Y. Eth. Op. 1049 (declining to find a lawyer's response to a potential client's message on a website a "solicitation" as that word is defined under the New York Rules on Professional Conduct).

[63] VA R. Prof. C. r. 7.3(c) (requiring labeling of written solicitations).

[64] Mass. R. Prof. C. r. 7.3(c)(3).

action for personal injury or wrongful death that occurred within the last thirty (30) days.[65] New York and Florida have an identical prohibition for personal injury or wrongful death solicitations,[66] with Florida including several other groups of persons in the category of prohibited solicitations.[67]

Virginia's rule on solicitation is nearly identical to the Model Rules, but it further requires the words "ADVERTISING MATERIAL" be included on the outside envelope of a written solicitation or at the beginning and end of any recorded or electronic solicitation, unless of course the solicitation is to one of the permitted persons to whom solicitation is allowed.[68] California contains a nearly identical rule to that of Virginia, except that the word "Advertisement" is required to be displayed.[69]

New York's rule on solicitation, similar to its rule on advertising, requires lawyers and law firms submit a copy of a solicitation with the attorney disciplinary committee of the judicial district or judicial department where the lawyer or law firm maintains its principal office.[70] The lawyer or law firm must also keep a list of the names and addresses of all recipients to whom the solicitation was sent for no less than three (3) years after the solicitation was first dispersed.[71] New York also adds some very particular rules regarding solicitations. First, solicitations cannot be sent anywhere the recipient does not usually receive mail or anywhere the recipient would have to sign for the solicitation.[72] Second, solicitations made in writing or by computer-assessed communication to a pre-determined recipient must disclose how the lawyer obtained the identity of the recipient and learned of their legal need.[73]

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[65] *See* Ga. R. Prof. C. r. 7.3(a)(4) (prohibiting solicitation when the lawyer knows or reasonably should know the person solicited could not exercise reasonable judgment in employing a lawyer); Ga. R. Prof. C. r. 7.3(a)(3) (prohibiting solicitation when the solicitation involves an action for personal injury or wrongful death that occurred less than 30 days ago).

[66] N.Y. R. Prof. C. r. 7.3(e); Fla. R. Prof. C. r. 4-7.18(b)(1)(A).

[67] *See* Fla. R. Prof. C. r. 4-7.18(b)(1) (outlining categories of persons a lawyer cannot solicit via written communication).

[68] Va. R. Prof. C. r. 7.3(c); *see, e.g.*, Va. Legal Ethics Op. 508 (finding it permissible for an attorney to communicate directly with an accident victim by letter for the purpose of soliciting employment, provided the letter does not contain a false or misleading statement).

[69] Cal. R. Prof. C. r. 7.3(c).

[70] N.Y. R. Prof. C. r. 7.3(c)(1).

[71] *Id.* at r. 7.3(c)(3).

[72] *Id.* at r. 7.3(d).

[73] *Id.* at r. 7.3(f).

D. Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Although ABA Model Rule is grouped under the Rule 7 "Information About Legal Services" umbrella, this rule might be more aptly described as a variation on the admonition of Rule 7.2 not to pay for referrals. Specifically, Rule 7.6 tells a lawyer not to make political contributions for the purpose of obtaining engagements or appointments: "A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment."

Notice that ABA Model Rule 7.6 does not prohibit "political contributions," which are described in comment [2] as "any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office." The Rule is instead aimed at the motivation for the political contributions. The ABA adopted this rule in 2000, taking aim at the practice known as "pay-to-play" in which "lawyers and law firms are considered for or awarded government legal engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to 'steer' such business their way."[74] The analogous rule in the ABA Model Code of Judicial Conduct (2010) is Rule 2.13(B) (Administrative Appointments), which is limited to addressing contributions to the judge's own campaign in excess of designated amounts.

