Lawyer Advertising:
From Networking to Hashtag Law

BY SHEILA VAN DUYNE, ESQ.

Many years ago, there were two groups of lawyers: those who advertised and those who refused to do so because they believed it was, for want of a better word, tacky. In 1977, the U.S. Supreme Court held that it was unconstitutional to prohibit attorney advertising in *Bates v. State Bar of Arizona,* 433 U.S. 350, 381-382 (1977). Prior to advertising being accepted as a viable and respectable option, back in the days of practicing law by way of a telephone, Dictaphone, and inter-office routing envelopes, we came up with some old-school marketing efforts.

I remember one meeting when my law firm was feeling an economic pinch. All of us lawyers sat around the big table in the "war room" spit-balling ideas as to how best to bring in new cases. We spent a lot of time discussing whether we should attend church and become more involved in our local communities. We felt that our weekends should be spent bringing up estate planning or mentioning our latest legal win at a Kiwanis meeting.

Other marketing techniques included an annual all-male fishing trip with the clients, which always seemed incredibly unfair, or constant business lunches. I remember one attorney who went to lunch with his client and returned carrying six big file folders looking like God's gift to the firm.

Then there were the bad ideas – buying an entire room at the local watering hole drinks on the firm credit card, setting up a covert working relationship with a treating medical person, and whatever on earth happened in Las Vegas involving construction defect cases.

Lawyer marketing and lawyer advertising has greatly changed over the years. Prior to the Google Hit sales pitch, companies pushed case referral plans that sounded great but never delivered. Now most firms make a half-hearted effort to blog or post legal news on Facebook, but there are some that go all-out with internet advertising, social media, cool websites, blogs, Facebook pages, and client texts.

As a former member of the State Bar of Nevada's Lawyer Advertising Advisory Committee, it sometimes seems impossible to apply the advertising rules to everything out there. There has been an explosion of internet advertising. There are some who see internet advertising as being next to impossible to control. Some also feel it is

unfair to hamper lawyers when the rest of the world can communicate more freely with potential clients. For a more thorough discussion of these issues see the article "Rethinking Lawyer Advertising Rules" by Mark L. Tuft. It can be found at www.cwclaw.com/article/rethinking-lawyer-advertising-rules/.

It is difficult to police internet ads primarily because they are transient. They pop up or are driven by clicks. We continue to focus our review of advertising on print ads, mailings, commercials, billboards, and other similar media. This does not mean that the guidelines and rules do not apply to the internet. Rather it just means that lawyers are often on their own to self-police and apply the rules to their advertising, wherever it is. The general ethical considerations set forth in the rules and guidelines should extend to what we put onto the internet. Enforcement is a possibility – just a little less likely at this time, given the amount of internet advertising.

The first thing an attorney considering advertising should do is to review the American Bar Association and the state guidelines. In Nevada, the applicable statutory provisions are set forth in Rules of Professional Conduct Rules 7.1 through 7.5, and the statute of limitations is set forth in Supreme Court Rule 106. There is a four-year period that applies to advertisement review, which runs from the date the advertisement or communication was known to bar counsel. This is a fairly stretchable statute of limitations and is based upon the premise that we all need to submit our advertising to the state bar within 15 days of disseminating it under the RPC provisions.

The Rules of Professional Conduct sections set forth basic common-sense provisions regarding advertising requirements and explain the application review process. The state bar has dedicated a committee of volunteer attorneys to do the initial review of the submitted advertisements on a monthly basis and to meet ad hoc to review any pre-dissemination ads.

Typically, the committee receives somewhere from 20-40 ads to review each month. Tombstone ads are not required to be submitted. Websites with basic firm information are not submitted. Most internet advertising is not submitted, though it should be, and many lawyers simply do not realize they are supposed to submit their ads, billboard, articles, and mailings to the committee and/or forget to do so. Other lawyers, upon seeing an uncompliant ad, can also send that in, to the attention of the committee. Anything we send out to the public can wind up before the Lawyer Advertising Advisory Committee for review by your peers and potential referral to the state bar's Office of Bar Counsel for action.

The committee makes recommendations to the Office of Bar Counsel, which then addresses the matter with the lawyer submitting the advertising. Most advertisers are happy to make the necessary changes or additions to their ads after receiving a call from bar counsel.

The purpose of this committee is not to judge taste or decide what may or may not be effective advertising. There are many lawyers out there and many different types of ads. Some are funny. Some are awful. Some are good and some are bad. The committee just wants to make sure that the ads comply with the rules.

The main focus of the rules here in Nevada, and throughout the nation as

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well, is how attorneys include language related to their fees, how lawyers imply or predict success, how lawyers may improperly use or rely upon actors to portray themselves or their clients, whether lawyers include incorrect or incomplete legal disclaimers, and whether there has been an offering to pay for reviews or referrals. Lawyers must not claim a specialty or expertise unless they possess such. The overarching goal is for lawyers not to mislead their clients in any way.

In Nevada we look to RPCs 7.1, 7.2, 7.3, 7.4, and 7.5. For lawyers advertising for the first time, it helps to sign on to the state bar's website – www.nvbar.org – and locate the advertising resources, which include a summary of interpretive guidelines as well as the filing forms you need to complete with some basic instructions. Applications for new ads should be submitted within 15 days of dissemination of the ad. There is a $100 review fee. There is also an option to obtain pre-dissemination review for a $250 fee.

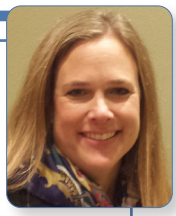
Some types of ads are exempt from this process: As mentioned above, these include the "tombstone ad," which includes basic information about a lawyer: name, address, phone number, office hours, languages, memberships etc. Additionally, announcements about change of address and any derivatives of prior approved ads also are exempt. These are obviously easy to begin with for a new lawyer seeking name recognition.

When filing a new and not-yet approved advertisement keep in mind the following: All disclaimers need to be visible and appropriately sized. Can you see it or hear it? Is it typed in such a small font that you cannot read it? Then it will not be compliant. There must also be no bait and switch. If there is an implication that a non-Nevada attorney will work on a case, this is inherently misleading. If an ad features a room full of attorneys who are just actors, this is inherently misleading. Disclaimers would be needed.

Anything that is seen to guarantee a result is also scrutinized: Representations as to what to expect – size of a verdict, guilt or innocence, consistently stellar results, a qualified 100 percent success rate, must have a disclaimer: "PAST RESULTS DO NOT GUARANTEE WARRANT OR PREDICT FUTRE CASES."

If a representation includes the millions of dollars won by the lawyer, then this number must be able to withstand review. The number should not be the gross amount, but instead must reflect the amount that went to the clients. Similarly, if a lawyer had an amazing jury verdict, it must not have been overturned later. If the ad discusses contingency-fee arrangements, then a lawyer needs to warn that a client may wind up being responsible for the other sides' legal costs if they lose. "No payment unless you win" is misleading without such a representation included.

The main goal is to prohibit legal advertising that is considered false or misleading. We are all officers of the court. We are not supposed to misrepresent our qualifications, our abilities, or our success rate, even if we are short on work. The end does not justify the means in attorney advertising. The committee does condone "mere puffery," but if it sounds like a factual representation or a guarantee, then we need to include appropriate disclaimers or back up our claims.



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