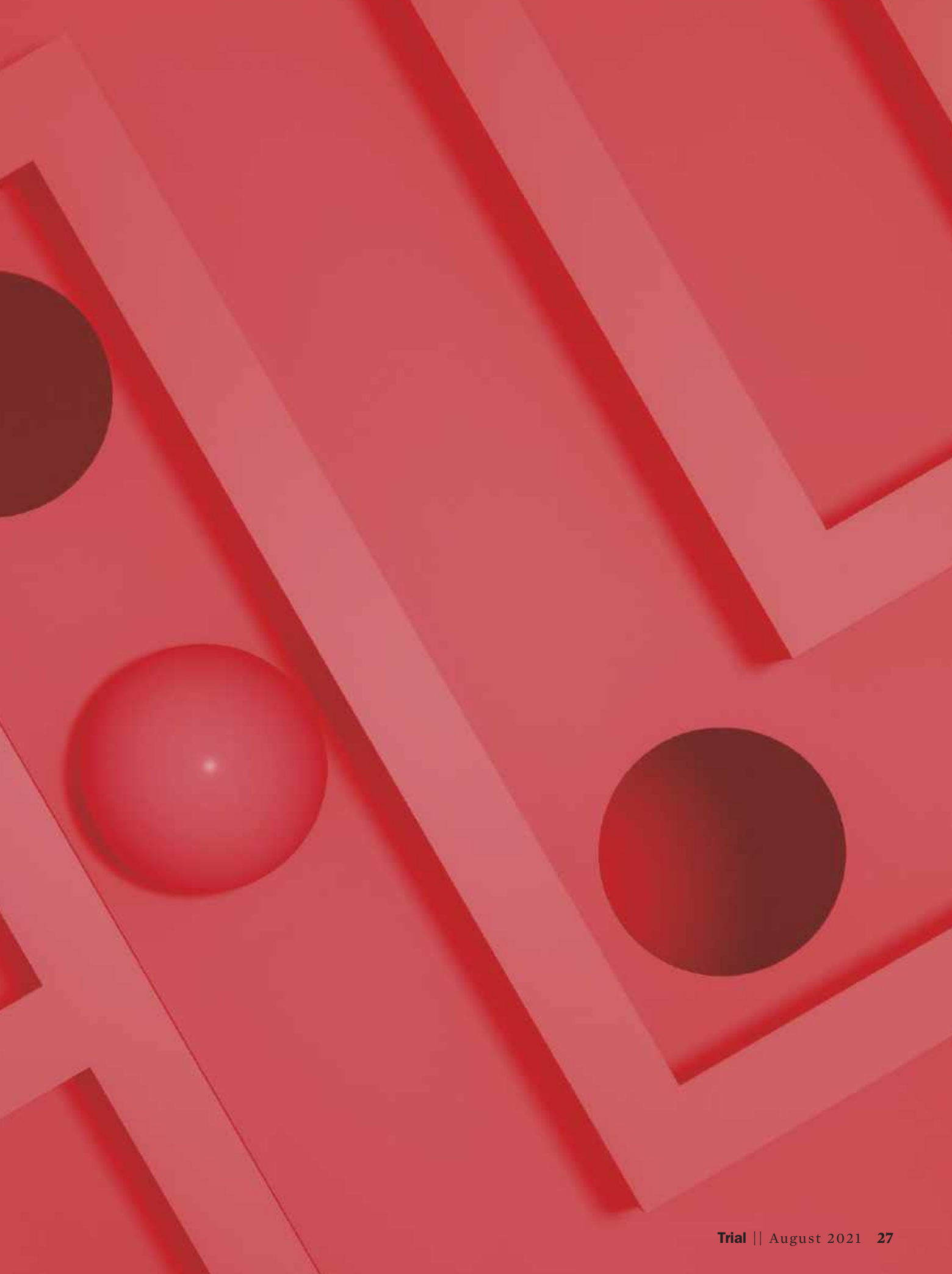


Navigating Ethical MINEFIELDS

Be prepared for the ethical challenges that come with social media use—whether by parties, witnesses, jurors, or attorneys.