In requiring proof of an illegal purpose, ABA Model Rule 7.6 may be practically unenforceable.[75] Very few jurisdictions have adopted a version of ABA Model Rule 7.6. None of the States have adopted the language of the rule, although New York's Rule 7.2 includes comments [5] and [6], which make it clear that "pay to play" is unethical. The NY Rule 7.2 comments [5] and [6] directly state that the contribution itself is unethical if made for an improper purpose, rather than aiming at the acceptance of the appointment as does the ABA Model Rule 7.6.

Even if the ABA Model Rule 7.6 was adopted in a relevant jurisdiction, its application is less relevant to advertising and marketing in the usual sense and more focused on scrutinizing the purpose of political contributions and the practice of seeking and accepting appointments. In this way, it is more akin to the prohibition in ABA Model Rule 7.2(b) against "paying" or "giving value" for referrals.

III. OTHER RULES IMPORTANT IN ADVERTISING & MARKETING

While the "advertising rules" may be the most specific in terms of the "do's" and "don'ts" of lawyer advertising and marketing, there are other professional rules to consider. In

[74] American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982– 2013, at 827 (2013).

[75] *See* John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action "Cops": Public Servants or Private Entrepreneurs?, 57 Stan. L. Rev. 1441 (Apr. 2005) (" Rule 7.6 requires proof of illegal purpose and is therefore virtually unenforceable in all but the most extreme cases— cases that could also be prosecuted under existing state bribery laws."); John C. Coffee, Jr., "When Smoke Gets in Your Eyes":

the context of advertising and marketing that occurs through social and other electronic media such as blogs and podcasts, lawyers must prioritize their duty of confidentiality (ABA Model Rule 1.6), take care not to commit the unauthorized practice of law (ABA Model Rule 5.5) by "holding out" in jurisdictions outside their licensure, and avoid interactions with others that run afoul of ABA Model Rules 4.1 through 4.4 or otherwise exceed the boundaries of the lawyers' admonition to maintain the "integrity of the profession" in ABA Model Rules 8.2 and 8.4.

A. Confidentiality

Confidentiality is a very broad concept. Under Model Rule 1.6, a lawyer shall not reveal "information relating to the representation of a client unless the client gives informed consent, the disclosure if impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Many states have adopted a version of Rule 1.6 that is slightly narrower, but nevertheless still quite broad. See Tab 1 of the materials for overview and comparison of the ABA confidentiality rule, ABA Model Rule 1.6, with the versions of the same rule from the identified States. Rather than all information relating to the representation of a client, some states focus on the following:

- Privileged information,
- Client request to hold information "inviolate," and
- Information that would be "detrimental" or "embarrassing" to a client.

While there may be ample guidance on what information may be "privileged," there will be little guidance available to make clear what amounts to a client request to hold information inviolate or how to judge in advance (and without specifically asking) what a client might view as "detrimental" or "embarrassing." A client request may very well take the form of an engagement letter or outside counsel guidelines, which will invariably admonish lawyers to keep all client information confidential. Clients will now often include Confidentiality or Non-Disclosure Agreements ("NDA's") along with the engagement terms. To the extent that such NDA's are used for more than just the clients' lawyers, the NDA might add another source to consider when considering the definition of confidential information.

Perhaps most pertinent to lawyers' efforts to advertise or market their experience, credentials, and services, it is not always safe to assume that "publicly available" information is excluded from a lawyer's duty of confidentiality. The RESTATEMENT OF THE LAW GOVERNING LAWYERS §59 excludes "information that is generally known" from its definition of confidential information. However, the ABA version of the rule does not do so expressly, and there are many cases making clear that the duty can apply to publicly available information. *See, generally* the Rule 1.6 annotation in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Tenth Edition (American Bar Association), citing *In re Anonymous*, 932 N.E. 2d 671 (Ind. 2010) (neither client's prior disclosure of information relating to her divorce representation to friends nor availability of information in police reports and other public records absolved lawyer of violation of Rule 1.6); *Iowa Supreme Court Att'y Disciplinary Bd. v. Marzen,* 779 N.W. 2d 757 (Iowa 2010) (all

