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A Brave New Advertising World: Ensuring Success and Avoiding Pitfalls with Legal Advertising in Emerging Formats

Whether seeing the eccentric and over-the-top TV commercial promoting personal injury attorneys, or catchy social media posts we see on Twitter, Facebook, or Instagram, one thing we know is that in the years since the seminal decision in *Bates v. State Bar of Arizona*¹, in which the U.S. Supreme Court opened the legal profession to advertising, lawyers have become increasingly prolific marketers across all forms of advertising. But even from its beginnings, legal advertising has not been without its risks and pitfalls. Like other aspects of the practice of law, lawyers are guided by and often times restricted in who, what, where, when and how we advertise. This is most apparent whenever lawyers utilize new methods or services to advertise.

In this article, we will take an in-depth look at lawyer advertising through new methods, including social media, as well as some of the associated risks and best practices to consider when engaging in legal advertising through new or emerging formats.

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Bates Was Merely the Tip of the Iceberg

It was largely impossible when *Bates* was decided, more than four decades ago, for the legal profession to realize the full scope and potential of the advertising market, particularly in light of fast-paced technological advancements. Since then, however, lawyers' efforts, and the way in which lawyers think about marketing, have evolved considerably, from print (newspapers, magazines, billboards, and of course, the Yellow Pages), to the airwaves (radio, television), to an online presence (websites, online ads, social media posts), and any combination of those. That evolution has resulted in a windfall for lawyers who have recognized the correlation between varied marketing efforts and increased prospective and actual clients. In short, more advertising means more new clients in the door. Despite that evolution, the rules and regulations adopted since have largely remained the same, requiring lawyers (and bar regulators) to regularly navigate new techniques using dated principles. Nonetheless, these rules remain instructive in the same way across advertising formats, and when taken into proper consideration, can help guide a successful advertising campaign.

¹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Social Media and Tech Platforms Open New Doors

One popular example of new advertising formats: video-focused social media platforms, such as Instagram or TikTok, which allow users to quickly create, edit, and share short videos (read: soundbites), from smartphones or tablets, for free, to a potentially limitless audience. Naturally, ordinary run-of-the-mill content languishes, while content that is more appealing, overlaid with music, text, and hashtags (words or phrases preceded by the “#” symbol for use in quickly searching content), has a far greater likelihood of flourishing and thus generating more “likes,” “shares” and followers. The purpose of these ads is no different than the many late-night lawyer commercials we have all seen over the years: to increase a firm’s visibility and reach. To see for yourself, just search “#LawyerTikTok” to see the wide array of lawyers posting and advertising here. However, these video posts are easier and far more cost-effective to create for lawyers with marketing budgets of any size, including those that have only their phone and no marketing budget at all.

Another relatively new form of advertising appears to combine traditional media with more contemporary avenues: services that use vehicles from ride-share companies to display law firm ads. One such company, Carvertise, recently highlighted in the American Bar Association (“ABA”) Journal, attempts to harness the traditional ad style, by placing law firm ads on the exterior of ride-share cars, with added features such as having the ride-share drivers, for an extra fee, pass out law firm print material or brochures to their ride-share customers, as well as the use of geotargeting² to target a firm’s potential clients by directing when and where the ride-share vehicles emblazoned with their ads should drive (e.g., specific intersections or block radius, sporting events, concerts, business conferences).³ This concept allows firms to not just increase their visibility, but also to focus on specific areas where they think they would generate the most new clients.

These two types of advertising are merely provided as examples, but as with any new form of advertising, potential risks and pitfalls exist. Lawyers continue to remain subject to strict advertising and solicitation regulations, regardless of how they promote their services, which they should be mindful of as they approach these and other new platforms.

² Short for “geographic targeting,” geotargeting is a method used to deliver specific electronic content to users based on their geographic location, using data collected from users, typically data associated with IP addresses and mobile device location data, as well as their online behaviors, interests, and demographics, for advertising purposes. The practical effect gives advertisers the ability to specify the location they want their electronic ads to appear, delivering hyper-focused ads unique to users looking for specific goods or services when they are near a specific geolocation point (e.g., ads for personal injury lawyers appearing for users who may be near a hospital).

³ Lyle Moran, *Uber-Ads: Always on the Lookout for Effective Ways to Advertise, Lawyers are Turning to Ride-Share Vehicles*, ABA Journal (April 1, 2022)

Less Isn’t Always More

As the saying goes, sometimes less is more. Sometimes, however, less in this form may lead to more issues. Take for example the first format discussed above: video ads posted on social media platforms. Law firm ads using this format certainly allow attorneys to reach a potential and significant client base which they might otherwise struggle to reach absent large marketing budgets. However, lawyers should consider that often times videos posted on social media, which may span 10 to 60 seconds in length, will not always allow for the proper considerations and protections that may be present in other forms of lawyer advertising.

