

Social Media Ethics

Presented by Heather Riggs, Founder
Atlanta Legal Marketing

I. Relevant Georgia Rules of Professional Conduct and Comments to the Rules

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

a. A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:

1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;

2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;

3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;

4. fails to include the name of at least one lawyer responsible for its content;

5. or contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

"Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."

6. contains the language 'no fee unless you win or collect' or any similar phrase and fails to conspicuously present the following disclaimer:

"No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

b. A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.

c. A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.

COMMENT TO RULE 7.1

1. This rule governs the content of all communications about a lawyer's services, including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

2. The prohibition in sub-paragraph (a)(2) of this Rule 7.1: Communications Concerning a Lawyer's Services of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

Affirmative Disclosure

3. In general, the intrusion on the First Amendment right of commercial speech resulting from rationally-based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(5) of Rule 7.1: Communications Concerning a Lawyer's Services. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win." Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client's liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as "fees" and "costs" in an advertisement.

4. Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this Rule 7.1: Communications Concerning a Lawyer's Services would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.

Accountability

5. Paragraph (c) makes explicit an advertising attorney's ultimate responsibility for all the lawyer's promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end

product with these Rules. Although prior review by disciplinary authorities is not required by these Rules, lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.

RULE 7.2 ADVERTISING

a. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

1. public media, such as a telephone directory, legal directory, newspaper or other periodical;
2. outdoor advertising;
3. radio or television;
4. written, electronic or recorded communication.

b. A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

c. Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

1. Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.

3. Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.

4. Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

5. Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

COMMENT TO RULE 7.2

1. 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.

2. This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

3. Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

4. Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

5. Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

a. A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

1. it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
2. the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
3. the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or
4. the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

b. Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

c. A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

1. A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:
 - i. does not engage in conduct that would violate the Rules if engaged in by a lawyer;
 - ii. provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and
 - iii. discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

2. A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

3. A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

4. A lawyer may pay for a law practice in accordance with Rule 1.17.

d. A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.

e. A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engaged in by a lawyer.

COMMENT TO RULE 7.3

Direct Personal Contact

1. There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

2. The situation is therefore fraught with the possibility of undue influence, intimidation and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct, personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

3. Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

4. Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

5. In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

6. This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

7. A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

II. *In re Skinner*, 740 S.E.2d 171 (Georgia 2013)

In the Supreme Court of Georgia

Decided: May 19, 2014

S14Y0661.IN THE MATTER OF MARGRETT A. SKINNER.

PER CURIAM.

The State Bar of Georgia made a formal complaint against respondent Margrett A. Skinner (State Bar No. 650748), alleging violations of Rules 1.3, 1.4, 1.6, and 1.16 of the Georgia Rules of Professional Conduct. Prior to an evidentiary hearing on the formal complaint, Skinner filed a petition for voluntary discipline, admitting that she violated Rule 1.6 by improperly disclosing confidential information about a former client, and in which she agreed to accept a Review Panel reprimand for the violation. The special master and the State Bar recommended that we accept the petition for voluntary discipline. We rejected the petition, however, noting that a Review Panel reprimand is “the mildest form of public discipline authorized . . . for the violation of Rule 1.6,” In the Matter of Skinner, 292 Ga. 640, 642 (740 SE2d 171) (2013), and noting as well that the petition and accompanying record did not “reflect the nature of the disclosures (except that they concern [unspecified] personal and confidential information) or the actual or potential harm to the client as a result of the disclosures.” *Id.* at 642, n.6. Following our rejection of the petition, the special master conducted an evidentiary hearing, and he made his report and recommendation on December 18, 2013, in which he found that

Skinner violated Rules 1.4 and 1.6 but not Rules 1.3 and 1.16.1 Neither party sought review of the report by the Review Panel, and the matter is again before this Court for decision.

In his report, the special master found that a client retained Skinner in July 2009 to represent her in an uncontested divorce, and she paid Skinner \$900, including \$150 for the filing fee. For six weeks, the client did not hear anything from Skinner, and after multiple attempts to contact Skinner, the client finally was able to reach Skinner again in October 2009. At that point, Skinner informed the client that Skinner had lost the paperwork that the client had given to Skinner in July. Skinner and the client then met again, and Skinner finally began to draft pleadings for the divorce. The initial drafts of the pleadings had multiple errors, and Skinner and the client exchanged several drafts and communicated by e-mail about the status of the case in October and early November 2009. Those communications concluded by mid-November, and Skinner and the client had no more communications until March 18, 2010, when the client reported to Skinner that her husband would not sign the divorce papers without changes. In April 2010, both the client and her husband signed the papers.

A disagreement developed about the fees and expenses of the divorce. Skinner asked the client for an additional \$185 for certain travel expenses and the filing fee. In April and early May 2010, Skinner and the client exchanged several e-mails about the request for additional money. Then, on May 18, the client informed Skinner that she had hired another lawyer to complete her divorce, and she asked Skinner to deliver her file

to new counsel and to refund \$750. Skinner replied that she would not release the file unless she were paid. Although Skinner eventually refunded \$650 to the client, Skinner never delivered the file to new counsel, contending that it only contained her “work product.” New counsel completed the divorce within three months of her engagement.

Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. The client filed a grievance against Skinner, and in response to the grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.

The special master found that Skinner violated Rule 1.4 when she failed between July and October 2010 to keep her client reasonably informed of the status of the divorce, and the special master found that Skinner violated Rule 1.6 when she disclosed confidential information about her client on the Internet. The special master found no violation of Rules 1.3 and 1.16.2 Turning to the appropriate discipline for these violations, the special master noted that Skinner had substantial experience as a practicing lawyer — she was admitted to the Bar in 1987 — which is an aggravating

circumstance. The special master also found, however, a number of mitigating circumstances, including that Skinner had no prior discipline, the absence of a dishonest or selfish motive for her improper conduct, that she refunded a substantial portion of her fee to the client even after doing work for the client, that she accepted responsibility for her misconduct by filing a petition for voluntary discipline, that she otherwise was cooperative in the disciplinary proceedings, and that she had expressed remorse for her misconduct. In addition, the special master found as mitigation that Skinner experienced a number of personal problems during her representation of the client and the subsequent time that she posted the confidential information about her client on the Internet, including colon surgery in April 2010, the diagnosis of both her mother and father with cancer (she was their primary caregiver), and the death of her father. For both violations, the special master recommended a public reprimand, with the additional condition that Skinner “be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures.”

We have reviewed carefully the record and the very detailed report of the special master, and we agree with his recommendation of a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files and case tracking procedures. See *In the Matter of Adams*, 291 Ga. 173 (729 SE2d 313) (2012). Although other jurisdictions occasionally have disciplined lawyers more severely for improper disclosures of client confidences, we

note that those cases involved numerous clients and violations of other rules, see *Office of Lawyer Regulation v. Peshek*, 334 Wis.2d 373 (798 NW2d 879 (2011) (60-day suspension), or the disclosure of especially sensitive information that posed serious harm or potential harm to the client, see *In re Quillinan*, 20 DB Rptr. 288 (Ore. Disp. Bd. 2006) (90-day suspension), available at www.osbar.org/-docs/dbreport/dbr20.pdf. In this case, the improper disclosure of confidential information was isolated and limited to a single client, it does not appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances. Accordingly, we hereby order that Skinner receive a public reprimand in accordance with Bar Rules 4-102 (b) (3) and 4-220 (c), and we order that she consult with the Law Practice Management Program of the State Bar as set forth above and implement its suggestions in her law practice.

Public reprimand. All the Justices concur.

III. ABA Model Rules and Decisions from Other States

ABA Model Rules

ABA Model Rule 1.1 (Competence)

ABA Model Rule 1.5 (Fees)

ABA Model Rule 1.6 (Confidentiality of Information)

ABA Model Rule 1.7 (Conflict of Interest: Current Clients)

ABA Model Rule 1.7 (Conflict of Interest: Current Clients: Specific Rules)

ABA Model Rule 1.15 (Safekeeping Property)

ABA Model Rule 1.16 (Declining or Terminating Representation)

ABA Model Rule 1.18 (Duties to Prospective Client)

ABA Model Rule 5.5 (Unauthorized Practice of Law; Multi-jurisdictional Practice of Law)

ABA Model Rule 7.1 (Communications Concerning a Lawyer's Services)

ABA Model Rule 7.2 (Advertising)

ABA Model Rule 7.3 (Solicitation of Clients)

ABA Model Rule 7.4 (Communication of Fields of Practice and Specialization)

ABA Model Rule 8.4 (Misconduct)

Lawyer Reviews

Hunter v. Virginia State Bar, 285 Va 485, 744 SE2d 611 (2013) Searcy v. Florida Bar, 2015 WL 5769238 (ND Fla 2015)

In re Loughlin, 148 So3d 176 (Louisiana 2014)

Lawyer Internet Marketing

North Carolina Legal Ethics Opinion 2010-14 (April 27, 2012) Habush v. Cannon, 828 N.W.2d 876 (Wis. Ct. App. 2013)

In re Naert, 2015 WL 5722624 (S.C. Sup. Ct. Sept. 30, 2015) Social Media Postings

California Formal Opinion 2012-186

NYC Ethics Opinion 2015-7

Pennsylvania Bar Association Ethics Opinion 2014-300

Philadelphia Bar Association Ethics Opinion 2010-6, 2011

North Carolina Ethics Opinion 8

New York State Ethics Opinion 1062 (2015)

New York State Ethics Opinion 967 (2013)

New York State Ethics Opinion 972 (2013)

New York State Ethics Opinion 912 (2012)

New York State Ethics Opinion 899 (2011)

New York State Ethics Opinion 848 (2011)