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Myth and Reality About the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241 (Winter 2001) ("[l] egal minds will have little difficulty finding [Rule 7.6] inapplicable to the facts of their case").

lawyer-client communications, even those including publicly available information, are confidential); *In re Bryan*, 61 P. 3d 641 (Kan. 2003) (disclosing, in court documents, existence of defamation suit against former client); *State ex rel. Okla. Bar Ass'n v. Chappell*, 93 P. 3d 25 (Okla. 2004) (lawyer in fee dispute with former employer violated Rule 1.6 by filing motion referring to criminal charges that were filed and later dismissed against former client); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E. 2d 850 (W. Va. 1995) ("[t] he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); *In re Harman*, 628 N.W. 2d 351 (Wis. 2001) (lawyer violated Rule 1.6(a) by disclosing to prosecutor former client's medical records he obtained during prior representation; irrelevant whether those records "lost their 'confidentiality'" by being made part of former client's medical malpractice action); ABA Formal Ethics Op. 480 (2018) (rule protects from disclosure information relating to a representation, "including information contained in a public record"); Ariz. Ethics Op. 2000-11 (2000) (lawyer must "maintain the confidentiality of information relating to representation even if the information is a matter of public record"); Colo. Ethics Op. 130 (rev. 2018) (Rule 1.6 contains no public records exception to prohibition against disclosing information related to the representation of a client); Nev. Ethics Op. 41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers); Pa. Ethics Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent's misconduct to disciplinary board even though it is recited in court's opinion); cf. Cal. Ethics Op. 2016-195 (n.d.) (must protect confidential client information even if publicly available); David Hricik, The Same Thing Twice: Copying Text from One Client's Patent into Another's Application, 5 No. 5 Landslide 22 (May/ June 2013) (discussing whether copying text from one client's patent application into another's may breach duty of confidentiality).

A state's rule may define "confidentiality" in a way that expressly excludes information generally known or publicly available, such as New York Rule 1.6 (definition confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) **information that is generally known in the local community or in the trade, field or profession to which the information relates**') (emphasis added). There are also states that do not expressly exclude information "generally known" but leave the door open to such as argument. For example, the District of Columbia, Georgia, New York, and Virginia versions of Rule 1.6 defines confidential information as that which is privileged and that which the client "requested be held inviolate or the disclosure of which would be embarrassing" or "detrimental." This leaves the door open to an argument that information already generally known, if neither embarrassing nor detrimental, falls outside the definition as long as the client had not asked the lawyer to keep it secret.

There are cases using the "publicly available" rationale to support a finding that information was not confidential, and perhaps, even if confidential that the duty of confidentiality is overridden by First Amendment rights. *See, Hunter v. Va. State Bar*, 744 S.E. 2d 611 (Va. 2013) (state bar's interpretation of Rule 1.6 as prohibiting posting publicly available client information about completed cases on lawyer's blog **violated First Amendment**). In the *Hunter* case, Horace Hunter blogged about a client's criminal case in which the client prevailed. The Virginia State Bar maintained that Mr. Hunter's blog violated Rule 1.6(a). It was not

disputed that Mr. Hunter did not seek advance consultation and consent from his clients prior to discussing their cases on his blog. It is also not disputed that all of the content contained in the blogs regarding those cases was content revealed in open court on the public record. The Virginia State Bar's position was not that Mr. Hunter revealed information protected by the attorney-client privilege, or information that any client requested be kept inviolate, but instead that the material, which included such information as the charges the client faced and the evidence produced at trial for and against the client, fell within Virginia Rule 1.6's prohibition on disclosures "which would be embarrassing or would likely to be detrimental to the client."

