

ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

I am a partner in a small boutique law firm and we decided that it was time to update our website. In looking at other law firm's websites to get ideas, we realized that all of the firm's "branding" was outdated, especially since we are trying to develop business with small start-up companies in the technology sector. Now, instead of just updating our website, we decided to rethink every aspect of our branding including online attorney biographies, business cards, social media, and letterhead. We obviously want to retain a professional image and comply with the attorney advertising rules, but we really want to stand out to modern technology and social media savvy companies. I know there are a number of restrictions on attorney advertising. What issues should we consider with our rebranding? Are there any advertising or branding issues we should avoid?

Sincerely,
Ed G. Adman

Dear Ed G. Adman:

You are wise to be concerned with your ethical obligations when creating your firm's branding suite. In today's digital age, many of your colleagues and potential clients will research your services on the internet before even meeting you in person. Your new branding tools and their content will certainly affect how others perceive your firm. Attorneys can undoubtedly maintain a professional image and stand out to modern technology and social media savvy companies while complying with their ethical obligations. The Forum has previously addressed what constitutes attorney advertising when circulating newsletters (Vincent J. Syracuse, *Jamie B.W. Stecher & Matthew R. Maron, Attorney Professionalism Forum*, N.Y. St. B.J., September 2013, Vol. 85, No. 7) and use of social media and advertising in the context of attorney's personal social media pages. (Vincent J. Syracuse, *Maryann C. Stallone & Hannah Furst, Attorney Professionalism Forum*, N.Y. St. B.J., February

2016, Vol. 88, No. 2). Some of the rules that govern the use of social media by lawyers have attracted attention and have been viewed as an anachronism that may be due for an overhaul. See Carolyn Elefant, *Ethics opinions have to reflect the present and future – not the past*, A.B.A.J., December 2017, http://www.abajournal.com/magazine/article/legal_ethics_opinion_relevance.

Your question takes us to a subject that we have not previously addressed in this Forum and requires a discussion of several of the New York Rules of Professional Conduct (RPC). In determining which rules apply, one must first analyze whether the branding tools that you plan on using constitute attorney advertising within the definition offered by RPC. Rule 1.0(a), which tells us that an advertisement is "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." RPC 1.0(a). The advertising guidelines for lawyers are primarily set forth in Rule 7.1. Rule 7.1 is extensive and requires particular attention by all attorneys.

Website

First, the content on your website should be a truthful and accurate representation of your firm and the services provided, as attorney advertising may never be "false, deceptive or misleading." See RPC 7.1(a)(1). RPC 7.1(b) sets forth some of the permissible elements of attorney advertisements, including the attorneys' qualifications, names of clients who are regularly represented (provided they have given prior written consent), bank references, credit arrangements, and prepaid or group legal service programs in which the law firm participates. RPC 7.1(c) enumerates prohibited actions in attorney advertisements including paid endorsements or testimonials about the firm without disclosing that the person has been compensated, a portrayal of a fictitious law firm, and use

of actors to portray the lawyer or members or the firm, or clients. Rule 7.1(d) states the information that a lawyer may include in the advertisement, but only if the communication complies with Rule 7.1(e). Rule 7.1(e) requires that the information contained in the advertisement be factually supported as of the date on which the advertisement is published or disseminated, contain the disclaimer "Prior results do not guarantee a similar outcome," and in the case of a testimonial or endorsement from a client for a matter still pending, the client must give informed consent confirmed in writing. See Rule 7.1(e). This means that if you plan on including statements about your services, which we anticipate you may, you must include the disclaimer required by Rule 7.1(e): "Prior results do not guarantee a similar outcome."

In addition, the home page of a law firm website should be marked "Attorney Advertising." RPC 7.1(f). RPC 7.1 Comment [5] explains that the purpose of the "Attorney Advertising"

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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label is to “dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers.” The Comment further notes that the label is not necessary for advertising in newspapers or on television, or similar communications that are “self-evidently” advertisements, such as billboards. *Id.*

The required statements set forth in RPC 7.1(f) and 7.1(e) must also be clearly legible and capable of being read by the average person. *See* Rule 7.1(i). In designing your website, focus on being clear and unequivocal for the statements required under the RPC and don’t let creativity get in the way of clarity.

We would also caution you against using phrases to advertise your firm that cannot be factually supported. Comment [3] to Rule 7.1 states in relevant part, “A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services or about the results a lawyer can achieve, for which there is no reasonable factual foundation.” RPC 7.1 Comment [3]. The NYSBA Committee on Professional Ethics addressed the ethics of two attorney advertising phrases: “I Know How to Win for You” and “unsurpassed litigation skills.” NYSBA Comm. on Prof’l Ethics, Op. 1005 (2014). The Committee opined that both of these advertising phrases are impermissible under Rule 7.1. *Id.* The Committee found that, “both statements are misleading in suggesting a result or skill level that cannot be factually supported as of the date on which the statements are published or disseminated, and therefore both statements violate Rules 7.1(a) and 7.1(e).” *Id.* Notably, the Committee opined that “[m]erely posting the disclaimer that ‘Prior results do not guarantee a similar outcome’ will not cure the ethical infirmity of the proposed advertising.” *Id.* For these reasons, the Commit-

tee opined that a lawyer should not use words like “Best,” “Most Experienced,” or “Hardest Working.” *See* NYSBA Comm. on Prof’l Ethics, Op. 1021 (2014). Based upon the foregoing, we warn you against using any type of similar language on your website in describing your services.