As was recently reported, a group of immigration lawyers have become concerned about the potential for some of these social media videos posted by other immigration lawyers to mislead and confuse the targeted prospective clients: undocumented immigrants.⁴ At least one such subset of these ads promoted immigration lawyers’ ability to navigate and resolve complex immigration issues, using a hashtag phrase to promote the concept that an attorney could easily resolve their immigration issue (e.g., #arreglarsinalir, which, translated from Spanish to English, means to “fix without leaving”).⁵ But in doing so, these ads appear to endorse legal options for its viewers which are often narrowly-defined and largely inapplicable to the vast majority of potential clients.⁶ One risk here is that, at best, ads like these may be inaccurate, and at worst, may be considered false or misleading by bar regulators and create unrealistic expectations in the mind of the potential clients by omitting the often complex and nuanced requirements under immigration law. They may further be viewed as providing legal advice to the viewer, thus causing them to unknowingly take action in reliance on that advice.

Such reports and concerns about advertising using newer technology raise numerous questions for practitioners, not only from an ethical perspective, but also out of a concern of heightened liability. Questions such as: How far can I go in making claims in my ads? Do I really need to include that long wordy disclaimer? When might my ads create an inadvertent attorney-client relationship? What methods of advertising qualify as impermissible solicitation? What are the consequences to me and my practice if one of my ads creates certain incorrect expectations for potential clients? And how do I overcome those incorrect expectations and perceptions?

⁴ Isabella Dias, *The TikTok Trend That Has Immigration Lawyers Worried*, Mother Jones (April 7, 2021)

⁵ *Id.*

⁶ *Id.*

The Rules

Any analysis of legal advertising should start with the American Bar Association's ("ABA") Model Rules of Professional Conduct, which generally directs lawyers to, above all, be truthful in their advertising. More specifically, Model Rule 7.1 provides that "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."⁷ Whether an ad or communication is "misleading" will depend, among other factors, on what a reasonable person seeing the ad would believe, whether they would be misled about the lawyer's services, or whether they were led to form an unjustified expectation.⁸ While each state's rules vary on the specific language, these principles remain the underpinning of legal advertising and solicitation requirements across the board. Supplementing Model Rule 7.1's requirements is Model Rule 8.4(c), which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.⁹

Further, Rule 7.3(b) bars lawyers from live person-to-person solicitation of lawyers' professional services, save for a few exceptions, when a lawyer's significant motive is pecuniary gain.¹⁰ Solicitation is defined under Model Rule 7.3(a) as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter."¹¹ The main purpose behind prohibiting live person-to-person solicitation is the significant potential for overreach exerted upon the person that the lawyer knows is in need of legal services.¹²

It is important to note that, from the perspective of the Rules of Professional Conduct, these expectations are often viewed through the lens of the prospective/actual client, and will typically be construed in favor of the client and against the lawyer. These modes

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⁷ ABA Model Rule 7.1.

⁸ Comment [2], Model Rule 7.1.

⁹ ABA Model Rule 8.4(c).

¹⁰ ABA Model Rule 7.3.

¹¹ *Id.*

¹² Comment [2], Model Rule 7.3.

of interpretation demonstrate why it is essential for lawyers to thoroughly consider these issues in their advertising prior to dissemination, rather than after.

In addition to the ethical considerations under the Model Rules, lawyers may also be subject to claims of liability for ads which appear misleading, are overly-ambitious, or are plainly inaccurate. Lawyers posting on social media in which they offer legal advice should be cognizant of the risks. For example, a lawyer who responds to a specific user's question on social media or who engages a viewer of one of their social media posts in a conversation runs the risk of not only inadvertently establishing an attorney-client relationship but potential claims of malpractice if any information exchanged between them is viewed as deficient legal advice.¹³ In other cases, attorneys may be subject to statutory enforcement actions brought by states for ads which qualify under the statute but do not strictly conform to the requirements.¹⁴ In extreme cases, improper ads or solicitation may even lead to criminal charges.¹⁵ There are also myriad state-specific statutes and requirements for advertising more generally, which of course lawyers are also subject to (but which will not be explored in this article). It is worth remembering that, from a liability standpoint, any doubt as to the existence of an attorney-client relationship is often resolved in favor of the putative client.