The Virginia District Disciplinary Committee agreed with the Virginia State Bar and found Mr. Hunter in violation of Virginia Rule 1.6(a). In the Circuit Court, Mr. Hunter argued that the First Amendment requires a bright-line principle that overrides Rule 1.6(a) with regard to all proceedings that transpire in an open session of any state or federal court. Mr. Hunter argued that he had a constitutional right to read the entire transcript of any such public trial, on a television program or on the Internet, and that lawyers have historically understood that there is no ethical constraint against their discussing what transpires in such public judicial proceedings, in books, articles, CLE programs, or in the mass media.

In its Memorandum Order, the Circuit Court reversed the District Committee on this issue and ruled in favor of Mr. Hunter, stating: "The Court unanimously finds that the District Committee Determination as to Rule 1.6(a) is contrary to the law as it violates Respondent's rights under the First Amendment of the United States Constitution and therefore the charge is dismissed." The Virginia Supreme Court upheld the Circuit Court's decision, observing:

> The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.[76]

The Virginia Supreme Court did, however, find that Mr. Hunter could be required to post a disclaimer on his blog site to avoid "misleading" the public as to the results he could obtain.

Although lawyers may take comfort in the *Hunter* decision, lawyers should consider the persistent grey area about the reach of the First Amendment relative to lawyer confidentiality rules. Even if a lawyer might evade discipline for revealing information that was shared in "open court," a lawyer might not evade liability for breach of fiduciary duty, contractual liability for violating engagement terms or an NDA, or being fired by a client whose expectations of lawyer confidentiality may not be coextensive with the professional rules or First Amendment.

B. Holding Out

[76] *Hunter*, 744 S.E. 2d at 620.

ABA Model Rule 5.5 admonishes a lawyer not to "practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." State law determines what is the unauthorized practice of law ("UPL") and the definition of the practice of law varies by state. However, the most common elements are:

- Furnishing advice or service involving the application of legal principles to facts or purposes or desires.
- Prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- Representing the interests of another before a tribunal on than in the presentation of facts, figures, or factual conclusions as distinguished from legal conclusions or examination of witnesses or preparation of pleadings.
- "Holding out" as qualified or authorized to practice law.[77]

It is the "holding out" aspect of the definition of the practice of law that should be read together with ABA Model Rule 7.1's admonition against "false and misleading" communications about a lawyer's service. Some examples follow:

- **Use of the term "associate" or "counsel":** In Opinion 22-17 (March 2, 2017), the District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law ("DC UPL Committee") made it clear that use of the words "associate" or "counsel" constitute "holding out" as authorized to practice law, which could amount to UPL if the words are connected to a jurisdiction other than the lawyer's jurisdiction of licensure. The DC UPL Committee observed that these terms "when used in a legal context, convey to members of the public that an individual is authorized to practice law."

[77] See, e.g., Rules of the Supreme Court of Virginia, Part 6, Section I; New York Judiciary Law § 478; *El Gemayel v. Seaman*, 72 N.Y.2d 701, 706, 533 N.E.2d 245, 248 (N.Y. 1988) (internal citations omitted) ("It is settled that the 'law' contemplated by Judiciary Law § 478 includes foreign as well as New York law. . . . The 'practice' of law reserved to duly licensed New York attorneys includes the rendering of legal advice as well as appearing in court and holding oneself out to be a lawyer. Additionally, such advice or services must be rendered to particular clients (*Matter of New York County Lawyers Assn. v Dacey*, 21 NY2d 694, *revg on dissenting opn below* 28 AD2d 161 [publishing a book on "How to Avoid Probate" does not constitute the unlawful "practice" of law]) and services rendered to a single client can constitute the practice of law.")

- **Law School Graduate (JD)**: Although a person may be able to advertise the fact that he or she attained a J.D. without committing UPL,[78] having a JD without a license does not entitle a person to hold out as an "attorney."[79]

- **Disclaimer may be effective to avoid "UPL" and "misleading" communications when advertising or soliciting outside jurisdiction of licensure:** *See, e.g.*, Utah Ethics Op. 22-04 (2022) (placing billboard in Utah or having "pamphlets or fliers mailed to or distributed in Utah by out-of-state lawyers violate Rule 7.1 as being materially misleading unless they include a disclaimer that the lawyers in the firm are not licensed in Utah"). *But cf*. Ill. Ethics Op. 14-04 (2014) (noting that "[s]olicitation of personal injury cases within Illinois by a lawyer not admitted to practice in Illinois is not, in and of itself, a form of unauthorized practice of law" but that such advertising must comply with the lawyer advertising rules).

