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BUSINESS DEVELOPMENT: ETHICAL CONSIDERATIONS

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Business Development—Ethical Considerations

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Most of us have practiced in a landscape where we have been exposed to legal ads on a regular basis. After all, almost 40 years have passed since an attorney's right to advertise was upheld by the U.S. Supreme Court. Because this right to commercial free speech is subject to regulation by ethics authorities in each jurisdiction, many attorneys are reluctant to market themselves for fear of running afoul of the rules. This conservative approach naturally extends to the wild world of social media.

Even those who choose not to engage in an active business development campaign may be subject to ethical scrutiny. After all, marketing is, at its essence, communication, and we all communicate in some fashion or other. Consequently all attorneys need to have at the very least a cursory grasp of the pertinent rules.

An excellent place to begin is by examining the resources included in Professionalism & Ethics in Lawyer Advertising, published and updated by the ABA Center for Professional Responsibility. Links to pending cases, court rulings, and ethics opinions as well as a comprehensive outline of the differences between the pertinent MRPCs and state rules are provided. An attorney must closely scrutinize the precepts of his or her own state in light of the wide variation in rules that exists among jurisdictions.

Because most states have adopted a version of the Model Rules of Professional Conduct (MRPC), initial reference can be made to MRPC 7.1–7.5 (rules governing information about legal services) and the amendments adopted in August 2012.

Although most lawyers would not intentionally violate MRPC 7.1 by “making false or misleading communications” about themselves or their services, some may inadvertently violate this basic rule. Ethics complaints have been filed against attorneys who unintentionally listed outdated or inaccurate credentials on their websites. These cases demonstrate that many attorneys do not review the content developed by the marketing companies they hire. The attorney’s defense that she was unaware of the content is ineffective because ethical compliance cannot be delegated. It also should be noted that Comment 1 specifies that the reach of the rule extends beyond advertising and applies to **all** communications about a lawyer’s services. Some states, such as Virginia, require specific disclaimers that precede the communication of “specific or cumulative case results.”

Attorneys are prohibited under MRPC 7.2 from giving “anything of value to a person for recommending the lawyer’s services.” As this rule covers referral fees, MRPC 1.15 and 5.4 also come into play. Those who have established reciprocal referral arrangements are advised to read Comment 8 of MRPC 7.2. Note that some states require prior filing or approval of an ad, some require filing within a certain period after publication while most require neither pre-approval nor filing at any time whatsoever.

Restrictions on solicitation of clients through direct contact, whether in-person, live telephone, or real-time electronic contact, are outlined in MRPC 7.3. States have imposed a variety of restrictions, some dictating the number of days that must have elapsed between the date of the accident or catastrophe and the time of solicitation. Others focus on the mental, physical, or emotional state of the potential client.

Labeling requirements (often including substance, size of font, and placement of text) are detailed in this rule.

MRPC 7.4 should be reviewed with care before communicating information about fields of practice and specialization. In the course of naming a law firm, a cautious attorney will take a look at MRPC 7.5. Although not specifically geared toward advertising, Rule 1.6 can be brought into play if a lawyer reveals “information relating to the representation of a client” in the course of a communication about legal services.

In addition to the Model Rules of Professional Conduct, the ABA Aspirational Goals for Lawyer Advertising are worth a glance. The Goals remind lawyers that their ads should be dignified, professional, and in good taste. Use of “inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings” is discouraged.

Some video ads may pass muster ethically but fail to satisfy the standards established by the Aspirational Goals. Check out the following and judge for yourself. The video ad of a Florida divorce lawyer begins with the following: “If you and your spouse hate each other and want to get out of the hellhole you call a marriage, you’ve come to the right place.” The opening may very well be the high point of the ad. Also, take a look at the video of a Pennsylvania criminal lawyer who states, “I make jail visits because I’ll probably be there visiting my friends anyways.”

While new ethical frontiers have opened that may give a lawyer pause for thought, a review of pertinent rules, state advisory opinions, and ethics and judicial opinions will pave the way to an ethically compliant business development campaign.