



# Ethics of law firm marketing and advertising

## CONSIDERATIONS IN MARKETING AND ADVERTISING YOUR LAW PRACTICE TO ENSURE COMPLIANCE WITH LAWS AND STANDARDS

The Supreme Court held in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, that attorney advertising was a form of commercial speech protected by the First Amendment. Thus, Arizona Bar officials could not punish two attorneys who truthfully advertised their routine legal services in a newspaper. The Arizona Bar charged the attorneys in *Bates* with violating an attorney disciplinary rule for a newspaper ad in which the lawyers offered “legal services at very reasonable fees.” Justice Harry A. Blackmun rejected the Arizona Bar’s contention that ads would have an “adverse effect on professionalism” and “would be inherently misleading,” writing that restrictions on any attorney advertising had “served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable.”

Although attorney advertising is legally protected speech, as with most everything else in life, there are rules which in this regard are set forth in the California Rules of Professional Conduct Rule (CRPC) 7.1 through 7.5 (effective November 1, 2018). When considering these rules, California attorneys cannot lose sight of CRPC Rule 1.0 which sets forth the “purpose” of the CRPC, which is “intended to regulate professional conduct of lawyers *through discipline...to protect the public....and shall be binding upon all lawyers.*”

### Communications concerning a lawyer’s services

Chapter 7 of the CRPC is titled “Information About Legal Services” and governs all communications of any type whatsoever about a lawyer or the lawyer’s services, including advertising. Comment [1] to CRPC Rule 7.1 defines communication to include “any message or offer made on behalf of a lawyer concerning the availability for

professional employment of a lawyer or a lawyer’s firm directed to any person.”

This is a very broad definition, which potentially includes conveyance of information by correspondence, stationary, letterhead, business cards, brochures, advertisements, a website, blogs, tweets, and other postings in a social media setting. Simple phrases on a social media post such as “tell your friends to check out my website” or “call me for a free consultation” can be considered “communications” and trigger compliance with the rules. Likewise, blogs that advertise an attorney’s availability for employment that are either explicitly, or implicitly through its description of the types and character of legal services offered by the attorney or detail descriptions of case results, or both are “communications” subject to the requirements and restrictions of CRPC. The prudent practitioner should expect that almost any transmission of information concerning legal services, regardless of the mode, will be considered a “communication” for the purposes of enforcing these Rules.

### False or misleading statements

CRPC Rule 7.1(a) states that “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 communication considered as a whole not materially misleading. Simply stated, do not communicate to any person by any means untrue comments or statements concerning the lawyer or the lawyer’s services. The Comment section to CRPC Rule 7.1 sets forth some guidance and identifies several “communications” that are presumed to violate this rule, which include:

- a communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule;
- any communication that states or implies “no fee without recovery” is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs;
- the rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person who speaks such language.
- What is or is not considered a “misleading” communication is a bit murky. CRPC Rule 7.1, comment [3] states the rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. This statement is broad and creates considerable room for confusion, interpretation and speculation. Beware of any communications that might be subject to this comment.

### Unjustified expectations

Comment [4] to CRPC Rule 7.1, provides that “a communication that

truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstance of each client's case." These types of communications are often seen on an attorney website. The cure to maintaining compliance with the rule would be to include in any such communication an appropriate disclaimer or qualifying language to avoid creating unjustified expectations. (See comment [4] to CRPC Rule 7.1.)

### Advertising and referral services

CRPC Rule 7.2, provides that subject to the requirements of Rule 7.1 (not false or misleading) and 7.3 (no solicitation) "a lawyer may advertise services through any written, recorded or electronic means of communication, including public media." However, pursuant to CRPC Rule 7.2(b), a lawyer shall not compensate, promise or give anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer's firm with the following exceptions:

- a lawyer may pay the reasonable costs of advertisement or communications permitted;
- a lawyer may pay the usual charges of a legal services plan or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimal Standards for a Lawyer Referral Service in California. The State Bar certifies all lawyer referral services (LRS). An LRS is an individual or organization that refers potential clients to lawyers. Certification is a requirement for all LRS's which operate in California. Since LRS's must demonstrate that they

meet established standards, certification protects the public. See, Business and Professions Code section 6155.

- a lawyer may purchase a law practice (and its clients) subject to the requirements of CRPC Rule 1.17, which govern the sale of a law practice.
- a lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited that provides for the other person to refer clients or customers to the lawyer, if the reciprocal referral arrangement is not exclusive, and the client is informed of the existence and nature of the arrangement.
- a lawyer may offer or give a gift or gratuity to a person having made a recommendation resulting in the employment of the lawyer provided the gift or gratuity was not offered or given in consideration of any promise or agreement or understanding that the gift or gratuity would be made or that referrals would be made in the future.
- Advertising is therefore permitted, allowing the public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. However, CRPC Rule 7.2, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

### Referral agreements

CRPC Rule 7.2, permits a lawyer to compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. It permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. In any division of fees between or among lawyers not in the same law firm the lawyer must comply with CRPC Rule 1.5.1, Fee Divisions Among Lawyers. (Any referral agreement which calls for consideration needs to be documented at the time of the arrangement and expressly approved by the client.) Also, beware, no "capping." (See Business and Professions Code section 6150-6159.)

