

2022

**BENCH AND BAR
CONVENTION**



MARKETING & THE MEDIA

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- ▶ When Advertising Rules Apply to Marketing
- ▶ Two Considerations to Navigate Advertising
- ▶ Minimum Information Required
- ▶ Facebook, Instagram and Video Sharing Sites
- ▶ ABA Rule Trial Publicity
- ▶ Florida Rule Trial Publicity

OVERVIEW



WHEN ADVERTISING RULES APPLY 4-7.11

All forms of communication including:

- Electronic mail
- Internet (including web banners, pop-ups, websites, social networking, and video sharing media)

If you are promoting your practice of law, YOU ARE
ADVERTISING!!!!!!!!!!!!

TWO CONSIDERATIONS TO NAVIGATE LAWYER ADVERTISING IN FLORIDA

- **Medium** (Where: method of delivering message)
- **Content** (What: all compositional elements in message: wording, pictures, video, etc.)

Example of Loving Significant Other Posting

Application of rules always depend on the medium and content of the advertisement.

MINIMUM INFORMATION REQUIRED IN ADVERTISEMENTS

- Name of lawyer, law firm 4-7.12(a)(1)
- Geographic disclosure of bona fide office by city, town, or county 4-7.12(a)(2)

PRESUMPTIVELY VALID CONTENT

4-7.16

Presumptively valid content is also commonly referred to as “Tombstone/Safe Harbor” information. An advertisement in any public medium (e.g., t.v., radio, print, Internet banner, Internet pop-up) that contains no information other than the following **is not** required to be filed for review:

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- An illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statute of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books

THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING GUIDELINES FOR NETWORKING SITES

- There are numerous networking sites of various types. Some networking sites were designed for social purposes, such as **Facebook**, **MySpace**, and **Twitter**. Notwithstanding their origins as social media, many use these social networking sites for **commercial purposes**. Other networking sites are specifically intended for commercial purposes, such as **LinkedIn**.
- Pages appearing on **networking sites** that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules.

VIDEO SHARING SITES (YOUTUBE, VIMEO, TIKTOK, ETC.)

- Videos of individual lawyers on video sharing sites that are used solely for purposes that are unrelated to the practice of law are not subject to the lawyer advertising rules.

Videos appearing on video sharing sites that are used to **promote** the lawyer or law firm's practice are subject to the lawyer advertising rules. These videos and all information the lawyer or law firm posts with them must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21.

However, such videos are considered at the request of the prospective client, and therefore are not required to be filed with The Florida Bar for review. Rule 4-7.20(e).

However, **invitations to view** or link to the lawyer's video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business must comply with requirements for direct written solicitation under Rule 4-7.18(b).

THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING GUIDELINES FOR NETWORKING SITES

- **Instant messages** and **direct e-mail** must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b).
- **Posts by third persons** If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request. Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above.

CONTINUED...

THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING GUIDELINES FOR NETWORKING SITES

- **Twitter** Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a).
- **Networking sites** The SCA is of the opinion that a page on a networking site is sufficiently similar to a website of a lawyer or law firm that pages on networking sites **are not** required to be filed with The Florida Bar for review.
- **Banner advertisements** In contrast with a lawyer's page on a networking site, a banner advertisement posted by a lawyer on a social networking site is subject not only to the requirements of Rules 4-7.11 through 4-7.18 and 4-7.21, but also **must be filed for review unless** the content of the advertisement is limited to the safe harbor information listed in Rule 4-7.16. See Rules 4-7.19 and 4-7.20(a).
- **YouTube** Videos that are used to promote you or your law firm's practice are subject to the lawyer advertising rules. The Standing Committee on Advertising has determined that such videos **do not** have to be filed for review.

TRIAL PUBLICITY RULE

4-3.6

- a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding. (b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.
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TRIAL PUBLICITY RULE

4-3.6

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

ABA TRIAL PUBLICITY RULE 3.6

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

ABA TRIAL PUBLICITY RULE 3.6

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

ABA TRIAL PUBLICITY RULE 3.6

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

FREQUENTLY ASKED QUESTIONS ???

- ▶ **What rules apply to my website?** 4-7.11 to 4-17. Not required to file for review per 4-7.20(g).
- ▶ **What rules apply to social media?** It depends. If for social purposes, not subject to advertising rules. If used to promote you or firm, advertising rules apply. Not required to file for review per Standing Committee on Advertising.
- ▶ **What rules apply to YouTube and similar sites?** It depends. If for social purposes, not subject to advertising rules. If used to promote you or firm, advertising rules apply. Not required to file for review per Standing Committee on Advertising.
- ▶ **Do I have to file my Facebook page or LinkedIn?** No. If used to promote you or firm, advertising rules apply. Not required to file for review per Standing Committee on Advertising.
- ▶ **Do I have to file banners, pop-ups, other advertisement on a social networking site or video sharing site of a third party's social networking page?** Yes. Subject to filing under 4-7.20. However, exempted if "Tombstone"/"Safe Harbor" under 4-7.16 and 4-7.19.
- ▶ **Are direct email advertisements ever exempt from filing?** No, unless they are sent to other lawyers, family members, current clients, past clients, or persons who have asked to receive information per 4-7.20(d) and (e).

REVIEW

POINTS TO REMEMBER

- ▶ **#1** Application of rules always depends on the medium and content of the advertisement.
- ▶ **#2** Rules apply to all forms of communication.
- ▶ **#3** Always remember the two minimum requirements for all advertisement.
- ▶ **#4** Pages appearing on social networking sites are subject to advertising rules. If you post an advertisement **or** share on a third party's social networking page, it is subject to filing UNLESS exception applies.

SOURCES

- ▶ **The Florida Bar Handbook on Lawyer Advertising and Solicitation**
- ▶ **The Florida Bar Standing Committee on Advertising Guidelines For Networking Sites**
- ▶ **Board of Governors New Policy On Review of Advertising Filing (Effective July 1, 2014)**
- ▶ **The Florida Bar Standing Committee on Advertising Handbook on Lawyer Advertising and Solicitation**
- ▶ **The Young Lawyers Division Social Media Pocket Guide**
- ▶ **Florida Advertising Opinions**
- ▶ **Ethics and Trial Publicity by Walter Saurack and Peggy Chen**
- ▶ **Media Mania: A Practical and Ethical Approach For Attorneys Contacts With Reporters by Andrew W. Lester**

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