C. Interactions with Others

ABA Model Rules 4.1 through 4.3 set out boundaries around which a lawyer interacts with others. ABA Model Rule 4.1 requires truthfulness in statements to others and does materially alter the lawyer's obligation to avoid false and misleading advertising as set forth in ABA Model Rule 7.1. However, a lawyer using interactive media for advertising and marketing efforts must consider whether the media platform involves an interaction that might be governed by ABA Model Rule 4.2, which governs communications with persons known to be represented by counsel, and Rule 4.3, which governs communications with unrepresented persons.

Although passively viewing information on social networking sites does not implicate the "anti-contact" rule, ABA Model Rule 4.2 prohibits a lawyer from using the interactive aspects of a social media sites to contact a person known to be represented by counsel. Specifically, a "friend" request would amount to contact, which could implicate the rule if the purpose is to gain access to nonpublic information that might be relevant to the representation.[80]

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[78] *In re Rowe*, 604 N.E. 2d 728 (N.Y. 1992) (publishing article on legal topic and identifying himself in it as "J.D." did not violate suspension directing lawyer not to practice law, give advice on law, or hold himself out as lawyer); *Sutton v. Hafner Valuation Grp., Inc*., 982 N.Y.S. 2d 185 (Sup. Ct. 2014) (certified real estate appraiser did not hold himself out as licensed lawyer by listing "Juris Doctor" on his résumé; fraud count against him properly dismissed). *But see In re Strizic*, No. PDJ-2013-9014, 2013 WL 1963871 (Ariz. P.D.J., Apr. 10, 2013) (lawyer not licensed in jurisdiction violated rule "by operating as 'The Tax Edge' and using the designations 'J.D.' and 'LLM'").

[79] *In re Banks*, 561 A.2d 158 (D.C. 1987).

[80] *See* Annotation to ABA Model Rule 4.2 contained in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Tenth Edition (Kindle Locations 13115-13122) (American Bar Association):

> *In re Robertelli*, 258 A. 3d 1059 (N.J. 2021) (when represented person's privacy settings restrict information to "friends," lawyer may neither send "friend" request nor entice represented person to send one); *Rosenay v. Taback*, No. AANCV156019447S, 2020 WL 4341767, 2020 BL 281902 (Conn. Super. Ct. July 2, 2020) (sending "friend" request to party known to be represented is impermissible contact); D.C. Ethics Op. 371 (2016) (requesting access to information protected by privacy settings, such as making "friend" by privacy settings, such as making "friend" request to

ABA Model Rule 4.3 governs a lawyer's interactions with an unrepresented person, requiring a lawyer not to "state or imply that the lawyer is disinterested." Moreover, under Rule 4.3, a lawyer will be required to clarify his or her role in a matter if it reasonably appears that the unrepresented person misunderstands the lawyer's role. Finally, Rule 4.3 prohibits a lawyer from giving legal advice other than advice to secure counsel if the unrepresented person's interests possibly conflict with the interests of the lawyer's client. Again, a lawyer seeking access to the nonpublic aspects of a person's social media site cannot give the impression that the lawyer is disinterested. There is a fair amount of variability on the extent a lawyer may be required to make an affirmative disclosure when seeking to interact with an unrepresented person through social media in the course of representing a client.[81]

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represented person, violates Rule 4.2); Me. Ethics Op. 217 (2017) (access and use of private portion of represented person's social media account is prohibited by Rule 4.2, even if action is fully automated through social media interface itself); Pa. Formal Ethics Op. 2014-300 (2014) (" friend" request violates rule, but lawyer may access public portion of represented party's social media site); W. Va. Ethics Op. 2015-02 (2015) (lawyer may not contact represented person through social media or send "friend" request to such person, but lawyer may access public portion of person's social media page). *See also Sun v. Xu*, No. 19-2242, 2021 WL 6144671, 2021 BL 498070 (C.D. Ill. July 6, 2021) (public post to Twitter account, directed at represented parties, could violate Rule 4.2). See generally Yvette Ostolaza & Ricardo Pellafone, Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites, 11 J. High Tech. L. 56 (2010).

