

# Practice Pointer: Things to Consider in Drafting a Yellow Pages Ad

by Kate A. Toomey

If you ever want a few minutes' diversion and nothing else is handy, take a look at the Yellow Pages listings for attorneys.<sup>1</sup> Although the Office of Professional Conduct ("OPC") seldom receives notarized and attested informal complaints about attorney advertising, people sometimes submit information (anonymously) about attorney advertising, and the OPC's Ethics Hotline regularly receives calls about what's permissible. The rules governing advertising are simple but not always scrupulously followed, and given the number of hotline calls, it's clear that attorneys aren't always familiar with them. This article is a primer on the rules governing mass media advertising, with suggestions about what to avoid.<sup>2</sup>

An initial prohibition against attorney advertising was lifted some years ago. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (affirming constitutional right to advertise legal services). In the quarter century since then, all state professional conduct rules explicitly permit advertisement.<sup>3</sup> Nevertheless, the subject remains acrimoniously controversial: is lawyer advertising simply a useful source of information for the public, or does it contribute to the degradation of the profession by transforming the practice of law into a commercial enterprise? *See* Laws. Man. on Prof. Conduct (ABA/BNA) § 81:101. The OPC does not, of course, take a position on this, but it's an interesting debate.

With the advent of lawyer advertising came the evolution of various Rules of Professional Conduct governing in some measure the content of the ads, and making attorneys accountable for them. *See e.g.* Rules 7.2 & 7.1, UTAH R. CIV. PRO. States can impose such regulations "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse. . . ." *In re R.M.J.*, 455 U.S. 191, 203 (1982).<sup>4</sup>

## In Utah, Media Advertisements Are Subject to Several Simple Administrative Requirements

Any public media ad must identify the name of "at least one

lawyer responsible for its content." Rule 7.2(d), UTAH R. CIV. PRO. This is readily complied with by including the name of the attorney who drafted or reviewed the ad before its placement.

Also, you must keep a copy or recording of any public media advertisement for two years after its dissemination, along with a record of when and where it was used. *See* Rule 7.2(b), UTAH R. CIV. PRO. The Comment following the rule observes that the function of this record-keeping is "to facilitate enforcement." Thus, if an ad were the subject of a disciplinary complaint and investigation, the OPC might request that you supply a copy, along with a list of dates and places in which it ran.

## Advertisements May Not Be Misleading

In addition to the foregoing, the important thing to keep in mind is that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Rule 7.1, UTAH R. PRO. CON. In turn, "[a] communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, . . . (b) is likely to create an unjustified expectation about results the lawyer can achieve. . . ; or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." *Id.*

The Comment following the rule explains that ordinarily an attorney can't advertise the results of a client's case, or use client endorsements, because "[s]uch information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." Rule 7.1, Comment, UTAH R. PRO. CON. These are simple, easily followed guidelines.

But what else is misleading? Remember that this is a fact-intensive inquiry and that jurisdictions differ in what is and is not misleading. Nevertheless, here are some examples from reported cases and

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ethics advisory opinions in other jurisdictions:

- listing a series of “offices near you,” when these were only available meeting spaces, not the attorney’s offices;<sup>5</sup>
- “if there is no recovery, no legal fees are owed by our clients;”<sup>6</sup>
- using a tag line such as “The Everything Lawyers;”<sup>7</sup>
- climactic scene of television ad showing attorney making closing argument to jury when none of the firm’s lawyers had ever tried a personal injury case to conclusion and the firm policy was to avoid trials by referring to outside counsel any matters that couldn’t be settled;<sup>8</sup>
- printing bogus newspaper article with headline “Biker Awarded \$250,000 for Accident;”<sup>9</sup>
- using words such as “business lawyer,” “revolutionary Business Plan;”<sup>10</sup>
- stating “DIVORCE, QUICKIE, Dominican Republic. From \$275.00 – ‘One Day’ Qualified Attorney;”<sup>11</sup>
- stating “Tip the scales in **your** favor!”<sup>12</sup>
- stating the lawyer “can help you when others can’t;”<sup>13</sup>
- stating “We are a team of fourteen lawyers with nearly 200 years combined experience,” and “Licensed in Massachusetts and Connecticut” when the attorney whose photograph was featured in the ad wasn’t licensed in both states, and at the time he placed the ad, only four of his colleagues were admitted in both the jurisdictions identified;<sup>14</sup>
- stating “WE HELP YOU CREATE AND PRESERVE WEALTH;”<sup>15</sup>
- stating “DIVORCE... \$65.00;”<sup>16</sup>
- showing actor portraying police officer calling the attorney to come to the scene of an accident to determine fault;<sup>17</sup>
- stating “Practice limited to representing the Injured across the Country and around the World” but attorney did work in other areas of the law, and international experience was related to having some clients from foreign countries and being admitted once pro hac vice in the British Virgin Islands.<sup>18</sup>

Examples of advertisements from other jurisdictions that were deemed not misleading:

- offering uncontested divorce at “very reasonable price” provided the charge is within the low range of prices charged in

that area;<sup>19</sup>

- listing areas of practice;<sup>20</sup>
- stating “We Will Investigate and Push Your Claims;”<sup>21</sup>
- stating that the law firm is the “largest” if this can be verified.<sup>22</sup>

Here are some suggestions for using mass media advertising without violating the Rules of Professional Conduct. Avoid using your “track record.” Even if your statements are scrupulously accurate, they may create unjustified expectations in prospective clients. Every case being unique, it’s virtually impossible to predict with precision what you’ll be able to accomplish for a particular client even if you’ve been successful in the past. As one commentator put it, “Since the result of a case depends upon the case’s merit and the counsel’s ability, there is no way to determine if the results obtained were exceptional, adequate, or poor, or whether the lawyer was instrumental in the case’s outcome.” New York State Ethics Op. 539 (1982).

