

# Do's & Don'ts of Ethical Legal Marketing

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Flip on any local television channel in Alabama on any weekday between 8AM and noon, and you are bound to see an ad for a lawyer or law firm. The weekday morning airwaves are full of advertisements featuring attorneys who compare themselves to hand tools and depict themselves in outlandish hunting scenarios getting “the big bucks.” While most scoff at these advertising methods, these lawyers have identified their target audience and have discovered the best methods of reaching them. In this ever-increasingly competitive world of lawyering, it is imperative that lawyers and law firms not only choose the most effective marketing strategies to suit their practice but ensure that those strategies and tactics are compliant with the Alabama Rules of Professional Conduct and other guidance such as formal opinions issued from the Alabama State Bar’s Office of General Counsel.

## Legal Marketing – So Many Methods, So Little Time

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The legal landscape has evolved dramatically over the years, especially over the last decade. Twenty years ago, the chosen methods of advertising for legal services were word-of-mouth and Yellow Pages ads. Today, more lawyers and law firms are choosing social media outlets such as Facebook, Twitter, and LinkedIn to market themselves, or are relying heavily on aesthetically pleasing websites that offer information on a lawyer’s expertise and practice areas as well as whitepapers and blog posts on emerging legal trends and issues.

### Identifying Your Target Audience

Before choosing one of the marketing methods above or others, a law firm or practice must identify their target audience based on current practice areas, existing clients, and potential clients that need the services offered. **Your target audience should be the driver of every decision you make as related to legal marketing.** Legal marketing objectives can range from building a lawyer’s profile in an industry sector to growing a practice in a specific region. However, clients are at the center of any legal marketing objective.

Future work can be generated in a variety of ways. You can focus solely on keeping the clients you have, if they are a stream of future work. You can do more or different work for existing clients. You can do work for new clients. Or, you can do new types of work for existing and new clients. Regardless, if you do not identify your target audience, the clients you have and the clients you want to have, creating an informed legal marketing strategy will be impossible.

## Mapping Out a Strategy

Once you identify your target audience, the next step is to develop a strategy for reaching that audience. What are your objectives in reaching this target audience? What are your strengths? What organizations are you involved with that could lead to potential sources of work, either directly or by referral? What is your strongest method of networking, one-on-one, organizations, public speaking, writing, events? **Develop specific, measurable, attainable, relevant, and time-bound objectives to map out your strategy.**

## Choosing Your Methods Wisely

You've identified your target audience. You've developed measurable objectives and a strategy for reaching the target audience. Now, you must choose the most effective methods for executing this strategy and reaching your audience. As described above, there are countless methods to choose from. Traditional methods such as radio, television, newspaper, and billboard advertisements. Digital methods such as social media, email marketing campaigns, websites, blogs, and whitepapers. And unconventional methods, too. The crucial thing to note is that you must not choose a method just because "you've really been wanting to start a Facebook page for your practice" or "that other attorney uses television advertisements." **You must communicate the right message through the most effective method to make the most impactful mental connection or memory with your target audience.** For example, a lawyer who currently handles more domestic cases might choose Facebook, as that social media platform is particularly effective for word-of-mouth advertising among individuals. However, a lawyer whose primary source of business is referrals from other lawyers might choose LinkedIn to connect with other lawyers.

## Legal Marketing vs. Lawyer Advertising

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So, let's get something straight before we dive into the heavy stuff. What is the difference between legal marketing and lawyer advertising? **Legal marketing is the overarching term used to describe all that goes into an analysis and strategy by lawyers and law firms to keep and generate business,** and includes advertising, client relations, cross-selling, public relations, etc. **Lawyer advertising is a chosen method to be utilized in a legal marketing strategy** such as newspaper ads, billboards, business cards, and social media (*Yes, social media is construed as advertising. We'll talk about that later*). Now that we are on the same page, let's look at the regulations and guidance pertaining to legal marketing and lawyer advertising.

## Alabama Rules of Professional Conduct

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The Alabama Rules of Professional Conduct define "proper conduct for purposes of professional discipline" and "define the nature of relationships between the lawyer and others." The Rules which

deal most directly with advertising are the “7s” – 7.1 thru 7.7. I’m not going to repeat them verbatim here. You are lawyers. You can look them up and read them – and you should. But, we will try to hit the highlights.

### **Rule 7.1 – False or Misleading Communication**

Rule 7.1 applies to any form of marketing utilized by lawyers. The focus of this rule is on the content of the information disseminated rather than the means of dissemination. A lawyer cannot make a false or misleading communication. Generally, any information communicated about a lawyer’s services that contains any of the following may be considered false or misleading:

- Information that would create unjustified expectations;
- Endorsements or testimonials;
- Self-laudatory statements;
- Specializations; and
- Comparison with others.

