

The Ethics of the Pivot

What to know if you need to change directions in your practice.

By [William Hornsby](#)

It's no surprise that the demand for certain practice areas ebbs and flows with the economy. In good times, we see increased demand for real estate transactions, employer-related immigration and small business matters, for example. Bad times result in more demand for economically related services such as bankruptcy (duh), consumer matters, including debt collection, and landlord-tenant disputes.

While many lawyers and firms that experience a downturn simply ride out the storm, perhaps with staff reductions or other budget-saving tactics, others will try to pivot into an emerging hot area. Of course, firms that offer a variety of services can more easily allocate their resources in response to the reductions and demands. Still, single-issue firms that focus on a particular practice area and many solos are unable to do so. Consequently, some of them make the pivot to an area of emerging demand.

During the Great Recession, we saw a spike of disciplinary actions against lawyers who tried to pivot. Their problems were rooted in their lack of knowledge in their new field of practice, although typically compounded by a bit of larceny in their hearts.

While all of a lawyer's state rules of professional conduct apply regardless of the area of practice, lawyers who pivot need to focus on two fundamental ethics issues:

- The obligation to provide *competent* services
- The obligation to market those services in ways that are *truthful and not misleading*.

Competent Representation

The very first rule of professional conduct, Rule 1.1, requires competent representation. It is the legal profession's equivalent to the Hippocratic oath, although it goes further than doing no harm. It is a simple-to-read, but sometimes hard-to-apply two-sentence rule. ABA Model Rule 1.1 states:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation.”

But what exactly does this mean in a profession that licenses lawyers in a way that gives them the green light to practice in any area of law? The [comment breaks down](#) every part of the rule and should be read by all lawyers — and particularly those who are or are thinking of making a pivot.

The comment reinforces the notion that a lawyer is qualified to handle any type of matter: “A lawyer need not have special training or prior experience to handle legal problems of the type with which the lawyer is unfamiliar.” However, to meet the “knowledge and skill” requirement of the competence standard, the comment indicates several factors that should be examined, including:

- The complexity and specialized nature of the matter
- The lawyer’s general experience
- The lawyer’s training and experience in the specific field
- The lawyer’s preparation and study given to the matter
- Whether the lawyer will associate or consult with a lawyer who has established competence in the field

The “thoroughness and preparation” standard of the rule involves a look at what’s at stake. According to the comment, more complex matters require more extensive treatment than matters of lesser complexity and consequence. This standard may be challenging since, from the client’s point of view, every legal matter is complex!

The last issue under Rule 1.1 regarding a pivot involves the decision to co-counsel with a lawyer who has some degree of expertise in the lawyer’s new area of practice. The comment points out the need to obtain the client’s informed consent to the arrangement as well as compliance with a host of additional rules such as confidentiality and fee-sharing.

Truthfully Marketing Legal Services

Beyond the competency issues, a lawyer who pivots must consider the impact of that decision on marketing those new legal services. The cornerstone of state rules governing lawyer advertising and solicitation requires that all communications be truthful and non-deceptive. Rule 7.1 of the ABA Model Rules, and its corresponding state rules, prohibits

communications that are false or misleading. Like Rule 1.1, Rule 7.1 is very simply stated but complex in its application. The rule states:

“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

Let’s focus on misleading here.

No lawyer, especially one who pivots at midcareer to a new practice area, is going to advertise that they are new at this. But what are the challenges for a lawyer to avoid deception when making the pivot?

Consider these advertisements by a lawyer who makes the pivot from one practice area to another:

- A client testimonial on Yelp, that the lawyer then includes on the firm’s website, stating, “Lawyer Jane Doe was there for us when we needed her.”
- A website that includes the icon for a selective directory, such as Best Lawyers, even though the lawyer was selected for one practice area and is now going into another area.
- A business card that states, “Specializing in XYZ law.”

Quiz time: Which of these is almost certain to be compliant, which is a bit dicey, and which is likely to be deemed misleading?

Since the client testimonial does not involve the field of practice but rather a standard of service, there is no reason to believe a lawyer who pivots will not continue to offer the same standard of service. Therefore this type of advertisement is not likely to be deemed a misrepresentation even when the client received services in a different area of law. Note, however, that your state may decide this otherwise.

A few states have issued ethics opinions concluding that the advertisement of a listing in a selective directory is a misleading omission unless the ad includes information about when the listing occurred, e.g., the year, and what practice areas are involved. Therefore a designation that the lawyer was listed in the directory without further explanation that the

honor was for one field of practice could be considered a violation of Rule 7.1 if it implies that it is for a different area.

Not too long ago, the ethics rules in most states prohibited a lawyer from stating that he or she was a specialist or specialized in a particular area unless a state or state-approved organization certified the lawyer. Lawyers were able to advertise that they focused or concentrated in a field of practice or that they limited their services to a field of practice, if true. Most states, but not all, now permit a lawyer to indicate that he or she specializes in a field of practice if that is true and the advertisement does not state or imply that the lawyer is certified as a specialist unless that's the case.

This issue is addressed under Rule 7.4 in most states and in ABA Model Rule 7.2 and its comment. The comment to the ABA Rule, however, indicates that a lawyer should have experience and specialized training to advertise that he or she is a specialist in a practice area. So this is a term the pivoting lawyer should avoid until he or she meets those standards.

As we work our way through the current economic downturn, lawyers will find opportunities in practice areas they have not considered before. Some will pivot from one practice area to another. When they do, it is imperative they consider the impact of the ethics rules on their decisions.