

LAWYER MARKETING: AN ETHICS GUIDE

Hypotheticals

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Hypothetical 1

Your state bar recently adopted new marketing rules. You are trying to convince your partner to take the changes seriously. One partner has argued that your law firm's risks are fairly low, because inappropriate lawyer marketing at most brings a "slap on the wrist."

Can inappropriate lawyer marketing result in:

(a) Greater likelihood of malpractice liability?

YES NO

(b) Disqualification?

YES NO

(c) Suspension of the lawyer conducting the marketing?

YES NO

(d) Claims against the lawyer under state consumer protection laws?

YES NO

(e) Discipline for violating state and federal laws governing spam faxes?

YES NO

(f) Criminal charges?

YES NO

(g) Suits against the lawyer for intentional interference with the relationship between another lawyer and her client?

YES NO

Hypothetical 2

You practice in a state which recently revised its ethics rules. Among other things, the new rules severely restrict lawyer marketing. You and your partners realize that your state's bar might challenge some of your firm's marketing under these new rules, and you want to know what standard will apply if the bar takes such action.

If the state bar challenges your law firm's marketing, will it have to prove that any clients or potential clients have been or might be harmed?

YES

NO

Hypothetical 3

Your firm's chairman just asked you to supervise your firm's marketing efforts in a southern state. Although you do not have an office in that state, several of your Charlotte office partners hold licenses in the state. Your first question is the application of the state's ethics rules to your marketing efforts.

- (a) Will the state's ethics rules apply to a print advertisement placed in that state's main business magazine?

YES

NO

- (b) Will the state's ethics rules apply to a print advertisement placed in American Lawyer magazine, which is sold in the state?

YES

NO

Hypothetical 4

As your law firm's partner chiefly responsible for ethics issues, you field questions and complaints from state bars. You just received calls from two state bars. Each of the bars complained about several statements on your firm's website. Your firm has a two-lawyer office in the capital of one of the states whose bar has complained about your website, and one of your 500 lawyers is licensed in the other state whose bar has complained.

- (a) Must your firm website comply with the marketing rules of the state in which you have a two-lawyer office?

YES

NO

- (b) Must your firm website comply with the marketing rules of the state whose bar members include one of your lawyers?

YES

NO

Hypothetical 5

In checking out some of your competitors' websites, you notice one especially interesting website. A local lawyer boasts that he is "published in Federal Reports," and describes himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling case law of the United States." As you read the rest of the website, you realize that the lawyer had simply acted as counsel of record in a case that resulted in a published opinion. You wonder whether his website statement violates your state's prohibition on false advertising.

Does the lawyer's website reference to being published in the Federal Reports violate your state's prohibition on false advertisements?

YES

NO

Hypothetical 6

Your firm's executive committee members have become increasingly frustrated by what they perceive to be your law firm's main competitors' aggressive marketing techniques. The committee asked you to assess the ethical propriety of some statements in your competitors' print advertisements.

Do generally applicable ethics standards allow your competitors to include the following statements (or images) in their print advertisements:

- (a) The firm's real estate department is "one of the best" in the area?
- | | |
|-----|----|
| YES | NO |
|-----|----|
- (b) The firm has an anti-trust department that is "second to none" in providing anti-trust advice?
- | | |
|-----|----|
| YES | NO |
|-----|----|
- (c) The law firm is "a premier personal injury law firm" in its city?
- | | |
|-----|----|
| YES | NO |
|-----|----|
- (d) The law firm is a "full service firm"?
- | | |
|-----|----|
| YES | NO |
|-----|----|
- (e) The law firm's lawyers are "committed" to obtain a successful result for their clients?
- | | |
|-----|----|
| YES | NO |
|-----|----|
- (f) The law firm provides "quality legal services"?
- | | |
|-----|----|
| YES | NO |
|-----|----|

(g) The law firm has "30 years of experience" (which represents the combined legal experience of the firm's lawyers)?

YES

NO

(h) The law firm will be a "passionate and aggressive advocate"?

YES

NO

(i) The motto: "Don't settle for less than you deserve"?

YES

NO

(j) The phrase: "Let us take care of you"?

YES

NO

(k) The slogan: "People make mistakes. I help fix them."?

YES

NO

(l) A close-up image of a tiger's eyes?

YES

NO

(m) An image of a wizard?

YES

NO

(n) The lawyer's membership in the Florida Bar (if the lawyer is a member of the Florida Bar)?

YES

NO

Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures, and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

- (a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

YES

NO

- (b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

YES

NO

- (c) Pictures of people on your website who appear from the context to be your lawyers, but who are actually paid models?

YES

NO

Hypothetical 8

Your firm's marketing folks have recommended the use of testimonials and endorsements as a way to generate some new business.