RPC 7.1 Comment [12] states that “[d]escriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported.” This is permissible because these are considered general descriptions and are not claims concerning quality and are therefore not likely to mislead a potential client. *See* RPC 7.1 Comment [12]. Despite these exceptions, the safest way to proceed is to keep your statements factual in nature and insure any statement can be supported by facts and evidence.

Domain names are also governed by the rules affecting legal advertising and publicity. Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1878 (2016 ed.), citing NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2003-1 (2003). RPC 7.5(e) specifically addresses domain names, stating:

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

- (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;
- (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;
- (3) the domain name does not imply an ability to obtain results in a matter; and
- (4) the domain name does not otherwise violate these Rules.

The comments to the rules and ethics opinions are instructive, providing examples of prohibited domain names. RPC 7.5(e) Comment [2] specifically notes that a personal injury firm cannot use the domain name [\[yourcase.com\]\(http://yourcase.com\) or \[www.settleformore.com\]\(http://www.settleformore.com\) because it does not comply with RPC 7.5\(e\)\(3\) and implies an ability to obtain results. The New York City Bar Association \(NYCBA\) Committee on Professional and Judicial Ethics in Formal Opinion 2003-01 opined that a lawyer or firm may utilize a domain name that does not include the names of the lawyers when: \(1\) the website clearly includes the actual name of the law firm; \(2\) the domain name does not include any statements that are false, deceptive or misleading; and \(3\) the domain name does not imply any special expertise or competence or suggest a particular result. NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2003-1 \(2003\).](http://www.win-</p></div><div data-bbox=)

Although you may identify the areas of law in which your firm practices on the website, you should not use words that suggest that you are an “expert” or “specialist” in your firm’s website domain name. RPC 7.4(c)(1) states that a lawyer can only be identified as a “specialist” in certain circumstances, such as through certification by a private organization approved for that purpose by the American Bar Association. In NYSBA Comm. on Prof’l Ethics, Op. 1021 (2014), the Committee addressed use of the term “expert” and opined that it is impermissible to use the word “expert” in a law firm domain name under RPC 7.5(e) or 7.4. *Id.*

Letterhead and Business Cards

Designing your firm’s new letterhead and business cards can help in presenting a modern image; however, consider RPC 7.5 before sending your new paper goods to the printer. RPC 7.5(a) states, “a lawyer or law firm may use internet website, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices provided the same do not violate any statute or court rule and are in accordance with Rule 7.1.” When you are designing your firm’s suite of paper goods, it is imperative to consider the specific text included. According to NYSBA Comm. on Prof’l Ethics, Op. 1028 (2014), a law-

yer's letterhead or professional card may provide the name of the lawyer without adding "lawyer or "esquire" or a similar identifier. In addition, the lawyer's title within the firm, such as "partner" or "associate," is not required on a personal professional card. *Id.*, citing New York County Lawyers' Association Prof'l Ethics Comm., Formal Op. 682 (1990). Indeed, Rule 7.5(a)(1) provides a "non-exclusive list of the content of a lawyer's professional card." *Id.* However, the opinion notes that if a firm elects to list all partners and associates on firm letterhead, the firm must make a distinction between associates and partners. *Id.*, citing New York County Lawyers' Association Prof'l Ethics Comm., Formal Ops. 612 (1973) and 890 (1977). This distinction between partners and associates can be made by using a line to separate partners and associates or listing partners and associates on different sides of the letterhead. *Id.* The ethical requirements do require that the distinction be made specifically in the aforementioned ways, but only that a distinction between partners and associates is made evident. A failure to make the designation between partners and associates in letterhead where all names are listed would be misleading within the meaning of Rule 7.1 and would violate Rule 7.5(a). *Id.*

Attorney Biographies

When crafting your new attorney biographies there are many ethical traps an attorney can fall into. First, as noted above, RPC 7.4(a)–(c) prohibits an attorney from identifying himself or herself as a "specialist" or "specializ[ing] in a particular field of law" absent limited exceptions. *See* RPC 7.4(c). It is permissible for attorneys to discuss their specific experience in a certain field of the law, but they must be careful in identifying themselves a "specialist" in that field.

