



Lies, Damn Lies and Legal Marketing

The Ethics of Marketing Your Services as a Lawyer

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Sean Carter is the founder of *Lawpsided Seminars*, a company devoted to solid legal continuing education with a healthy dose of laughter.

Mr. Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company Homeside Lending, Safelite Auto Glass, J. Crew and many others. Most recently, he served as in-house counsel to a publicly-traded finance company

In 2002, Mr. Carter left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering his Lawpsided Seminars for state and local bar associations, law firms, in-house corporate legal departments and law schools. Each year, he presents more than 100 humorous programs on such topics as legal ethics, stress management, constitutional law, legal marketing and much more.

Mr. Carter is the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.

Finally, Sean lives in Mesa, Arizona with his wife and four sons.

THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH

Rule 7.1 Communications Concerning a Lawyer's Service

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 statement considered as a whole not materially misleading.

QUESTION TO PONDER

A rookie lawyer has just passed the bar and put out her shingle. On her very first day, a client walks in for a consultation. How many of the following statements omit a fact necessary to make the statement as a whole not materially misleading:

- a) “Of course, I’m ready for trial. Just so you know, I’ve never lost a case!”
- b) “I’m really touched by your plight. I’m going to make this matter my first priority.”
- c) “My standard hourly rate is \$500, but since we both are from Philly, I’ll just charge you half of that.”

UNREASONABLE EXPECTATIONS

Comment [2] to Rule 7.1

... A truthful statement is also misleading if there is 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.

QUESTIONS TO PONDER

Is the following billboard misleading? If so, why?



Which of the following phone numbers is acceptable to keep reasonable people from formulating specific conclusions about the lawyer or the lawyer's services for which there is no reasonable factual foundation?

- a) 1-800-CASH-4-U-2
- b) 1-800-WINNERS
- c) 1-800-SO-SO-LAW

PAST RESULTS AND TESTIMONIALS

Comment [3] to Rule 7.1

An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients 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 circumstances of each client's case.... The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

QUESTIONS TO PONDER

A favorite technique in lawyer television ads is to report success on behalf of a previous client. Normally, to avoid creating unjustified expectations, the ad contains a written disclaimer in tiny print that reads similar to the following:

"The results achieved on behalf of this client were specific to his particular case. The results you achieve may be substantially different depending upon: (1) your ability to fake pain and agony, (2) whether we can get an equally inept judge assigned to your case (which is likely), and (3) whether the jurors have taken their meds on the day of the verdict.

Is it ever acceptable to showcase a client's success without a corresponding disclaimer?

In many cases, a lawyer will attempt to avoid creating unjustified expectations by utilizing endorsements or testimonials from clients addressed only to the satisfaction of the client based on the interaction between lawyer and client and not to the outcome achieved. For example, such a testimonial may state that the lawyer was sympathetic or concerned, returned calls, communicated frequently, was prompt in responding to client requests, or was professional in their dealings. While such testimonials are ethically proper, they don't make for the most compelling sales pitch. After all, would you attend, say, a legal ethics seminar presented by a speaker who was billed in a similar manner?

"Sean Carter generally shows up on time!"
"His clothes fit nicely, although perhaps a bit snug."
"The program lasted the full one hour!"
"I didn't ask for my money back."
"Sean doesn't suck!"

UNSUBSTANTIATED COMPARISONS

Comment [3] to Rule 7.1

... an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated....

ADVERTISING

Rule 7.2 Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment [3]

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public.

DIRECT SOLICITATION

Rule 7.3 Direct Contact with Prospective Clients

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's 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.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.

Comments to Rule 7.3

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services.... The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately....

[2] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer.... The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

WRITTEN SOLICITATION

Rule 7.3 Direct Contact with Prospective Clients

- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" 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).

Comment [5] to Rule 7.3

.... if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

QUESTION TO PONDER

Any effective marketing letter must exert some level of pressure or a sense of urgency for the potential client to take action by retaining a lawyer. After all, a letter from a bankruptcy attorney that reads as follows isn't likely to land many new clients:

Dear John,

Has your wife just filed for divorce? If so, you might want to find an aggressive, tough lawyer to limit your alimony and child support and preserve your custody rights in court. On the other hand, you might as well just let her take you to the cleaners anyway. Take it from me. As a divorced dad, your life is pretty much over anyway. However, if you feel that you just must throw away your last few thousand dollars, give me a call to set up a consultation. It will give us both something to do with our wasted lives.

That being said, it's possible to cross the line into coercion, duress or harassment. Do you think the following letter crosses that line?

Dear Jane,

So that lying, two-timing snake has finally left for good, huh? Well, I know that you put up with a lot of stuff from him during the marriage, but now, it's time to get a backbone, girlfriend! If you don't take aggressive action and I mean NOW, he and his new honey are going to wind up with the house, the kids, the dog and the TiVo. And where will that leave you? Penniless and homeless, that's where!

Do you really want to have your children see you begging for loose change on a freeway onramp somewhere? Then you **MUST CALL ME RIGHT NOW**. In fact, don't continue reading this letter. **CALL NOW** before it's too la...

EXPERTISE

Rule 7.4 Communication of Fields of Practice and Specialization

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication.

FIRM NAMES

Rule 7.5 Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comments to Rule 7.5

- [1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.
- [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

QUESTIONS TO PONDER

Trade Names

Which of the following law firm trade names is acceptable?

- a) Best, Best & Krieger
- b) The Heavy Hitters
- c) Dewey, Cheatham and Howe

While there are restrictions in using a geographic location in the trade name of a firm, do such restrictions apply to the use of geographic locations in describing legal services. For instance, may a collection firm advertise its “New Jersey-style collections”? Or may a trust and estates firm advertise its “West Palm Beach wills”?

Web Addresses

Lawyers may use a distinctive website address in promoting their services. However, which of the following websites might run afoul of legal ethics guidelines:

- a) www.ellen_emasculates.com
- b) www.divorcelawyer.com
- c) www.leave_her_broke.com