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LEGAL ETHICS

You Don't Say!: Some Thoughts on Attorney Advertising

By Marc Garfinkle

In 1978, when I was fresh out of law school in San Francisco, the lawyers' world was not the world we know today. Most attorneys were white men who wore American-made three-piece flannel suits and Florsheim wing-tip shoes. "Office equipment" referred to telephones, photocopy machines, a Dictaphone and IBM Selectric typewriters. Secretaries knew shorthand. Facsimile machines were still unknown except to the military; we used messengers to speed documents across town and cable addresses to speed messages around the world. At least in Northern California, handshakes still solemnized agreements between attorneys, although dealing with Los Angeles lawyers required a writing, even then.

To advertise their success, attorneys drove nice cars and sported business cards and letterhead that were steel-die engraved on linen paper. Large firms sponsored ball teams and bought tables at charity dinners. Real advertising, legal for attorneys early on in California, was associated with sleazy-seeming solos, mostly bankruptcy and divorce lawyers, who ran small announcements in newspaper classified ads.

My first real office was in San Francisco's then-seamy South of Market district. After a few months of working from our respective apartments, my buddy Chuck Bourdon and I hung out a pair of shingles from a warehouse space there. We were actually the first two lawyers in San Francisco's now lawyer-heavy 94107. I had a cool, artsy business card designed by a friend who now teaches art at S.F. State, and Chuck's card had the *Miranda* warnings written on the back. We were both a tad avant-garde.

Chuck got his business from friends in low places. I got my business downtown, by knocking on lawyers' doors and announcing my availability to try cases and otherwise help out. Fortunately, it has always been OK for attorneys to ask for work from other attorneys. Such is neither advertising nor soliciting. So, at the beginning of my career, much like now, my clients were lawyers. Word-of-mouth clients—"civilians"—would come later. "These things take time," everyone said. "You can't build a reputation overnight." Soon, a lawyer would be able to.

A few hundred miles south of me, two ambitious and courageous young lawyers named Jacoby and Myers had been building a law firm that was beginning to rock our world. They, and other entrepreneurial attorneys, were raising the bright, colorful flag of free speech above the fading pin-striped banner of attorney dignity. Positioning themselves as advocates of the First Amendment and consumer rights, these young firebrands challenged the establishment wherever the public's right to information or an attorney's freedom of speech conflicted with state laws and ethical canons that suppressed self-promotion by lawyers.

When I returned home to New Jersey in 1982, advertising by lawyers was nascent, but thriving. More and more lawyers were promoting their practices through the various media. Then, digital technology spawned a golden age of media, which went platinum with the explosion of social media. In a blink, we had more and more ways to distribute more and more messages, to more and more people more quickly and precisely than ever before.

Advertisers rushed to exploit each new means of getting their words out, and lawyers had become among the savviest of advertisers. We became increasingly aggressive in publicizing our fees, announcing our specialties and distinguishing ourselves from our colleagues. Even the word "colleague" began to fade from our lexicon, gradually being replaced by the word "competitor," referring to two lawyers practicing the same kind of law in the same market.

It is not surprising, then, that a Wild West of advertising developed. Exaggerated claims, nefarious suggestions of back doors to success, and scads of irrelevant or salacious information and attention-grabbers characterized too many of the ads. Carefully-worded language about an attorney's experience did not let on that the experience was irrelevant, insignificant or nonexistent. Some attorneys seemed to be promising a particular outcome. Others intimated that they could achieve results that other able lawyers could not, or that the results they had

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obtained for one client would be available to all. Direct comparisons with colleagues abounded, price advertising flourished, and discounters appeared. All sorts of problems arose between attorneys, and between attorneys and the public.

Somebody had to straighten out the mess, set guidelines and discipline violators, so, in 1986, the Supreme Court created a new watchdog, the permanent Supreme Court Committee on Attorney Advertising (CAA). It was not a day too soon. Like the Office of Attorney Ethics itself, the CAA serves both as an agent of consumer protection and as a guardian of the high standards that have historically characterized attorney behavior. The CAA consists of seven members, all volunteers, five of whom must be members of the bar and two of whom are public members. They serve for three-year terms, and may be appointed up to four times. It is thankless service.

Paramount among the CAA's functions is monitoring attorney compliance with the relevant Rules of Professional Conduct (RPCs). The CAA is also charged with providing advisory opinions and generating ethics grievances when appropriate, relative to noncompliant advertisements and other related communications. Any ethics investigation or grievance sounding in advertising will be assigned to the CAA for handling and disposition. Those relevant RPCs are specified in Rule 1:19-2A. They are: 7.1 "Communications Concerning a Lawyer's Service"; 7.2 "Advertising"; 7.3 "Personal Contact with Prospective Clients" (excluding subsections (c), (d), (e) and (f)); 7.4 "Communication of Fields of Practice"; and 7.5 "Firm Names and Letterheads."

The actual language of the advertising rules is instructive. The principal two RPCs, 7.1 and 7.2, are reprinted here in reverse order. Highlighted is some language that has been, and will continue to be, the focus of controversy and misunderstanding:

RPC 7.2. Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, Internet or other electronic media, or through mailed written communication. *All advertisements shall be predominantly informational.* No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. *No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel;* included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

RPC 7.1 Communication Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false 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 Rules of Professional Conduct or other law;…

For a fairly exhaustive list of advertising "don'ts," refer to Kevin H. Michel's incomparable "New Jersey Attorney Ethics: The Law of New Jersey Lawyering." The book is updated annually, so it will reflect all rule changes that impact advertising. For example, until last year, the Office of Attorney Ethics had always required that our promotional material, business cards and letterheads include a bona fide office address. In 2013, the bona fide office rule was finally abandoned. Almost instantly, the venerable (and daunting to many) address requirement became one of access, availability and a fixed physical location. With social media advertising and interstate law firms both becoming so popular, we can continue to expect rapid changes in our advertising parameters.

Since *any* communication concerning an attorney's services is subject to scrutiny, unwitting lawyers are often running afoul of some advertising guideline or other. Because they have letterheads, business cards, office stationery, firm brochures or their names in gilt on a window, even lawyers who do not advertise must understand the limits above. Because they belong to a networking organization or an organization where they network, lawyers must know the basic advertising rules. Because they have an "of counsel" to their firm, or because they *are* of counsel, because they have an "elevator pitch" that describes their practice in 15 seconds or because they support a sports team with the sponsors' names on the shirts, because they forgot to remove their sign from the door of their last office or because they want to change the message on their voice mail, lawyers need to know what attorney advertising comprises and what the guidelines are.

The RPCs and the CAA make little distinction between an ad in the phone book and the attorney's business card. What you write in the ad journal at a bar association dinner, what you indicate on your card as your specialties, what you respond when asked what you do, what you include in your letterhead and what you say at your networking group all put you within the purview of the RPCs and are legitimate concerns of the CAA.

But have no fear. Walk boldly into the advertising night, my colleagues. The CAA will gladly guide you, advise you and assist you in being compliant. The rules are simple. Be reasonable. Don't be a blowhard. Be nice to your colleagues. Respect your audience's intelligence. Above all, remember that you are representing a dignified profession. That's a whole lot better than having to be represented by a dignified professional. Believe me. ■