By || **HEIDI L. WICKSTROM**



As social media becomes more and more prevalent in society, attorneys must be prepared to navigate the ethical minefields that come along with it. In the United States, 72% of adults use social media.¹ The majority of our clients, opposing counsel, jurors, and witnesses use social media. Since a diligent attorney must act with “zeal in advocacy upon the client’s behalf,” understanding the risks and obligations related to social media is crucial.²

ABA Model Rule of Professional Conduct 1.1 mandates that attorneys competently represent their clients—and this includes being conversant in “the benefits and risks associated with . . . technology.”³ Most state codes of professional responsibility have a similar requirement.⁴ Consequently, an attorney’s ethical duty of due diligence and representation now calls for at least a baseline level of competence related to social media. Whether you are protecting your client’s online presence, researching, or active in your personal and professional networking accounts, you can’t afford to be deficient in this important area of technology.

Your Client’s Social Media

Ask about your client’s social media activities during the initial case consultation. You will almost certainly find that your client uses some form of social networking, and the earlier you learn about it, the sooner you can recognize potential issues that may arise later.

Your client’s social media accounts are not discoverable simply because they exist.⁵ But be sure to inform clients not to destroy or alter any existing social media content. This can run afoul of Model Rule of Professional Conduct 3.4(a), which prohibits lawyers from unlawfully obstructing another party’s access to evidence or unlawfully altering, destroying, or concealing a document with “potential evidentiary value.”⁶

This rule also precludes lawyers from instructing their clients to destroy, hide, or alter evidence.⁷ The best practice is to avoid making any recommendation to clients that would explicitly or implicitly indicate they should destroy any past social media content.

However, in all jurisdictions, instructing your clients to maintain strong privacy controls is well within your ethical duty as their attorney. There is nothing improper about ensuring that your client maintains previously posted social media content but takes precautions moving forward to make accounts private or not searchable by those unauthorized to do so.⁸ Also note that it is permissible to advise clients to not accept friend or follow requests from strangers and to remove people they do not know or trust from existing followers or friends.

You likely will face discovery requests from defendants that broadly demand access to your clients’ social media accounts. Some courts have noted that discovery requests would be overbroad if they request *all information* contained in plaintiffs’ social media accounts.⁹ And some courts have held that the information sought must be relevant and material to the issues in the case: Requests must be specific; narrowly tailored with precise dates; and relevant to the injuries, claims, and disputes at issue.¹⁰

For example, a New York appellate court ruled that defense counsel’s request for an authorization permitting unrestricted access to the plaintiff’s Facebook account was a “fishing expedition,” conducted with the “mere hope of finding relevant evidence.”¹¹

Inform your clients that any posts related to the claim at hand may become

discoverable. This means that you must clearly instruct them to not post anything relevant to the lawsuit or their damages, even if the account is private, on the chance the account is searched during discovery at some point.

When evaluating the relevance of private portions of a party’s social media profile, courts have tended to agree that the critical factor in this inquiry is whether the public portion contains relevant information—a defendant “does not have a generalized right to rummage at will through information that [the] Plaintiff has limited from public view.”¹² But when claims for emotional distress and anguish are being asserted, a minority of courts have broadened what defense counsel may review from a plaintiff’s social media presence.¹³

When attorneys disagree on what social media information is appropriate to provide, courts often order the disclosure of relevant social media evidence based on a factual predicate for the request,¹⁴ a sufficient showing from a public search, or a prior search that turned up deleted information.

For instance, if opposing counsel has photographs obtained from a public social media search of a litigant who claims to be disabled playing sports, a

court can order a more extensive search of the litigant's social media account.¹⁵ Some courts also may conduct an in camera review of a party's social media information before determining what should be produced.¹⁶ Commonly, courts permit some disclosure of social media information but will limit it based on what is appropriate in each case.¹⁷

Communication With Parties and Witnesses

While local rules determine the precise ethical boundaries of interacting with litigants, witnesses, and jurors, there are some important ground rules that should guide your practice regardless of jurisdiction.