May your advertising campaign include the following:

- (a)** A client testimonial (from a real client) saying that your law firm is "one of the best" that your client ever employed?

YES

NO

- (b)** A client testimonial (from a real client) saying that your firm's lawyers always returned the client's phone call quickly?

YES

NO

- (c)** A reference to your being a client's "preferred" law firm?

YES

NO

- (d)** An endorsement by a well-known local sports figure?

YES

NO

- (e)** Quotations from a newspaper article praising your law firm?

YES

NO

Hypothetical 9

As part of a total revamping of your firm's marketing focus, you have decided to choose a new name for your law firm. You are considering a number of possibilities, but you want to assure that you comply with the ethics rules.

- (a) May a law firm's name include the name of a retired partner who is still alive, but in a nursing home?

YES

NO

- (b) May a law firm's name include the name of a retired partner who lives in Florida and occasionally drafts or revises wills for her friends?

YES

NO

- (c) May a law firm's name include the name of a former partner who is now a state senator?

YES

NO

- (d) May a law firm's name include the name of a former partner who was practicing at the firm when he was suspended from the practice of law?

YES

NO

- (e) May a law firm's name include the phrase "and Associates" if the lawyer practices by herself?

YES

NO

- (f) May a law firm composed of two lawyer named Keaton start a law firm with the name "Keaton & Keaton" -- when two other lawyers with the same name have been using that name for nearly 40 years in a city 100 miles away?

YES

NO

(g) May the two sons of the founders of the "Suisman Shapiro" law firm leave their fathers' firm and start their own firm -- using the name "Suisman Shapiro"?

YES

NO

(h) May two law firms include the name of the same practicing lawyer in their names?

YES

NO

(i) May lawyers practice under the name of Smith, Jones & Doe, P.C. -- if Jones and Doe are not shareholders, and do not share in the firm's profits and expenses?

YES

NO

(j) May a law firm's name include the name of a lawyer who is only "of counsel" to the firm?

YES

NO

Hypothetical 10

In an effort to improve your firm's recognition in your community, you want to start using a trade name that is likely to draw the attention of the increasing number of clients that select lawyers over the internet. You also want to start using a snazzy 800 number.

May you use the following names for your law firm:

(a) "The West End Law Firm"?

YES

NO

(b) "The Best West End Corporate Law Firm"?

YES

NO

May you use the following 800 numbers for your law firm:

(c) 1-800-HURT-BAD?

YES

NO

(d) 1-800-2WIN-BIG?

YES

NO

(e) 1-800-GET-CASH?

YES

NO

Hypothetical 11

As the managing partner of a medium-sized firm, you have read all the articles about the difficulties of medium-sized firms surviving in the next decade. Over the last six months, you have spoken with a number of managing partners of similar firms, and you have just unveiled your plans for a network of medium-sized firms throughout the Southeast. You envision sharing library resources, certain computer hardware, and other non-confidential materials.

You see the main benefit as being able to claim that you are "affiliated" with other law firms that combined would have over 300 lawyers. However, you do not plan to actually merge with the other firms. Instead, you intend to remain independent in the selection and representation of clients -- although you expect there to be some joint clients and multiple referrals among members of the group.

- (a) May you indicate on your website and in other places that you are "affiliated" with the other law firms in the group?

YES

NO

- (b) Will your firm be able to take cases against clients represented by the other firms in the group?

YES

NO

- (c) Will such an arrangement render your firm potentially liable for the malpractice of the other firms in the group?

YES

NO

Hypothetical 12

As your law firm has grown from about 90 to 900 lawyers, several issues have arisen about what titles lawyers may use when referring to themselves in marketing materials and elsewhere. Coincidentally, several issues involving titles arose this morning.

- (a) May a retired judge joining your firm refer to herself as a "retired judge" on letterhead and business cards?

YES

NO

- (b) May one of your lawyers who deals frequently with university professors refer to himself as "Dr." (like every other lawyer at your firm, this lawyer received a juris doctor degree)?

YES

NO

One of your firm's associates just read a newspaper article about the use of titles, and asked your opinion about two recent incidents.

- (c) May a disbarred lawyer use the title "JD" or "Esquire" after his or her name?

YES

NO

- (d) May a nonlawyer use the term "Esq." after his or her name?

YES

NO

Hypothetical 13

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than retain a law firm because of its general reputation. You and your marketing director want to highlight your firm's lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

(a) "Limits her practice to domestic relations matters"?

YES NO

(b) "Specializes in anti-trust issues"?

YES NO

(c) "Certified specialist in patent law"?

YES NO

(d) "Certified by the Texas Supreme Court as a trial lawyer"?

YES NO

Hypothetical 14

The firm's chairman has asked you to review your lawyers' website biographies to make sure they comply with applicable ethics rules.