In considering the social media video/TikTok example mentioned above, several areas stand out as potential pitfalls when engaging in this type of advertising. In and of themselves, short self-created social media posts will not always require the same level of thoroughness that is typically required with other forms of advertising. Print ads will often involve multiple drafts, rounds of editing, and submission to publishers and editors before circulation. Producers and marketers for TV commercials are likely to remain cognizant of their own potential liability for producing ads which may contain false or misleading claims. Further, at least several states' Rules of Professional Conduct require submission of ads to the respective bar regulator. States such as Connecticut, Florida, and Nevada require submission prior to or contemporaneously with dissemination of the ad. Other states, such as Texas, require submission and upon request will provide pre-dissemination approval to the lawyer or firm.¹⁶ In addition, certain states, but not all, also require retention of the ad for a designated period of time following dissemination.

¹³ See South Carolina Ethics Advisory Op. No. 12-03 (Dec. 2012).

¹⁴ Texas has enacted its "Deceptive Advertising Practices" statute, which became effective on September 1, 2019, and which provides for enforcement actions brought by its Attorney General or a district or county attorney for noncompliant ads which are for legal services regarding medications or medical devices. See Chapter 81, Subchapter J of the Texas Government Code. Similarly, in 2020, West Virginia enacted the Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act, which restricts certain legal advertising practices related to cases involving prescription drugs and medical devices, and requires certain disclosures in lawyer advertising. See W. Va. Code §§ 47-28-1 et seq.

¹⁵ A charge known as "barratry" under Texas Penal Code § 38.12 allows for criminal charges as well as civil remedies against lawyers engaged in such conduct. West Virginia's aforementioned Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act also provides for criminal penalties for lawyers found to violate the Act. See W. Va. Code §§ 47-28-1 et seq.

¹⁶ See American Bar Association chart "[Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct](#)" for a comprehensive cross-comparison of each states' advertising rules under their adopted Rules of Professional Conduct.

Furthermore, other forms of advertisements, and even certain social media posts, have the ability to include disclaimers. Those disclaimers will typically include information related to the content of the ad, the purpose of the ad, those who approved the ad, and contact information for the firm disseminating the ad. Most importantly, disclaimers serve to inform the viewer that the content is not legal advice and that viewing the ad alone will not create an attorney-client relationship.

There are of course jurisdictional requirements to bear in mind, including where the lawyer is licensed, where the lawyer's target audience sits, and how each jurisdiction interprets and enforces cross-jurisdictional advertising. When considering the reach of social media posts, the answer is almost never clear, and many jurisdictions' rules may ultimately apply, as acutely noted in a D.C. Bar ethics opinion.¹⁷

Chances are, however, when posting on social media, lawyers may not be thinking about whether their posts could be seen as false or misleading, or whether they should include a disclaimer about the non-existence of an attorney-client relationship, or how to retain a copy of the post for the requisite amount of time, or even whether to submit these to the appropriate authority. In light of these factors, it is easy to see how, if social media posts are not done appropriately, the potential for otherwise avoidable claims or disciplinary complaints increases.

In examining risks under the ride-share advertising example discussed above, other issues are worth considering. Dressing vehicles with ads is nothing new, nor is the placement of ads where it is strongly presumed that people are in need of legal services. Rather, it is *how* that type of service is used, and the ease with and extent to which firms may combine that with user data, geotargeting, and in-person solicitation to reach their intended audiences, that is new. The advertising service referenced above promotes the ability for law firms to place the ad-adorned rideshare cars when and where firms want them, such as at sporting events or concerts.¹⁸ This realistically would extend to geotargeting other locations where users are known with certainty to be in need of legal services, such as, courthouses, hospitals, or even at the location of a mass disaster in real time.¹⁹ However, taking those services one step further by utilizing the full potential of advertising on rideshare vehicles, geotargeting and in-person solicitation, may potentially run afoul of advertising and solicitation regulations. For example,

it's easy to imagine a scenario where a law firm uses the service offered to have rideshare drivers personally hand out law firm brochures with contact information on it to people being picked up outside of a criminal courthouse or near a mass disaster with information collected through specific user data that those individuals are in need of legal services. Soliciting in that manner is likely to violate rules on solicitation. This is especially true in light of ABA Formal Opinion No. 501, which discusses the extent to which lawyers are responsible for the actions of their employees and third-parties when soliciting on behalf of lawyers or law firms, and offers hypotheticals for actions which may qualify as impermissible solicitation.²⁰ Using the same scenario, query whether using the ride-share driver to hand out brochures and/or field questions about the firm could lead to the creation of an unintended attorney-client relationship in the eyes of the potential client/rider. When viewed in that context, it is clear that attorneys must carefully consider their advertising approach.