Likewise, and for similar reasons, avoid client testimonials and endorsements. Here’s an example from Ohio: testimonials from former clients stating that “If you have the right attorneys, you can fight City Hall,” and “Take my word for it, they’re the best.”<sup>23</sup> Some jurisdictions explicitly forbid such statements altogether, and whereas Utah’s rules are less restrictive,<sup>24</sup> because client endorsements may create unjustified expectations, the prudent course is to eschew them.

Also, don’t include comparisons of lawyers’ services, unless these can be substantiated. Even something so mild as the claim “We Do It Well” has been deemed unverifiable and misleading.<sup>25</sup> So has the seemingly innocuous “Big city experience, small town service.”<sup>26</sup> In this context, even if you can substantiate the comparison at the time you place the ad (such as “biggest jury award in the history of the State,” or “firm with the largest number of attorneys in town,”) it seems wise to consider whether you can be certain the claim will be true for the duration of the ad. What’s reasonable for a newspaper ad might not be the same as what’s reasonable for an annual publication.

A final suggestion is to check out the ABA’s Aspirational Goals for Lawyer Advertising,<sup>27</sup> which were first published in August 1988. As the title suggests, these are goals, rather than a list of explicit dos and don’ts, but the document serves as a useful tool for lawyers considering the appropriate content of an ad.

Note that the rules governing media advertising don't require prior review. *See* Comment, UTAH R. CIV. PRO. Nevertheless, some Bars have committees that assist attorneys by reviewing proposed advertisements; the committees also determine whether existing ads violate the Rules of Professional Conduct. If you would like to have such a committee in this jurisdiction, please e-mail me a note to that effect at [opc@utahbar.org](mailto:opc@utahbar.org). Although the OPC lacks the resources to review actual proposed advertisements, and any such review of necessity would have to consider the broader factual context of an ad, its attorneys are available through the Ethics Hotline (531-9110) to assist you with specific questions about appropriate content.

1. This article does not describe or refer to specific local Yellow Pages advertisements, and any resemblance between these and the examples cited here is coincidental.
2. Targeted mail solicitation is a topic for another day.
3. The relevant Utah Rule of Professional Conduct makes explicit that "a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication." Rule 7.2(a), UTAH R. PRO. CON. You may use many types of media, including broadcast media, print media, billboards, signs on benches, and transit vehicle signs. Web sites are also permitted. *See* Utah Ethics Advisory Op. Comm., Op. 97-10 (1997).
4. *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 ("A prophylactic rule is . . . essential if the state is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.").
5. *In re 95-30*, 550 N.W.2d 616 (Minn. 1996).
6. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985) (State's position that it is deceptive advertising to refer to contingent fee arrangements without mentioning client's liability for costs supports requirement that it be disclosed).
7. Philadelphia Bar Ass'n Professional Guidance Comm., Op. 98-11 (June 1998) (use of tag line would require that firm absolutely handles all types of cases).
8. *In re Zang*, 741 P.2d 267, 275-278 (Ariz. 1987). The decision also includes helpful dicta concerning guidance for determining what is misleading. *See id.* at 278-279.
9. Connecticut Informal Ethics Op. 88-3 (1988) (appearance of newspaper report implies neutral source whereas it was composed solely to advertise; creates expectation of results).
10. Philadelphia Ethics Op. 87-27 (1987) (subjective terms such as "expert" not permissible).
11. *Attorney Grievance Comm'n of Md. v. McCloskey*, 511 A.2d 56, 58 (Md. 1986).
12. Philadelphia Ethics Op. 87-28 (1987) (implies guarantee).
13. District of Columbia Bar Comm. on Legal Ethics, Op. 249 (1994).
14. *Haymond v. Statewide Grievance Comm.*, 723 A.2d 808 (Conn. 1998).
15. *In re Schnieder*, 710 N.E.2d 178 (Ind. 1999) (phrase misleading because it predicted outcome).
16. You're right, this is an old case; but the reasoning is still sound. *See People v. Roehl*, 655 P.2d 1381 (Colo. 1983) (misleading because it implied that the representation would be provided for that amount regardless of the case's particular circumstances; instead, the lawyer provided clients a packet of forms to fill out and file pro se).
17. *In re Pavlack*, 488 S.E.2d 309 (S.C. 1997).
18. *Medina County Bar Ass'n v. Grieselhuber*, 678 N.E.2d 535 (Ohio 1997).
19. *Bates v. State Bar of Arizona*, 433 U.S. 350, 382 (1977).
20. *In re R.M.J.*, 455 U.S. 191, 203-205 (1982).
21. Connecticut Ethics Op. 88-6 (1988) (whether lawyer investigates and pushes client's claim is verifiable).
22. District of Columbia Bar Ethics Op. 142 (1984).
23. *Office of Disciplinary Counsel v. Shane*, 692 N.E.2d 571 (Ohio 1998).
24. As noted earlier, the Comment following the rule discourages using client endorsements, but the rule itself doesn't forbid them.
25. *Medina County Bar Ass'n v. Grieselhuber*, 678 N.E.2d 535 (Ohio 1997).
26. Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 94-12 (1995).
27. These are available through the ABA's web site; the address is: [abanet.org/legs/services/clientdevelopment/abaasirationalgoals.html](http://abanet.org/legs/services/clientdevelopment/abaasirationalgoals.html). I haven't reviewed the ABA Commission on Advertising's *How-To Manual*, published in 1979, or the ABA Commission on Advertising's publication titled *Effective Marketing of Legal Services Through Advertising: A Practical Guide for Lawyers* (1985), but these also might offer some practical guidance in drafting advertisements.