When advertising, CRPC Rule 7.2(c), also requires that "any communication made pursuant to this rule shall include the name and address of at least one lawyer or law firm responsible for its content."

### The website

Many lawyers have a website. Although the CRPC do not specifically address a lawyer's website, the issue is addressed in the State Bar Formal Ethics Opinion 2001-155 (referencing prior CRPC Rule 1-400), which all lawyers with a website should read. According to this Opinion, an attorney's website is governed by rules regulating attorney print advertising and states that an attorney's website is considered a "communication" and an "advertisement" but not a "solicitation" under the CRPC. "An attorney's Internet web site providing to the public information about her availability for professional employment is a 'communication' under rule 1-400(A) of the Rules of Professional Conduct and an 'advertisement' under Business and Professions Code sections 6157 to 6158.3. As such, it is subject to the applicable prohibitions on false,

misleading, and deceptive messages. The content of the pages constituting the web site must be prepared carefully to satisfy these rules. This applies to the words that make up the message and to the images and sounds which are part of the presentation. Under the facts presented, the web site is not a 'solicitation' under rule 1-400(B) even if it includes electronic mail facilities allowing direct communication to and from the attorney. The attorney also must be aware of the possibility that the web site might be subject to regulation by other jurisdictions or that it might be considered the unauthorized practice of law in other jurisdictions." (State Bar Formal Ethics Opinion 2001-1555.)

Every website should include a disclaimer. Although the Rules do not require a disclaimer, the comments to CRPC Rule 7.1, states that "an appropriate disclaimer or qualifying language often avoids creating unjustified expectations." All websites should also include the following disclaimer: "This is a legal advertisement, and any comments provided do not create an attorney-client relationship."

### **Solicitation of clients known to need specific legal services**

CRPC Rule 7.3, is designed to regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in person or by telephone, or by directly targeting a person known to be in need of specific legal services through other means, e.g., letter, email, text, etc. The rule states that "a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer." As used in this rule, the terms "solicitation" and "solicit" refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed

to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. (CRPC Rule 7.3(e).)

#### ***Keeping it general***

A lawyer's communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a *website* or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches. This does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, it does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

Also, even if the person contacted is (1) a lawyer; or (2) has a family member, close personal, or prior professional relationship with the lawyer, a lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone, or real-time electronic contact if (1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment. (CRPC Rule 7.3(b).)

CRPC Rule 7.3 (c), provides: "every written, recorded or electronic communication from a lawyer soliciting professional employment from any person known to be in need of legal services in a particular matter shall include the word 'Advertisement' or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the

context that the communication is an advertisement." Lawyers should make sure to include the "advertising" disclaimer when using websites.

#### ***Prepaid legal services***

The Rule prohibiting solicitation does not prohibit a lawyer from participation with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, subject to the provisions of CRPC Rules 7.1, 7.2, and 7.3(b). (CRPC Rule 7.3(d).)

### **Communication of fields of practice and specialization**

No surprise, the CRPC prohibits misrepresentation that a lawyer is a "certified specialist" with the State Bar. Pursuant to CRPC Rule 7.4(a), "a lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless: (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and (2) the name of the certifying organization is clearly identified in the communication. Rule 9.35 of the 2022 California Rules of Court defines a "certified specialist" as a California attorney who holds a current certificate as a specialist issued by the State Bar of California Board of Legal Specialization, or any other entity approved by the State Bar to designate specialists. The State Bar establishes and administers a program for certifying legal specialists and may establish a program for certifying entities that certify legal specialists under rules adopted by the Board of Trustees of the State Bar. Simple rule. Don't communicate that you are a certified specialist unless you are a certified specialist.

This Rule does not prohibit the lawyer from communicating the fact that

the lawyer does or does not practice fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1. (No false or misleading communications). (CRPC Rule 7.4(b).)

### **Firm names and trade names**

A lawyer's communications regarding the firm name and designation must be true and must not be misleading. CRPC Rule 7.5 provides that a lawyer shall not use a firm name, trade name or other professional designation that violates the rule prohibiting false and misleading communications. The term "other professional designation" includes, but is not limited to, logos, letterheads, web browsers, and signature blocks. A lawyer

in private practice shall not use a firm name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or that is otherwise false or misleading. Further, a lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm or other organization unless that is the fact.

### **Conclusion**

The rules governing client communications regarding a lawyer's services are relatively simple and based on common sense. Do not make false or misleading communications regarding your firm and practice. Be transparent and err on the side of full disclosure and avoid misleading communications. Do

not engage in solicitation, and use disclaimers in written communications.

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