Damage awards, past results and testimonials (if true) may be permitted if the following “extended testimonial disclaimer” is used: “These recoveries and testimonials are not an indication of future results. Every case is different, and regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.” Specializations and comparisons with others are covered by Rule 7.4, which will be discussed below.

### **Rule 7.2 – Advertising**

Rule 7.2 specifically applies to advertising by lawyers. This rule allows for lawyer advertising through public media such as directories, newspapers, periodicals, outdoor displays, radio, television, or written communications. However, a copy or recording of the advertisement as well as the contemplated duration and identity of publisher or broadcaster must be mailed or delivered to the Alabama State Bar Office of General Counsel within three (3) days after its dissemination. The responsible lawyer must also retain a copy of the advertisement for six (6) years after its last dissemination. All advertisements must contain the name of at least one lawyer responsible for the content and a disclaimer that states “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.” If the advertisement contains reference to legal services for a certain fee, a lawyer must perform those services for the advertised fee for no less than 60 days following the date of last publication. A lawyer cannot trade anything of value to someone for recommending the lawyer’s services, e.g. a lawyer cannot pay for advertising of another attorney in exchange for referrals (RO-99-01). However, a lawyer

may pay the reasonable cost of advertising or the usual charges associated with a nonprofit referral service. RO 2012-01 also prohibits the use of daily deal websites, such as Groupon, to market discounted legal services in the form of redeemable certificates to prospective clients, as it violates or potentially violates several rules of professional conduct.

The Comment to Rule 7.2 captures the tension between traditional views of the profession and the need for advertising, not just for the sake of the lawyer but also for the benefit of the public.

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

As the result, and contrary to what many may believe, there are some very particular restrictions on how lawyers may advertise. And, the application of those rules on the new and evolving forms of communication and media are sometimes not so apparent and are, thus, often overlooked.

### **Disclaimers and Filing Requirements**

Perhaps the most pertinent points of Rules 7.1 and 7.2 are the required disclaimer and the required filing with the Alabama State Bar's Office of General Counsel. Whether it is the short disclaimer found in Rule 7.2 or the "extended testimonial disclaimer" discussed above, **you must be aware and constantly vigilant to include it in the many different forms of marketing you are utilizing, and that you must filing it with the Alabama State Bar's Office of General Counsel.**

1. **Social Media.** Most lawyers use someone else to establish and maintain their social media pages. And, unfortunately, those individuals have never practiced law and certainly never read the Alabama Rules of Professional Conduct. And guess what? You are responsible for what they do. **The use of social media is advertising covered under the “7s” in the Alabama Rules of Professional Conduct. Social media “pages” are very likely subject to the Rule 7.2(e) disclaimer requirement or, if applicable, the “extended testimonial disclaimer” requirement, and thus are also subject to the Rule 7.2(b) filing requirement.** For example, if you have a LinkedIn page where you communicate your practice areas, it needs the disclaimer, and a copy needs to be filed with the Alabama State Bar’s Office of General Counsel. Many lawyers’ LinkedIn pages in Alabama do not include the disclaimer, even though they specifically list their practice areas. Further, if a law firm or practice publishes anything about prior damage awards, past results or client testimonials on their social media pages, the page also needs the extended testimonial disclaimer.

**Questions:**

- Do individual lawyers’ social media pages fall under the requirements of Rules 7.1 and 7.2 of a disclaimer and a filing with the Alabama State Bar’s Office of General Counsel?
- Do whitepapers/blog posts disseminated on firm’s social media pages need a disclaimer on the post, or does the website’s disclaimer meet the requirement?

2. **Sponsorships.** Many law firms and practices use sponsorships to build brand awareness, name recognition or simply to be a good steward of their community. However, their intent is irrelevant. A law firm or practice might choose to sponsor a 5K, fundraising event, food drive, or little league team in their community. **However, if your advertisement communicates anything other than your name, address, etc., the disclaimer is probably required, and a copy must be filed with the Alabama State Bar’s Office of General Counsel.**

**Question:**

- If you sponsor an event and your logo is placed on the back of a t-shirt for the event, but your practice areas or services are not listed, does the sponsorship constitute an advertisement such that you need to file a picture of the t-shirt with the Alabama State Bar’s Office of General Counsel?

