

ETHICS TIPS FOR ATTORNEY MARKETING

Q: What may I put in my advertisements?

A: The most frequently asked questions are addressed below. As a general matter, however, you should understand that all lawyer advertisements are subject to Ethical Rule (ER) 7.1: "A lawyer shall not make or knowingly permit to be made on the lawyer's behalf 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."

Q: What contact information must I include in my advertisement?

A: Lawyers must include in advertisements the name and "contact information" for at least one lawyer or law firm responsible for the content. Though not defined in the rule, "contact information" would include the myriad ways a person can be contacted – regular mail, email, telephone, website, and so forth.

Q: When may I refer to myself as a legal specialist in my advertisement?

A: Under ER 7.4, a lawyer can't state or imply that he or she is a specialist in a particular area unless the lawyer is certified by the Arizona Board of Legal Specialization or by a national entity. The national entity must have "standards for certification substantially the same as those established by the board." The board must have recognized the entity before you identify yourself as a specialist certified by that national entity. You may identify yourself as a patent attorney if you're admitted to practice before the U.S. Patent and Trademark Office, and you can identify yourself as practicing admiralty law if indeed you do so.

If only one lawyer in your firm is a certified specialist, you may not advertise your firm as "specializing" in an area. A firm cannot make blanket statements about specialization without designating which specific members are certified. Ariz. Ethics Op. 00-01.

If you're not a certified specialist, you may indicate that you limit, restrict or focus your practice to certain fields, but you may not use derivatives of the word "special," such as "specializing" or "special emphasis." Ariz. Ethics Ops. 87-11, 00-01. For example, you may not advertise that you *specialize* in estates and trusts when in fact you're not a certified estate and trust specialist.

Q: What are the State Bar's certified specialties?

A: Bankruptcy, criminal, estate and trust, family law, personal injury and wrongful death, real estate, tax, and workers' compensation. You may not advertise yourself as "specializing" in commercial law and litigation or some other area for which the State Bar does not have a certified specialty. Ariz. Ethics Op. 87-11.

Q: Which national entities does the Arizona Board of Legal Specialization recognize?

A: The Board recognizes the National Board of Trial Advocacy, the American Board of Certification, the National Association of Counsel for Children, and the Elder Law Foundation.

Q: May I advertise my Martindale-Hubbell rating?

A: You may advertise your Martindale-Hubbell rating. An unsubstantiated comparison of a lawyer's services or fees with other lawyers' services or fees might be misleading, unless you attach an appropriate disclaimer. ER 7.1 comment 3. However, the Eleventh Circuit Court of Appeals has held that a lawyer's statement in advertising that he was "AV-rated, the Highest Rating" by Martindale-Hubbell was not misleading, and did not require a disclaimer advising readers that the directory's ratings are based on subjective criteria from confidential sources. *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000).

Q: May I advertise that I'm included in *The Best Lawyers in America*?

A: It's generally permissible to advertise that you're included in that publication, because even if it is construed as a comparison (see ER 7.1, comment 3), the subjective basis for the implied comparison can be verified. Ariz. Ethics Op. 05-03. You must identify, however, the specific year for the listing in the publication as well as the area of law for which you are listed. *Id.*

Q: What about other rating publications?

A: Ethics Op. 05-03 was limited to *The Best Lawyers in America*. As the Committee on the Rules of Professional Conduct explained, "Without knowing the identity of the publication, this Committee cannot conclude whether the publication's criteria enable a reasonable consumer to draw appropriate inferences and, thus, to determine whether a listing in such publication is misleading." As a result, whether you may advertise that you are included in other publications depends on those publications' criteria.

Q: Is it OK to advertise that I am – or another lawyer in my firm is – a retired judge?

A: Ariz. Ethics Op. 87-1 concluded that identifying oneself as "judge of the Superior Court, retired" is permissible.

Q: May I advertise that I am currently a judge pro tem?

A: Ariz. Judicial Ethics Advisory Op. 03-06 concluded that under the Code of Judicial Conduct it is *not* appropriate for attorneys who *currently* serve as judges pro tem to list their judicial titles on legal stationery and in advertising soliciting business.

Q: May I advertise that I formerly served as a judge pro tem?

A: Judicial Ethics Op. 03-06 concluded by noting that lawyers who serve or *have served* as judges pro tem are also governed by the lawyer ethical rules. Judicial Ethics Op. 03-06 prohibits advertising *current* service as a pro tem. *Former* service would appear to fall under the lawyer ethical rules. Ariz. Ethics Op. 94-01 may require you to qualify your statement that you formerly served as a judge pro tem with more specifics, such as the years of service. The opinion provides no bright-line test for when you need to add that clarification.

Q: May I advertise that I will pay referral fees?

A: No, because you are ethically prohibited from paying a referral fee to another lawyer or any other person. Arizona's ethics rules do not allow lawyers to give "anything of value to a person for recommending the lawyer's services..." ER 7.2(b). Exceptions are paying the reasonable costs of permitted advertising or communications; paying the "usual charges" for a legal service plan or for a not-for-profit or qualified lawyer referral service; and paying to purchase a law practice. ER 7.2(b)(1), (2), (3). You can't escape the prohibition against paying referral fees simply by using a euphemism for the practice. The touchstone is whether you are giving anything of value to another person for recommending your services, no matter what you call it.

Q: What if I'm advertising for a co-counsel? My anticipated co-counsel and I would split the attorney's fees. Am I advertising that I will pay a referral fee?

A: If you are sharing fees with another attorney in compliance with ER 1.5(e), then you're not paying a referral fee. ER 1.5(e) requires, among other things, that your co-counsel either receives a fee in proportion to the services performed, or assumes joint responsibility for the representation. "Joint responsibility" means, at the very least, that co-counsel accepts vicarious liability for any malpractice that occurs in the representation. Ariz. Ethics Op. 04-02.

Q: May I use a slogan in my advertisement?

A: Yes, as long as it is not false or misleading. ER 7.1; Ariz. Ethics Op. 89-07 (finding no ethical problem with slogan "We take the pain out of accidents").

Prepared by the State Bar's Ethics Counsel, Kristin Moye. This list of marketing tips was based on the Arizona ethical rules and opinions in effect as of February 1, 2019. Lawyers may call the State Bar Ethics Hotline at 602-340-7284 with additional questions.