Model Rule of Professional Conduct 4.2 prohibits communicating with a represented party; this applies to all forms of communication, including social networking.¹⁸ With deception being even easier in the virtual world than in person, making false or misleading representations online is of heightened concern.¹⁹ Several state ethics opinions make it clear that the rules of professional conduct prohibiting deceptive conduct or misrepresentations to third parties extend to cyberspace.²⁰

For example, do not "friend" a party or a represented witness, whether doing

so as yourself or by misrepresenting your identity in some fashion. In the same vein, never instruct a member of your staff to friend or interact with any party or represented witness. The best and safest practice is to avoid interacting online with any potential witnesses.

All jurisdictions permit attorneys to friend a client or former client on social media. But if you do so via your personal social media accounts, your client can then view any of your posts, and your "friendship" on social media can sometimes be publicly viewed. Think very carefully about using your personal account to follow or friend a current client on social media—your personal social media presence may not be palatable to all clients. A better practice is allowing current or former clients to follow your law firm's social media page, which likely does not contain personal updates or information.

Online Juror Research

Juror research has always been a crucial tool in a lawyer's trial preparation

arsenal. With today's easy access to social media, broaden your jury research to include a thorough review of potential jurors' online presence.

The ABA has issued a formal opinion that a lawyer is ethically permitted to review a juror's social networking presence, provided that no contact is made with the juror.²¹ The formal opinion clarifies that jurors being aware that they are being researched by an attorney (for instance, by receiving "alerts" from the social media provider that the attorney has viewed their account) does not constitute a "communication" with the lawyer.²² However, before searching a platform that will alert the juror of the search, consult your jurisdiction's local rules to ensure it has not enacted stricter controls.²³

A minority of jurisdictions have begun holding attorneys to a higher standard for demonstrating due diligence when researching prospective jurors. For instance, Missouri has imposed an affirmative duty on lawyers to conduct certain internet background searches

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of potential jurors if the lawyer plans to argue potential juror bias.²⁴ Regardless of whether you are in a jurisdiction that requires an internet search to prove juror bias, conduct a search of potential jurors on social media, and document the results in the event they must be raised to the court should you learn of a potential juror's lack of candor.

Your Social Media

Attorneys' ethical duties of confidentiality, due diligence, and candor extend to online representations regarding cases and practice areas. Over 80% of law firms in the United States use one or more social networking platform for information and marketing purposes.²⁵ While these platforms can be incredible resources to connect with potential, current, and former clients, be cognizant of ethical boundaries. When it comes to providing legal services and using social media as a communication tool, avoid making any statements that could be construed as a false or misleading communication.²⁶

On the web, geographic or situational boundaries do not exist as they do in the real world—so take extreme care to avoid advertising in or creating the appearance that you are able to practice law in a jurisdiction where you are not licensed. Model Rule of Professional Conduct 5.5(b)(2) explicitly prohibits lawyers from sharing information that would make the public believe they are admitted to practice law in a jurisdiction where they are not licensed.²⁷ If you advertise outside of your jurisdiction, clearly indicate where you are licensed and that you use local counsel when representing people in other states.

Similarly, while posting legal blogs, articles, and practice tips on a law firm website is permissible, include disclaimers stating that a post is not meant to form an attorney-client relationship or provide legal advice.²⁸ Be

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cautious when crafting informational and marketing elements of a law firm website, emails, and other online communications. Just because the communication is online does not mean that the ethics rules governing legal advertising and marketing do not apply.