Establishing Good Advertising Procedures to Manage the Risk to Your Practice and Firm

What should you be mindful of as you approach advertising, particularly when considering newer methods and media? Consider the following:

What platform(s) am I using to advertise?

Consider first which platform or platforms you will use to disseminate your ad. Your choice will not only directly impact the success (or deficiencies) of your advertising efforts, but will also dictate your approach to the majority of other risk factors, including managing your ad's content, format, target audience, and dissemination methods, among many other factors.

Who is my target audience for this ad?

Consider who you are trying to reach through any given ad, and even people outside of your intended target audience. As with new platforms, your ad may be disseminated much broader than you anticipated. Consider how your ads would be viewed by a reasonable person both in your intended target group and beyond.

What message am I trying to send?

If your message is clear and straightforward, perhaps this is best answered with an on-point ad. More often, however, your message may be more complex in various ways: it may be a multi-part ad (for example, one disseminated through a series of sequential social media posts), or may require a more granular, nuanced explanation or understanding than your advertising platform allows for. In that case, consider whether you should: revise the structure of your ad, include more detail where appropriate, select a different platform for your ad, or dispense entirely with the ad if it is too

¹⁷ D.C. Bar Ethics Opinion No. 370 (Nov. 2016) ("Given that social media does not stop at state boundaries, we remind members of the District of Columbia Bar that their social media presence may be subject to regulation in other jurisdictions, either because the District applies another state's rules through its choice-of-law rule, or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states.")

¹⁸ Lyle Moran, *Uber-Ads: Always on the Lookout for Effective Ways to Advertise, Lawyers are Turning to Ride-Share Vehicles*, ABA Journal (April 1, 2022)

¹⁹ See New Jersey Committee on Attorney Advertising Opinion 46. (Apr. 2020).

²⁰ American Bar Association Formal Op. 501 (April 13, 2022).

cumbersome to adequately and ethically disseminate. Remember, even if it is clear to you that your ad doesn't contain legal advice, it is essential to consider whether a reasonable person viewing your ad would interpret your message to be legal advice, and to tailor your message appropriately. To mitigate that risk, keep your message simple, and limited to basic information of general applicability. Above all, it is of the utmost importance to avoid false or misleading statements. If your message does not come off as clear, or because of its format would give a reasonable viewer false expectations, it is worth rethinking your ad.

What information am I disclosing in the message?

Carefully consider whether the information you are using is subject to the attorney-client privilege and/or protected as confidential under Model Rule 1.6.²¹ This includes client identification, success stories, details which are otherwise not generally known, references to confidential settlements, or materials under seal, amongst other information. Even if the information appears innocuous or non-confidential at first glance, it may nonetheless be possible for viewers to learn or infer additional information that is otherwise confidential, and thus a violation of Rule 1.6.²²

Am I using hashtags (i.e., "#") in an attempt to better reach my audience?

If so, consider whether using a hashtag or another truncated phrase will make the ad appear false or misleading. Hashtags or catchphrases should be kept generic, and not fact or scenario specific, so as to avoid appearing as legal advice or creating unrealistic expectations in the viewer's mind as to the results the lawyer may obtain²³ (i.e., instead of using "#bestcriminaldefenseattorney" consider a more general phrase like "#criminaldefense" when advertising a criminal defense practice).

Am I improvising the content of my ad on the spot and disseminating immediately thereafter?

If so, consider pausing to draft an outline or proposed lines. Consider reviewing that script or outline for anything that could reasonably be perceived as false or misleading. The draft might further benefit from a review of another person, preferably an attorney, whether that's a co-worker, employee, or even mentor, who may be able to review the material from a fresh perspective.

²¹ Model Rule 1.6 prohibits lawyers, in part, from revealing information related to the representation absent the client's informed consent, and is typically interpreted as covering any and all information related to the representation.

²² See *In re Kristine Ann Peshek*, M.R. 23794, 09 CH 89 (May 18, 2010) (violation of Rule 1.6 for disclosing clients' confidential information on a blog despite revealing only partially-identifying information, such as clients' jail identification numbers, and resulting in a 60-day suspension).

²³ Interpreting if and when content creates expectations of similar or unrealistic results often requires considering the ad or post in its entirety, as certain phrases, on their own, may not lead to certain client expectations, but when taken in the ad's totality, could lead to such an interpretation. See California Standing Committee on Professional Responsibility and Conduct Formal Op. No. 2012-186 (2012).

Do I need a disclaimer?

