

Getting The Word Out Under The New Advertising Rules

What Can Attorneys Do? What Should They Do?

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When the new Massachusetts rules for lawyer advertising arrived recently, it was a bit of a surprise that restrictions on ads were *loosened* rather than tightened.

In turn, some members of the bar have predicted a sort of public-image Armageddon for lawyers. Get ready for a tasteless barrage of unregulated television spots, a blizzard of direct mail and an electronic glut of e-mail, these critics warn.

But even though the Supreme Judicial Court has taken the shackles off the free speech rights of lawyers trying to get new clients, experts predict that no major changes will ensue. Not too many lawyers are likely to dive head-first into campaigns that could be viewed as intrusive or tasteless, according to attorneys.

But the new rules do bring subtle new ways for lawyers to get the word out — and to enhance their business.

Direct Solicitation

The SJC has largely obliterated the traditional restraint against personal solicitation. Under Rule 7.3(e) of the Massachusetts Rules of Professional Conduct, attorneys can now directly solicit, both in person and in writing, businesses, family members, other lawyers and former clients.

As a result, Robert S. White, co-chairman of the Worcester County Bar Association's Law Office Technology Committee, foresees a dramatic upsurge of direct solicitation, especially via e-mail.

"I have no doubt attorneys who aggressively advertise and solicit clients will send unsolicited e-mail," he says. "It's simple and just about free. They will target as many people as they can under the new rules, such as when there's new legislation or new caselaw."

Edward P. Ryan Jr. of Fitchburg, president-elect of the Massachusetts Bar Association, notes that "direct solicitation in one form or another has existed for a long time. Now it will be more widespread."

Michael C. Fee, partner in a small Watertown law firm, agrees that solicitation is common practice.

"Who doesn't do it?" he asks. "Lawyers often say [to prospective new clients], 'hi... how are you? Let me take you to lunch and talk to you about my becoming your lawyer.'"

While the personal touch — the tried-and-true formula lawyers use to build business relationships — may flourish under the new direct-solicitation rule, should lawyers consider mass mailings as well?

A massive outpouring of unsolicited e-mail "will be treated as junk mail," insists Boston lawyer K. William Kyros, who specializes in developing Web sites for lawyers.

Kyros claims that even though sending unsolicited e-mail — known as "spamming" — through a lawyer's Web site is certainly technologically feasible, it likely would not be fruitful marketing.

Similarly, John L. Whitlock of Boston, who served on the SJC Lawyer Advertising Committee, says mass paper mailings "will likely be lost in the shuffle. People don't like to receive unsolicited advertisements."

Whitlock suggests what might work better is sending a brochure to residents in smaller towns announcing the opening of a new law firm and describing the firm's practice specialties.

Marianne Ajemian, who heads up the marketing efforts at a large Boston law firm, doubts the new rules will cause large, business-oriented law firms to suddenly enter the fray after largely remaining on the sideline of lawyer advertising and direct solicitation.

“The bigger firms want to do targeted marketing, to reach out directly to specific clients as the best way to capitalize on their marketing efforts,” Ajemian says.

“Sophisticated users of legal services typically don’t respond to direct mail solicitations,” she observes. “In fact, they are put off by it. They see it as pedestrian. Direct mail solicitation works for attracting clients who may not use legal services often.”

As an example, she points to newsletters on Web sites of small firms and sole practitioners targeting huge numbers of people, such as in divorce or immigration law, who want information. In contrast to Ajemian, MBA General Counsel Martin W. Healy predicts that business and conveyancing attorneys *will* ratchet up direct solicitation of potential clients under the relaxed rules.

“This is the real area to watch,” says Healy, in contrast to advertising, which he doesn’t expect to change much under the new rules.

“The relaxation of the direct solicitation rule is not necessarily a bad thing,” he says. “Businesses are sophisticated and they have the resources to decide where their legal needs can be served. They can sort through the promises of professional services offered and make wise decisions.”

TV, Radio, Print

The new advertising rules allow television, radio and print ads to continue almost unbridled, as now the prohibition on “false or misleading” communications about the only significant restriction.