In-person solicitation of clients by attorneys is generally prohibited.²⁹ However, most jurisdictions do not hold online content geared to the general public to the same standards as in-person solicitation—the key determining factor is whether a person can easily disregard, ignore, block, or delete the content.³⁰

For example, an attorney sending repeated, direct messages to a social media user would likely violate ethics rules, but a chat box offering assistance on a firm page or an email advising of legal updates would not.³¹ Many attorneys and firms outsource work to digital marketing companies that create marketing copy and blog posts for a firm website, so remember that an attorney's ethical responsibility includes overseeing and approving what is posted on the firm website. Diligently and carefully review any outsourced copy

that will be posted in your name or your firm's name.


Posting about a client's case on law firm social media, even in the most benign fashion, could run afoul of the ethical duty to keep client information confidential, unless explicitly authorized.³² This duty also extends to client data; your firm should instruct attorneys and staff to conduct social media communication with clients through private messaging, including sending case updates through private or secure networks.

Many companies rate lawyers and their services and post ratings online for the public to view—for instance, Avvo, LinkedIn, and Martindale. Ethics opinions generally permit attorneys to participate in services that allow third parties to make comments or “rate” lawyers in ways the lawyers could not do on their own.³³ However, subject these posts to the same scrutiny as your own law firm posts, and ensure they do not contain false or misleading statements of fact.³⁴ Furthermore, with very few exceptions, it is unethical to pay someone, or offer a “credit” for a legal fee, to provide a positive review on any platform, even if true.³⁵

Finally, if you or your law firm receive a negative online review or comment from a current or former client, be careful when considering whether and how to respond. A respectful response that does not disclose any confidential information is not unethical.

But be cognizant of the ABA's new Formal Opinion 496, which addresses responding to online criticism from clients. On its own, a negative online review from a client does not create a “controversy” that entitles the attorney to disclose any confidential information in responding to the criticism.³⁶ An express statement that the allegation is false or that your ethical duties prevent you from responding in detail does not

violate duties of professional conduct.³⁷ However, disclosing details of the client's case in response to the review, even if true, is expressly forbidden.³⁸

Social media can be an incredible asset for maximizing your practice and thoroughly investigating and litigating your clients' cases, so long as you remain mindful of your ethical responsibilities and the rules of your particular jurisdiction when navigating this evolving area. 