(a) Can one of your lawyers call herself an "expert" in securitization transactions?

YES

NO

(b) Can one of your lawyers describe himself as an "authority" on the ethics rules?

YES

NO

(c) Can one of your lawyers who handles all or most of a corporate client's work call herself the company's "General Counsel" in marketing material?

YES

NO

Hypothetical 15

You have been trying to improve your firm's marketing efforts, and have asked each of your firm's lawyers to send you their individual honors and recognitions to include in various marketing brochures. Now you have to decide which honors to include in the brochures.

- (a) May your marketing brochure indicate that one of your lawyers has an "AV" listing by Martindale-Hubbell?

YES

NO

- (b) May your marketing brochure indicate that one of your lawyers has been listed in "The Best Lawyers in America" and "Super Lawyers" for the last two years?

YES

NO

- (c) May your marketing brochure indicate that one of your lawyers was listed in "The Best Lawyers in America" in 1998 (but not since then)?

YES

NO

- (d) May your marketing brochure indicate that one of your lawyers is listed as a "Super-Duper Lawyer" by the North Reston Litigator Lunch Bunch (composed of eight lawyers)?

YES

NO

- (e) May your marketing brochure indicate that one of your lawyers received a "Life Time Achievement" Award from your law firm's public finance group?

YES

NO

Hypothetical 16

You have enjoyed a successful and varied career as a commercial litigator. Your firm's new marketing director wants to highlight your experience both in firm brochures and on your firm's website.

May you do the following as part of your firm's marketing efforts (assuming that the descriptions are accurate):

- (a) Describe one of your cases (in which you represented a plaintiff) as resulting in the "largest verdict in the history of the state"?

YES

NO

- (b) Describe some of your successful jury trial results?

YES

NO

- (c) List all of your litigation wins and litigation losses?

YES

NO

- (d) Link to judicial decisions in a number of cases in which you were successful?

YES

NO

Hypothetical 17

Several years ago, you moved from a large city big firm practice to a much smaller firm located in the town where you were born and raised. In addition to what you see as lifestyle advantages, you think that the move will allow you to market your services by calling upon your relationships with childhood friends who now enjoy prominent positions in many professional service firms in your hometown. Because you never had to confront marketing issues like this in your previous big-city practice, you want to make sure that you do not violate any ethics rules in taking such steps.

May you do the following:

- (a) Establish an informal referral arrangement (without any written agreement or obligation on either side) with a financial planner you have known since childhood?

YES

NO

- (b) Arrange a formal "referral agreement" under which you agree to refer your legal clients to a small accounting firm managed by a high school classmate, with the accounting firm agreeing to refer to you any of its clients requiring legal advice?

YES

NO

Hypothetical 18

You have found that many clients seem reluctant to sign a retainer arrangement calling for an hourly rate. One of your partners suggested that you add a "money-back guarantee" to your retainer arrangements.

May you offer clients a "money-back guarantee" if you are not successful?

YES

NO

Hypothetical 19

You just started your own firm with two law school classmates, and you think that direct mail marketing can provide "more bang for the buck" than television or media advertising. However, before you get started you want to make sure you understand the ethics rules.

- (a) May you send targeted direct mail to people involved in serious automobile accidents (and whose names appear in the newspaper)?

YES

NO

- (b) May you send direct mail marketing to folks who have just declared bankruptcy (and whose names appear in the newspaper)?

YES

NO

- (c) Will your direct mail marketing have to comply with any specific requirements, include disclaimers, etc.?

YES

NO

Hypothetical 20

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want to start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

- (a)** Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

YES

NO

- (b)** Calling members of your church to see if they would like some estate planning advice?

YES

NO

- (c)** Setting up appointments to see the general counsel of local companies?

YES

NO

Hypothetical 21

As one of your firm's newest partners, you have been pushing your firm to hire a consultant who can help with expanding your firm's website. Your firm's managing partner just put you in charge of the job, and now you have a few questions about the pertinent ethics rules.

- (a) Will your law firm's website be considered an "advertisement" for ethics purposes?

YES

NO

- (b) If so, will your law firm's website have to comply with all ethics requirements governing advertisements?

YES

NO

Hypothetical 22

You have been trying to determine how you can "cash in" on consumers' increasing use of the internet to obtain advice, while avoiding some of the implications of an attorney-client relationship. One idea comes to mind, and you want to make sure that it would work.

May you set up a website in which you and other lawyers answer consumers' questions in return for a fee, while explicitly disclaiming an attorney-client relationship?

YES

NO

Hypothetical 23

You and another law school classmate plan to start practicing together immediately after graduation. Among other things, you are trying to determine what domain name to use.

(a) May you use "southsidelawfirm.com" as a domain name?

YES

NO

(b) May you use "smithandjones.org" as a domain name?