[81] *See* Annotation to ABA Model Rule 4.2 contained in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Tenth Edition (Kindle Locations 13115-13122) (American Bar Association):

Rosenay v. Taback, No. AANCV156019447S, 2020 WL 4341767, 2020 BL 281902 (Conn. Super. Ct. July 2, 2020) (lawyer must disclose to recipient of "friend" request that they are a lawyer representing a party in a case); Colo. Ethics Op. 127 (2015) (must disclose lawyer's name, fact that lawyer is acting on behalf of a client, and general nature of matter; may also have to disclose other information, such as client's name or fact that client's interests are opposed to those of unrepresented person, if necessary to avoid misunderstanding); D.C. Ethics Op. 371 (2016) (lawyers should identify themselves, their client, and the matter, and state that they are lawyers); Me. Ethics Op. 217 (2017) (whether and extent to which lawyer must disclose purpose for requesting access to unrepresented person's social media website depends on circumstances); Mass. Ethics Op. 2014-5 (2014) (lawyer seeking access to nonpublic portion of unrepresented potential adversary's social networking site must disclose her identity as party's lawyer); N.H. Ethics Op. 2012-13/ 5 (2013) (lawyer must identify self and role); N.C. Ethics Op. 2018-5 (2019) (lawyer must use true identity, respond accurately to request for more information, and not use or instruct third party to use deception); Pa. Formal Ethics Op. 2014-300 (2014) (lawyer must disclose his or her identity and purpose; failure to disclose purpose would imply lawyer is disinterested); W. Va. Ethics Op. 2015-2 (2015) (same); cf. Phila. Ethics Op. 2009-02 (2009) (lawyer's use of third party to "friend" unrepresented witness to gain access to private website does not implicate Rule 4.3, but deception does implicate Rule 8.4). *Compare* N.Y. State Ethics Op. 843 (2010) (lawyer may access public Facebook and MySpace profiles but may not send "friend" request to unrepresented party), with N.Y. City Formal Ethics Op. 2010-2 (2010) (lawyer may "friend" unrepresented person without disclosing reason for request; no mention of Rule 4.3). *See generally* John G Browning, Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites, 14 SMU Sci. & Tech. L. Rev. 465 (Summer 2011); Allison

E. Statements about Judges

Social media tempts everyone, including lawyers, to rattle off reactions without taking time to pause and reflect on the message or the wording. Perhaps it is even fair to say that social media strongly incentives quick and incendiary commentary as a method for increasing viewership. When the opportunity to comment on judges presents itself, lawyers may view it as an opportunity to attract attention to themselves as a lawyer on social media. Notwithstanding the First Amendment, lawyers should remain aware that ABA Rule 8.2 prohibits a lawyer from making a "statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." This rule parallels what would likely take a lawyer outside the protection of the First Amendment. Not only might that subject a lawyer to liability for defamation but it could expose the lawyer to professional discipline under ABA Model Rule 8.4, which makes it "professional misconduct" to, among other things, "violate or attempt to violate the Rules of Professional Conduct."

Clemency, Comment, "Friending," "Following," and "Digging Up" Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites, 43 Ariz. St. L.J. 1021 (Fall 2011); Sandra Hornberger, Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence, 27 Touro L. Rev. 279 (2011); Ken Strutin, Social Media and the Vanishing Points of Ethical and Constitutional Boundaries, 31 Pace L. Rev. 228 (Winter 2011).