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NOTES

1. Pew Research Ctr., *Social Media Fact Sheet*, Apr. 7, 2021, <https://www.pewresearch.org/internet/fact-sheet/social-media>.
2. Model R. Prof'l Conduct 1.3 cmt. 1.
3. Model R. Prof'l Conduct 1.1 cmt. 8 (Lawyers should "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.").
4. *See, e.g.*, 204 Pa. Code R. 1.1 cmt. 8; Ill. Sup. Ct. R. 1.1 cmt. 8.
5. *See, e.g.*, *Tapp v. N.Y. St. Urban Dev. Corp.*, 102 A.D.3d 620 (N.Y. App. Div. 2013).
6. Model R. Prof'l Conduct 3.4(a).
7. *Id.*
8. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014); N.Y. Cty. Lawyers Ass'n, Ethics Op. 745 (2013).
9. *Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018); *Vasquez-Santos v. Mathew*, 168 A.D.3d 587 (N.Y. App. Div. 2019).
10. *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525 (N.Y. App. Div. 2010) (The defendant must have a "factual predicate" based on public portions of a Facebook account to seek private portions of the account.); *Potts v. Dollar Tree Stores*, 2013 WL 1176504, at *3 (M.D. Tenn. Mar. 20, 2013) (The defendant "lack[ed] any evidentiary showing that Plaintiff's public Facebook profile contains information that will lead to the discovery of admissible evidence."); *Carlson v. Jerousek*, 68 N.E.3d 520 (Ill. App. Ct. 2016).
11. *McCann*, 78 A.D.3d at 1525.
12. *Palma v. Metro PCS Wireless, Inc.*, 18 F. Supp. 3d 1346, 1347 (M.D. Fla. 2014); *see also Caputi v. Topper Realty Corp.*, 2015 WL 893663, at *5-8 (E.D.N.Y. Feb. 25, 2015).
13. *Hinostrza v. Denny's Inc.*, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018) ("[I]nformation from social media is relevant to claims of emotional distress because social media activity, to an extent, is reflective of an individual's contemporaneous emotions and mental state."); *see also Holter v. Wells Fargo & Co.*, 281 F.R.D. 340 (D. Minn. 2011); *Locke v. Swift Transp. of Ariz.*, 2019 WL 430930 (W.D. Ky. Feb. 4, 2019).
14. *See, e.g., Medina v. City of N.Y.*, 2015 WL 9316065 (N.Y. Sup. Ct. Dec. 22, 2015).
15. *Vasquez-Santos v. Mathew*, 168 A.D.3d at 588.
16. *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, at 2 (E.D. Mich. Aug. 24, 2012), <https://tinyurl.com/dr77j7n4> (After reviewing "literally thousands of entries," the court found that the majority had no relevance to the case and designated the specific entries that it determined were discoverable.); *Richards v. Hertz Corp.*, 100 A.D.3d 728 (N.Y. App. Div. 2012) (When searching public portions of the plaintiff's Facebook account, the defendants found a photo of her skiing, despite the plaintiff claiming her injuries prevented her from playing sports and her pain was exacerbated by cold weather. The court granted a motion for in camera review of the plaintiff's Facebook posts and photos since the incident.).
17. *Scott v. U.S. Postal Serv.*, 2016 WL 7440468 (M.D. La. Dec. 27, 2016) (The court found the defendant's discovery requests were overly broad and modified them to require the plaintiff to identify the sites, her usernames, and the last time she had been on each site, but not the total time she spent on each one.); *but see Forman*, 30 N.Y.3d at 665 (New York high court held that disclosure of materials from an injured plaintiff's Facebook account, with limitations against improper "fishing expeditions," was consistent with New York's liberal approach to pretrial discovery.).
18. Model R. Prof'l Conduct 4.2.
19. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-2, at 2 (2010).
20. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); N.Y. City Bar Ass'n, Formal Op. 2010-2; N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010); Or. Bar Ass'n, Formal Op. 2013-189 (2013); N.H. Bar Ass'n Ethics Comm., Advisory Op. No. 2012-13/05 (2013).
21. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).
22. *Id.* at 5.
23. *See, e.g.*, N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012).
24. *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010) (en banc); Mo. Sup. Ct. R. 69.025.
25. Allison Shields, *2019 Websites & Marketing*, Am. Bar Ass'n, Oct. 23, 2019, <https://tinyurl.com/2bmkfcau>.
26. Model R. Prof'l Conduct 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").
27. Model R. Prof'l Conduct 5.5(b)(2).
28. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018).
29. Model R. Prof'l Conduct 7.3.
30. *See, e.g.*, Ill. Bar Ass'n, Advisory Op. on Prof'l Conduct 96-10 (1997), *aff'd*, Ill. Bd. Governors (2010) (finding an internet website to be "the electronic equivalent of a telephone directory 'yellow pages' entry" and "merely posting general comments on a bulletin board or chat group" not to be solicitation).
31. *See, e.g., id.*
32. Model R. Prof'l Conduct 1.6; *see Hunter v. Virginia St. Bar ex rel. Third Dist. Comm.*, 744 S.E.2d 611 (Va. 2013) (Virginia attorney's blog posts were deemed commercial speech that the state bar could regulate, independent of the argument that the speech was protected by the First Amendment.).
33. Mich. Bar Ass'n, Op. RI-147 (1992); N.Y. R. Prof'l Conduct 7.1.
34. Model R. Prof'l Conduct 7.1.
35. Model R. Prof'l Conduct 7.2(b) ("A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services[.]"); *but see* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 1052, at 4 (2015) ("A lawyer may give clients a \$50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.").
36. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 496, at 3 (2021).
37. L.A. Cty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Op. 525 (2012); Model R. Prof'l Conduct 1.6.
38. *See* Bailey E. Felts, *Think Twice Before Responding to Negative Online Reviews*, Ill. B.J., July 2018, at 50, <https://tinyurl.com/n3tw4v5d>.