Attorneys frequently cite in their biographies the litany of their honors in lawyer's listings such as "Best Lawyers." Under Rule 7.1(b) an attorney advertisement may include information related to "bone fide professional

ratings." Rule 7.1 Comment [13] states that, "a rating is not 'bona fide' unless it is 'unbiased and nondiscriminatory.'" A lawyer is permitted to advertise inclusion in these types of listings, provided that the methodology used to determine the inclusion of the lawyer in the listing is an "unbiased, nondiscriminatory and defensible process." *See* NYSBA Comm. on Prof'l Ethics, Op. 1007 (2014). Therefore, lawyers are not permitted to participate in rating services that are "pay to play" or subject to manipulation. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1672. If you or an attorney at your firm elect to include these types of listings in your biographies, it is imperative that you research the process by which these ratings are developed in order to insure your compliance with Rule 7.1(b) before listing same on your website.

Social Media

Many law firms maintain Facebook, LinkedIn, and Twitter accounts to promote their services in addition to their websites. These social media sites are likely considered advertising pursuant to Rule 1.0(a) because their primary purpose is for the retention of the firm. Therefore, the social media accounts must comply with all of the elements of Rule 7.1. As we noted in our prior Forum, these social media accounts must include the Rule 7.1(f) disclaimer, including Twitter posts. Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2016, Vol. 88, No. 2); *see also* NYSBA Comm. on Prof'l Ethics, Op. 1009 (2014) (concluding that tweets not subject to the exceptions in Rule 7.1(f) must include an "Attorney Advertising" label). The New York State Bar Association Committee on Professional Ethics has opined that these advertisement tweets are also subject to the Rule 7.1(k) retention requirement. *See* NYSBA Comm. on Prof'l Ethics, Op. 1009 (2014). RPC 7.1(k) states that "any computer-accessed communications shall be retained for a period of not less than one year" and all other advertise-

ments must be retained for a period of not less than three years following its initial dissemination. *Id.*

A common question regarding social media for law firms is the permissibility of attorneys answering legal questions in "chat rooms" or other internet forums. The New York State Bar Association Committee on Professional Ethics has opined that "answering questions on the internet is analogous to writing for publication on legal topics." *See* NYSBA Comm. on Prof'l Ethics, Op. 899 (2011). The Committee reasoned that Rule 7.1(4) permits a lawyer to write for publications on legal topics without affecting the right to accept employment, as long as the lawyer does not give individualized advice. *Id.* The Committee also cited to Comment [9] of Rule 7.1 which states that a lawyer should "refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice." *Id.* Although lawyers are permitted to provide general advice, the Committee cautioned lawyers against soliciting clients in chat rooms and other similar forums in violation of Rule 7.3(b) because these types of interactions are considered to be "real-time" or "interactive communications." *Id.* A lawyer may encourage a person to seek the advice of a lawyer in response to a question posed by a member of the public, but may not under any circumstances encourage his or her own retention, and the primary purpose of the response must be to educate the public by providing general answers to legal questions. *Id.*

As noted earlier, it has been suggested that some of the applicable rules are outdated and should be revised to reflect the realities on the use of modern social media outlets. *See* Elefant, *supra*. Whether the critics are correct may be a great subject for a future Forum. That said, lawyers are in the business of risk management which to us means that, at least for now, the rules are the rules. Divergences from

the rules create risks that are not worth taking.

Good luck with your firm's new branding. We believe you can create an image that is both attractive to modern and tech savvy clients and at the same time comply with the Rules of Professional Conduct.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My firm has decided to host a business development event at which several clients and prospective clients who are small business owners will set up

tables and booths to sell and promote their products and services. It's not only a chance to generate some new business for the firm, it's also an opportunity for the firm's attorneys, clients, and other business contacts to network with one another and do some holiday shopping. In the past, the event has been very successful. This is my first year serving as the chair of the committee organizing the event and I have a couple new ideas that I think will maximize our opportunity to promote the firm and generate business.

First, I'd like to organize a raffle for a few door prizes. The firm will purchase products from each of the vendors attending the event and wrap them in gift baskets with the firm's colors and logo. I'm thinking that we could even throw in a few attorney business cards or some pens or other small items with the firm's name. Instead of using traditional raffle tickets, however, attendees at the event

will enter the raffle by "adding" the firm on various social media platforms (Facebook, Twitter, and LinkedIn) and using a special hashtag for the event. Are there any specific ethics rules or regulations implicated by conducting the raffle in this way, or by conducting the raffle at all?

In conjunction with the raffle, I'd really like to use the event as an opportunity to build up the firm's ratings and reputation online. Like many firms, we're listed on sites like Avvo and Lawyers.com, but we're a small firm and only have a handful of reviews at the moment. Therefore, I was thinking that we could offer our current and past clients who are present at the event a discount on future legal services if they leave us an online review. If we offer this type of promotion, are we violating any ethics rules?

Sincerely,

I. M. Hopeful

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Questions?

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