3. **Website.** As mentioned above, many lawyer and law firms are utilizing websites to market themselves and reach their target audiences. And, that’s okay. Websites are a very effective way of reaching your target audience. Your website may be optimized so that it appears in a list of results when certain key words are searched. For example, if you are a mediator in Tuscaloosa,

your website should appear in a list of search results when someone searches the terms “mediator” and “Tuscaloosa.” Regardless of whether your website is search optimized, **any lawyer’s or law firm’s website that communicates the legal services provided or discusses practice areas constitutes an advertisement and thus must include a disclaimer, and a copy must be filed with the Alabama State Bar’s Office of General Counsel.**

A disclaimer included on any method of advertisement must be clearly legible and/or reasonably understood (*Que the television commercials where the disclaimer is read so quickly that the person reading it sounds like a chipmunk*).

### **Rule 7.3 – Direct Contact with Prospective Clients**

Rule 7.3 applies to the solicitation of professional employment through direct contact with prospective clients. If you thought advertising was complicated, the restrictions on direct contact with prospective clients will make your head spin. The rule states that “there is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph or facsimile transmission of prospective clients known to need legal services.” Yes, the dreaded telegraph solicitation. To that effect, there are numerous restrictions on lawyers directly soliciting prospective clients.

#### **Questions:**

- Do the same rules apply to direct solicitation by email?
- If so, how should the “Advertisement” requirement be applied to a direct solicitation email?

*What?*

Rule 7.3 prohibits the solicitation of a prospective client with whom a lawyer has no familial, current or prior professional relationship. It also prohibits the solicitation of clients on a lawyer’s behalf by a lawyer’s employees or agents. A lawyer is also prohibited from contacting a person regarding a specific matter when the lawyer knows or reasonably should know the person is already represented by a lawyer in the matter. Communication with a prospective client is prohibited if the lawyer knows the person does not want to receive the communication, is a minor, incompetent, or the person’s physical, emotional, or mental state is such that they cannot exercise reasonable judgment. The communication is also prohibited if it involves or contains coercion, duress, fraud, overreaching, harassment, intimidation, undue influence, false, fraudulent, misleading, deceptive, unfair, or improper statements or claims.

*How?*

Like the filing and disclaimer requirements under Rule 7.2 for advertisements, direct solicitations are also subject to disclaimer and filing requirements:

1. A copy of the communication, envelope, and a list of the recipients' names and addresses must be filed with the Alabama State Bar's Office of General Counsel before or concurrently with the first dissemination.
2. The lawyer must retain a copy of the communication for (6) years.
3. For any subsequent communications to additional prospective clients, the lawyer must file a list of the additional recipients' names and addresses either before or concurrently with the subsequent dissemination.
4. For frequent, identical communications to prospective clients, the lawyer must file a list of the recipients' names and addresses once a month since the previous list was filed.
5. Communications shall only be sent by regular mail, not registered, express or any other form of restricted delivery, and shall not resemble an official document, legal pleading, official government form or document (federal or state), or other legal document.
6. Communication must have "Advertisement" prominently in red ink on each page, and the word "Advertisement" shall appear in the lower left-hand corner of the envelope in red, 14-point or larger type.
7. Any contracts sent with the communication shall be considered a sample contract and have "SAMPLE" marked at the top of each page in red ink and a type size at least one point larger than the largest type used in contract. "DO NOT SIGN" should also appear on client's signature line.
8. The first sentence of the communication should state: "If you have already hired or retained a lawyer in connection with [state the general subject matter of solicitation] please disregard this letter [pamphlet, brochure, or written communication.]"
9. The communication must include how the lawyer obtained the information prompting the communication if it was prompted by a specific occurrence (e.g. death, recorded judgement, garnishment).
10. The communication shall not reveal the nature of the client's legal problem for which the lawyer is seeking employment on the outside of the envelope, brochure or pamphlet.
11. The lawyer should be able to prove truthfulness of all information contained in communication.
12. The communication shall not bear any statement that it has been approved by the Alabama State Bar.

#### *When?*

There are time restrictions on when a prospective client can be contacted by direct solicitation:

1. A lawyer shall not contact a person or a relative of a person involved in an accident or disaster within (30) days regarding a potential action for personal injury or wrongful death.

2. A lawyer shall not contact a prospective client regarding a civil or criminal proceeding pending in a state or federal court unless service of process, warrant, or information was obtained or served on defendant or other prospective client more than (7) days prior to communication.

The rule urges that “advertising makes it possible for a prospective client to be informed about the need for legal services and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client’s judgment... The use of general advertising, rather direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely.” The rule has some exceptions, such as, “responses by lawyers and law firms to requests for information from a prospective client, newsletters or brochures published for clients, former clients, those requesting it, or those with whom the lawyer or law firm has a familial or current or prior professional relationship.”