Consider including a disclaimer, either oral or written, particularly in light of the above factors, and whether a disclaimer will make the purpose of the ad even clearer to the viewer. Recognize that in some states, disclaimers, often with specific language, will be required depending on the type of ad. This may include information related to legal fees and costs, law firm identifying information, or even that the ad itself is labeled as attorney advertising or some derivative thereof. While your disclaimer will vary, it is worth considering whether to say in your ad, if a video, or include as text somewhere on the ad, that the content is not intended to be legal advice, that viewing the ad will not create an attorney-client relationship, and that confidential information should not be shared with the firm in response to the ad until an attorney-client relationship has been formed as acknowledged and documented by all parties.²⁴ It may sound formulaic and verbose, but disclaimers serve to add one more layer of protection in avoiding potential claims of liability stemming from advertising.

Do I need to submit my ad for review to the proper regulatory authority?

Always remember to check your local jurisdiction's advertising rules and regulations, as many have specific requirements for when and how lawyers must submit ads for review prior to or contemporaneous with the ads dissemination.

Do I need to retain copies of my ad?

As with the submission requirements, many states require lawyers to retain copies of their ads for a designated period of time after their first dissemination. Consider how long you must retain copies of any ads, and how your firm will retain those in the event that any regulator later inquires about those ads. This is particularly important when advertising on social media, as it is far easier for ads to be posted, revised, and deleted instantaneously as compared with other advertising formats.

Is there a likelihood that my advertising method will lead to an impermissible solicitation?

Under ABA Formal Opinion 501, we are reminded that lawyers are equally responsible for the actions of others, including employees, marketing firms hired by lawyers, or even other professional colleagues, who may be advertising and soliciting on behalf of a lawyer, as part of our duties to supervise under Model Rule 5.3.²⁵ While some methods of advertising and solicitation may not raise many eyebrows, such as handing out a business card in a courthouse to an inquiring prospective client, consider how far your proposed advertising format goes, such as targeting an intended

²⁴ In the event that viewers or prospective clients begin revealing apparently confidential information in response to your ad, often times through comments to a social media post, despite or in defiance of your disclaimer, consider removing (or restricting) the comment or thread as soon as possible.

²⁵ ABA Formal Ethics Op. 501.

audience with the hopes of catching a specific person who you know to be in need of legal services with both print ads and live person-to-person solicitations. If those actions rise to the impermissible level under Rule 7.3, even if performed by a third party, you may nonetheless be responsible for that third party's actions. Although the hypotheticals are non-exhaustive, Formal Opinion 501 nonetheless offers relevant and guiding scenarios to consider.

Am I referencing past legal achievements, highlighting "success stories" in my ad?

If so, consider including in your disclaimer that specific outcomes are not guaranteed and that individual outcomes vary on a case-by-case basis. Also ensure that under Model Rules 1.6(a) and 1.9(c)(2), information related to your clients remains confidential, and that absent client consent to disclose, any information regarding past achievements are kept generic in nature so as not to identify any clients or reveal protected information.

Conclusion

Due to the significant variability across the country of lawyer advertising rules, regulations, statutes, and case law, these points are intended to be a summary of issues to consider rather than an exhaustive list. Lawyers looking for additional guidance on advertising should be sure to review their state-specific ethics rules, ethics opinions from their state bars or bar associations, particularly more recent opinions which may provide guidance on newer advertising methods, and any other advertising-related regulations.

In the years since the *Bates* decision, lawyers have successfully and compliantly advertised on different media and platforms. However, lawyers must remain cognizant of their obligations, and the myriad rules and regulations related to legal advertising, as they consider expanding their efforts through new and emerging advertising platforms. By carefully considering and thoroughly reviewing any self-published content, within the context of regulations specific to lawyer advertising, lawyers can mitigate risks to themselves and their firms, while continuing to compliantly and successfully attract new clients, generate new business, and grow their practice.

This article was authored for the benefit of CNA by:

Christopher Heredia

Christopher Heredia is a Risk Control Consulting Director for CNA's Lawyers Professional Liability Program. He is responsible for developing content for CNA's Risk Control services by providing guidance to CNA's insureds on risk control and professional responsibility-related issues. Prior to joining CNA, Chris was an attorney with Am Law 100 firm in Chicago where he focused his practice in legal ethics, law firm risk management, and commercial litigation. Prior to his time in private practice, Chris served in the public sector, first as an Assistant State's Attorney with the Cook County State's Attorney's Office in Chicago, and later as Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission where he worked to regulate the legal profession in Illinois. He is admitted to practice in Illinois, the U.S. District Court for the Northern District of Illinois, and the U.S. Supreme Court.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com

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