But should lawyers who previously did not advertise take advantage of the change?

It may depend on who you ask, as the very notion of hawking legal services continues to polarize the profession in Massachusetts.

Roy A. Bourgeois, a Worcester business litigator, blasts advertising because “it really does denigrate the profession. It demeans our image. Lawyer advertisements are inherently deceptive.”

Bourgeois notes that “there’s a Worcester County lawyer who advertises that he’s done 150 trials. But he did drunk driving trials as an assistant district attorney — the same kind of trial over and over again. What does that really tell you as a consumer? It seems false and misleading.”

The MBA led the effort to restrict lawyer advertising. It proposed such restraints as banning dramatizations in advertisements, and requiring law firms who routinely refer cases, so-called brokering, to prominently notify potential clients of that fact in advertisements.

The SJC rejected all of the MBA’s proposals.

Healy insists the MBA’s focus was protecting “unsophisticated consumers in a vulnerable state who have a sudden need to hire an attorney. Consumers need full disclosure. A 30-second sound bite on how well a particular lawyer will serve the consumer when, in fact, that lawyer will not serve the client, is deceptive and at minimum misleading.”

Healy claims “the MBA had no axe to grind against advertisers. We just wanted to clean up advertising practices.”

One Boston personal-injury attorney who requested anonymity maintains that consumers are not best served by brokering of cases — a practice that does not have to be disclosed under the new advertising rules.

“If you are an advertiser and do not handle cases yourself, you may naturally forward a case to whomever pays you the highest referral fee,” observes the attorney.

“Which attorneys will agree to highest referral fees?” the lawyer asks. “They will not be the most experienced, competent attorneys with healthy caseloads of their own, but, more likely, attorneys with little or no experience hungry for cases. They perhaps possess little ability to best serve the client.”

The attorney disputes the notion that brokers’ advertisements educate consumers.

“When clients select an attorney they see on television, they expect that attorney to represent them,” the lawyer says. “They like his voice, his appearance, the way he comes across as sincere. But after they sign the contingent fee agreement, imagine their surprise when they learn that the attorney they selected based on the ad will not be handling the case. It is a classic ‘bait and switch.’”

The attorney contends that unsophisticated clients are dissuaded from leaving the advertising attorney because they feel bound by the fee agreement.

Barry A. Feinstein, a personal-injury lawyer based in Peabody, advertises throughout New England, and routinely refers cases to “affiliated” offices.

“Full disclosure [of case referrals] is appropriate,” Feinstein remarks.

He says his television ads note that he has affiliated law offices. When a prospective client calls his Peabody office, and, for example, that person lives in Maine, the caller is immediately transferred to an affiliated office in Maine, Feinstein explains.

The contingent fee agreement, according to Feinstein, discloses that the Maine law firm will handle the case, but under his supervision.

He says ads broaden access to legal services and do not diminish the legal profession.

“What denigrates the profession is lawyers not keeping in touch with clients, or zealously advocating clients’ interests, or stealing clients’ money,” Feinstein asserts.

Robert K. Rainer, a Boston personal-injury attorney who advertises heavily, also insists that lawyer advertising does not taint the profession or mislead the public.

“Advertising sends the message that the lawyers being advertised are competent, hard working, aggressive, ethical, and in the business of helping the public who can’t pay \$300 an hour for a lawyer,” says Rainer, who says his office doesn’t refer cases.

Rainer asserts that the fervent opposition to lawyer advertising comes from those lawyers who choose not to advertise, but who are falling behind those that do.

“Advertising raises the bar of competition,” Rainer notes.

He downplays concerns over the content of ads.

“Some are personally tasteless to me, and some of my ads are probably offensive to others,” he admits. “But that’s not the point. The line to draw is when the advertising is false or misleading. You shouldn’t tell people you can do things when you can’t.”

Douglas K. Sheff, president-elect of The Massachusetts Academy of Trial Attorneys, claims that reputation and referrals is still the best way to attract the more desirable cases.

“Traditionally, lawyers with the greatest accomplishments, the best reputation for talent, integrity and excellence both in and out of the courtroom, became known in their communities,” he remarks. “Prospective clients would gravitate to the most competent attorneys.”