General mailings or mailings targeted to specific persons or potential clients are also permitted by this rule; however, those mailings would constitute advertisements and would be subject to the requirements of Rule 7.2.

Communications to former clients or offers to provide legal services on a pro bono basis are not subject to Rule 7.3.

### Networking & Business Cards

Another method of marketing frequently utilized by lawyers is networking, e.g. Chamber of Commerce events, receptions, etc. And, what does every good lawyer have on hand when attending a potential networking opportunity? Business cards. Formal opinion RO 2003-01 states that a business card “can constitute advertising [actually, solicitation] if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients.” In this case, business cards would be subject to Rule 7.3 as it pertains to direct contact with prospective clients. The Disciplinary Commission also specifies in formal opinion RO-91-17 that it would be ethically impermissible for an

attorney to provide business cards to other professionals for distribution to their clients, customers

#### Question:

- If a lawyer gives their business card to a new acquaintance with whom the lawyer has no prior or current professional relationship at a networking event, after the acquaintance had described a potential legal issue that they were experiencing, does that constitute direct solicitation and thus violate Rule 7.3?

or patients, e.g. Chamber of Commerce employee distributing a lawyer's brochure or other advertising materials or a lawyer leaving business cards or other advertising materials at a bar, nightclub, doctor's offices, or bail bondsmen offices.

#### Rule 7.4 – Communication of Fields of Practice

##### Questions:

- Does listing practice areas under the "Specialties" section on a company page on LinkedIn violate Rule 7.4?
- If a lawyer or law firm posted a disclaimer that stated the practice areas listed under the heading of "Specialties" do not constitute specialties as defined and prohibited by the Alabama Rules of Professional Conduct Rule 7.4, would it be permissible?

Rule 7.4 focuses on the communication of fields of practice by lawyers. Although a lawyer is allowed to communicate practice areas, a lawyer cannot state or imply that she is a specialist, unless the lawyer is engaged in patent practice before the U.S. Patent and Trademark Office (may use designation of "Patent Attorney" or similar designation), the lawyer is engaged in admiralty practice (may use designation of "Admiralty" or "Proctor in Admiralty"), or the lawyer has been certified as a specialist in a field of law by a named organization or authority that has been approved by the Alabama State Bar Board of Legal

Certification<sup>1</sup>. The rule otherwise prevents the use of "specialist," "practices a specialty," and "specializes in," as this implies formal recognition as a specialist and may be misleading. A lawyer is not prohibited from communicating areas in which he or she is experienced or the focus or concentrations of their practice, but the lawyer must be very careful.

#### Alabama State Bar's Office of General Counsel

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If a lawyer is still unsure as to whether an advertising or marketing strategy is allowed under the Alabama Rules of Professional Conduct, the lawyer should consult with the Alabama State Bar's Office of General Counsel.

Although the Alabama Rules of Professional Conduct do not require lawyers to submit advertisements for them to be reviewed for compliance with the Rules before they are disseminated, why not get their opinion? The Bar staff is there for you. They encourage lawyers to reach out to them for advice. And it doesn't cost a thing. It is part of your Bar membership. And what a great benefit. Contrastingly, the state of Florida charges lawyers \$150 per advertisement to review them for compliance. However, please note that an email requesting review of the advertisement for

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<sup>1</sup> The Alabama State Bar Board of Legal Certification has previously approved certifications from the following certifying agencies: American Board of Certification, National College for DUI Defense, National Elder Law Foundation, National Association of Counsel for Children, National Board of Trial Advocacy, and the National Association of Estate Planners and Councils.

compliance purposes does not satisfy the obligation to file a true copy or recording of the advertisement with the Alabama State Bar's Office of General Counsel. Also, note that if you file an advertisement with the Alabama State Bar's Office of General Counsel, you will not receive confirmation of receipt or an opinion on whether it is compliant.

## Conclusion - These Rules are Confusing

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Long story short -- the Alabama Rules of Professional Conduct are confusing, dated and difficult to apply. And, it's not just the Rules that provide guidance but also formal opinions, as discussed above. **If you have a question, don't hesitate to call the Alabama State Bar's Office of General Counsel for advice BEFORE you buy or post that advertisement or solicit that work.**

And remember, you, as the licensed attorney, are responsible for your marketing and advertising. Your marketing professionals aren't likely versed in the rules which govern our practice, and your reliance on their work or advice does not relieve you of your responsibility.