

# How Lawyers Can Navigate the Ethical Minefield of Legal Advertising

*By Ashley Merryman*    *Oct. 25, 2023*    *US News*

Attorney advertising is vital to law firm success and profitability, but marketing continues to pose legal ethics issues that must be addressed at every turn.

In the decades since the Supreme Court issued its 1977 opinion of *Bates v. State Bar of Arizona*, which legalized attorney advertising, states have become more lenient about lawyer marketing, while the courts often strike down onerous limitations.

When it comes to the formal limitations on advertising, “All the restrictions are eroding,” says Thomas Spahn, counsel at McGuireWoods, who has authored several books on attorney ethics. In the meantime, there is probably more variance between states on ethics rules for attorney advertising than there is on any other issue, according to Spahn. And this is hurting consumers on a national scale, some experts say. But until this is resolved, attorneys contemplating new advertising should consult their state bar association rules and protocols, Spahn says.

Even as the rules fall, there remains a philosophical tension relating to attorney advertising. Many lawyers still hold the view that advertising is unseemly. On one hand, there is a concern that legal advertising may target those most in need of counsel but least able to evaluate an attorney’s claims. On the other hand, legal advertising can give people information they wouldn’t otherwise learn, says Elizabeth Tippet, an associate professor at the University of Oregon School of Law.

All states prohibit attorneys from using false and misleading content in advertising. Further, this goes beyond outright falsehoods. It also includes omissions of facts and debatable opinions. States frequently prohibit attorneys from describing themselves as “the best” or using other superlatives to describe their work, unless the term is related to an independent peer assessment such as U.S. News’ list of Best Lawyers. In some jurisdictions, attorneys can say they “specialize” in a practice but cannot say they are “specialists” unless they have a certification in the field. Even true statements can be prohibited if they mislead someone. For example, if a law firm accurately states it had a \$1 million victory in court, but implies future clients will receive similar results, that would be a violation, Spahn explains.

Generally speaking, attorney advertising is any way lawyers might communicate to the public about the services they provide. Advertising includes commercials, brochures, business cards and stationery. Depending on the state, it might include a firm’s website, newsletters and more. Some states, such as Florida, Nevada and Texas, require attorneys to submit almost all advertising to the bar for review. However, even these states have exceptions to the rule.

While attorney advertising is generally allowed, solicitation is usually forbidden. But the line between advertising and solicitation is often blurry. The difference is based on how intrusive the communication is. For example, attorneys could probably send everyone in a zip code informational letters about their rights if they are arrested. But for periods of time, states can prevent attorneys from sending letters to accident victims about their rights to sue because the victims are presumptively too traumatized to make an informed decision about attorney representation.

Marketing strategies typical in other fields – such as paying percentages tied to referrals – also pose ethical dilemmas for attorneys. While attorneys can pay flat fees for advertising, paying a marketer based on the advertising’s success could be an unlawful fee split, particularly if the marketers are nonlawyers.

Attorneys can pay online directories if it’s the internet equivalent of a phonebook listing, but attorneys shouldn’t pay directories to match clients with them or to recommend the firm. That could be a prohibited referral fee.[...]