YES

NO

(c) If you use "smithandjones.com" as your domain name and eventually go your separate ways, may either of you continue to use "smithandjones.com" as a domain name?

YES

NO

Hypothetical 24

As a computer science major in college, you have always tried to use your special skills once you became a lawyer. You are now considering establishing a "virtual" law firm, and wonder how state marketing rules apply to such arrangements.

If you practice law without an actual physical office, may you include in your marketing the address of an office suite that you rent (as required) for meeting clients?

YES

NO

Hypothetical 25

You and one of your law school classmates just started your own law firm, and have been looking for ways to increase your local profile.

- (a) May you encourage satisfied clients to write a review in a local website that solicits such reviews?

YES

NO

- (b) May you link your website to another website filled with complimentary reviews?

YES

NO

Hypothetical 26

Your small firm has been playing "catch-up" in its internet marketing efforts, and you are wondering what steps you may ethically take.

- (a) May you list a competitor's name as a key word in a search engine company's search-based advertising program for your firm?

YES

NO

- (b) May you arrange for a pop-up ad for your firm to appear when an internet user types the name of your competitor?

YES

NO

Hypothetical 27

As you try to catch up with some of your competitors' marketing, several questions have arisen.

- (a) May you add your firm's name to a for-profit internet "referral service" that lists lawyers practicing in certain geographic or practice areas?

YES

NO

- (b) May you pay a for-profit internet "referral service" based on the number of "hits" on your website?

YES

NO

- (c) May you participate in a service under which clients agree to contract with listed lawyers who themselves agree to provide specific legal services at a fixed rate -- where the service deposits clients' payments into the lawyers' trust accounts, and then withdraws and keeps an agreed-upon amount that varies with the lawyers' fee?

YES

NO

Hypothetical 28

Some of your firm's newer lawyers want your firm to expand its marketing using the internet. Among other things, one of your lawyers suggests that perhaps you can sell advertising space on your law firm's website and in its brochures.

(a) May your law firm sell advertising space on your website and in brochures?

YES

NO

(b) May you split the cost of jointly advertising with another professional such as a realtor?

YES

NO

Hypothetical 29

As a fairly veteran lawyer, you have been slow to use social media in your marketing. One of your children has urged you to take advantage of this new type of marketing.

(a) May you offer a prize to clients who join your social network?

YES

NO

(b) May you include information in a social network profile's "expertise" and "specialty" fields?

YES

NO

Hypothetical 30

One of your newest lawyers wants to start a blog, and you are analyzing how the ethics rules will apply.

- (a) Will a blog dedicated to work-life balance in a large law firm have to comply with lawyer marketing rules?

YES

NO

- (b) Will a blog describing case results (some of which your firm won) have to comply with the marketing rule governing case results?

YES

NO

Hypothetical 31

You just asked one of your newest lawyers to propose ways to expand your firm's marketing activities using social media. Now you have to decide whether to accept one of her recommendations.

May your law firm offer the sort of "daily deals" that have become increasingly popular?

YES

NO

Hypothetical 32

As new forms of marketing have begun using novel automated methods, you wonder whether the ethics rules permit two specific methods that one of your partners just mentioned to you.

- (a)** May you arrange for a vendor to analyze (without human intervention) emails that you receive, and then automatically send targeted advertising to the senders based on words in the email?

YES

NO

- (b)** May you arrange for an autodial message to be sent to potential clients, ending with a statement indicating that the potential client can speak to a lawyer or lawyer's representative by pressing a number on the telephone?

YES

NO

Hypothetical 33

You have served for several decades as your firm's general counsel and chief ethics advisor. Your firm is just now beginning to encourage its lawyers to market themselves through texts, tweets, and social media postings. Given the succinct nature of these communications, you wonder if all of the normal ethics rules apply to them.

Do all of the ethics marketing rules apply to texts, tweets and social media postings?

YES

NO

Hypothetical 34

After attending a spectacular seminar entitled "Lawyer Marketing: An Ethics Guide," you understand that bars' ability to restrict marketing varies directly with the marketing's intrusiveness. All marketing must meet the content-based restrictions. The state can more severely restrict "direct mail" marketing because it is more intrusive than a newspaper ad or billboard. And bars can even more severely restrict in-person marketing, because it is more intrusive than "direct mail." You wonder how these basic principles apply to lawyer websites, emails, text messages, and real-time electronic communications.

(a) How are lawyer websites characterized for ethics marketing rules purposes:

Direct mail?

In-person?

(b) How are lawyer emails characterized for ethics marketing rules purposes:

Direct mail?

In-person?

(c) How are lawyer texts characterized for ethics marketing rules purposes:

Direct mail?

In-person?

(d) How are lawyer real-time electronic communications characterized for ethics marketing rules purposes:

Direct mail?

In-person?