Sheff says he “hopes that lawyers who take advantage of the new advertising rules do not interrupt this free-flowing process which has functioned so well for years.”

Healy says some lawyer ads lack sufficient information to truly educate consumers.

“The MBA believes in the right of lawyers to advertise, but many ads are basically ‘teasers,’” Healy claims.

But regulating advertising usually runs afoul of the first amendment, insists Whitlock.

“The reputation of the profession is a concern, but we’re not going to control lawyers by restricting their free speech rights,” Whitlock says.

“Tastelessness has nothing to do with what’s misleading,” he observes. “The new rules may cause a few lawyers to develop an advertising personality and may encourage them to be more exuberant. But a little color in our lives is okay.”

Whitlock says “lawyers have to self-regulate. If an advertisement is misleading, then they should talk with the Board of Bar Overseers.”

Whitlock remarks that sharp opposition to lawyer advertising is driven by economic pressures.

“The advertisers are getting business away from those that don’t,” he says. “That’s really at bottom here. But it’s not a legitimate concern [to support restrictions] when not as good lawyers advertise and the better lawyers don’t.”

Increase In Advertisements

Opinions are mixed on whether the new rules will dramatically change the content, style and extent of lawyer advertising in Massachusetts.

Richard C. Campbell of Boston, who co-chaired the MBA’s study of lawyer advertising, says the bar should expect “more advertising, more testimonials and dramatizations, more direct solicitations, more fancy packages delivered to accident victims immediately after accidents. The SJC has almost invited lawyers to do so.”

Healy says “advertisers that have been viewed as pushing the envelope will be emboldened to produce ads that are even more sensational.”

But Whitlock, in contrast, predicts the new rules will have little impact beyond what already exists.

“I have real doubts that we’ll see any noticeable change in advertising by lawyers,” he predicts.

“The new rules will not change anything in Massachusetts, and the ads won’t look different from other states.”

Rainer, who says the new rules will not cause him to change his advertising methods, claims that few attorneys do “large-scale marketing” through advertisements.

“It’s an expensive venture. You have to be prepared to spend money,” he says. “You occasionally see flash-in-the-pan marketers, but they run out of resources quickly because they are not prepared to market over the long term.”

Some lawyers question the economic viability of advertising.

Fee, who opened his practice in 1995 after working for a large Boston law firm, notes that he used to think advertising in local media outlets was necessary.

“But my experience was that it brought in the dregs,” he notes. “If you want to solicit car accident, dog bite, drunk driving cases from people who don’t know a lawyer, then I guess advertising makes sense.”

Fee says he now relies on more traditional ways to attract clients, mainly through referrals from other lawyers and friends.

Bourgeois advises less-established lawyers scratching and clawing to establish a foothold in private practice to think long and hard on the practice niche they want to develop, and whether advertising fits their plans.

“Young lawyers need to understand the market,” he observes. “They need to come up with a business plan on where and what they want to practice. Learn about a field and master it.”

Bourgeois says that “if you come out of law school today wanting to do suburban divorces, you’re insane. You shouldn’t go head-to-head with tons of other lawyers. Lawyer advertisers are just cannibalizing off each other. There are only so many tort cases out there.”

Kyros maintains that the Internet will inevitably become the marketing forum of choice.

“The Internet is going to displace television and radio,” he claims. “It’s moving toward unified communications as computers and television are integrated on the ‘Net. It’s the future of marketing for lawyers, both for loud and soft approaches.”

Kyros claims that flashy advertisements don’t play well on the Internet, since Web users are actively seeking information.

“They’re looking for cases handled, or articles written by a particular lawyer,” he says. “Even less sophisticated clients are looking for lawyers who practice in a specific area [of law] rather than someone who has a loud advertisement. Lawyers with more to say, and with more experience, benefit more from an Internet presence.”

Kyros predicts that more and more lawyers will establish Web sites as concerns over whether they comply with professional conduct rules disappear.

Web pages will no longer have to carry disclaimer labels that they may be considered advertising, he notes.