



THE CANADIAN  
BAR ASSOCIATION

# The Ethics of Advertising

## A Toolkit for Lawyers



**Prepared by Colin Ouellette and Sydney Young  
for the Ethics and Professional Responsibility Subcommittee**

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## **EXTERNAL REVIEWERS**

Katrina Haymond, Field Law

Kimberley Precht, Field Law

CBA Small, Solo and General Practice Law Section

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# INTRODUCTION

## What is Advertising?

Advertising is the use of public communications to promote a particular product or service in hopes of drawing attention from consumers. While advertising may be narrowly construed to the use of mediums like television, radio, billboards and magazines, this definition also allows for a broader interpretation. Advertising may be interpreted to encompass any form of public communication, including the use of websites and other popular social media platforms such as Facebook, Instagram, Twitter and TikTok.

## Why Advertise?

Legal marketing and advertising serve a seemingly obvious purpose: to generate business and increase profits. Advertising helps increase client intake and revenue. It may also offer secondary benefits like educating the public (consumers), building awareness of legal services, defining a brand, recruiting new lawyers, and expanding the geographical reach of your professional reputation.

In the legal profession, advertising may help lawyers and law firms to better define their practice, extend their geographical client basis, and seek to generate new business. Along with these benefits, however, lawyers have a professional responsibility to ensure that any communications to the public uphold the values of the profession.

## A Brief History of Regulation in Advertising in the Legal Profession

It is well accepted that freedom of speech under section 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)* includes commercial advertising. In the professional sphere, however, this right to engage in advertising must be balanced by the importance of maintaining the integrity of the profession and the statutory responsibility of serving and protecting the public.

Before the *Charter*, advertising restrictions by the Law Society of British Columbia were challenged in *Canada (Attorney General) v. Law Society (British Columbia)*.<sup>1</sup> The Supreme Court of Canada (SCC) held that, although freedom of speech was a valued and fundamental right, the Law Society was authorized to take disciplinary action against a lawyer for breach of the advertising rules. The SCC concluded that a lawyer's right to freedom of speech was not infringed by professional rules and regulations which limited that right.<sup>2</sup>

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<sup>1</sup> [1982] 2 SCR 307.

<sup>2</sup> Casey, Regulation of Professions in Canada Release #10, 12/2022 at ss 3:4.

After the *Charter*, the SCC continued to find that professional limitations on freedom of speech were acceptable. In *Rocket v. Royal College of Dental Surgeons of Ontario*,<sup>3</sup> the SCC affirmed that commercial speech was protected by the *Charter* but held that it was essential for professional societies to regulate the way their members advertised. The SCC noted that although the motive for advertising is primarily economic, advertising also serves an important public interest by enhancing the public's ability to make informed choices.<sup>4</sup>

The SCC noted that the public, as consumers of professional services, are unable to evaluate the validity of competing claims between professionals and are therefore highly vulnerable to unregulated advertising.<sup>5</sup> Given these competing interests, the SCC concluded a widespread ban on advertising contravenes the right to free speech but that there is a legitimate interest in regulating professional advertising to maintain the high standards of the profession and to protect the public from irresponsible and misleading advertising.<sup>6</sup>

## Overview

Over the past 30 years legal advertising has skyrocketed. Although it was once considered unprofessional to advertise legal services, effective marketing is now considered necessary for a lawyer or firm to grow and thrive.<sup>7</sup>

Effective marketing can give lawyers and law firms greater access to potential clients, assist in overcoming geographical boundaries, raise awareness and track consumer interest. Marketing and advertising are also accompanied by negative effects, however, including a rapidly changing and increasingly saturated market, and a host of ethical issues.

Given the ethical repercussions of advertising, law societies have created specific rules to protect the public and prevent lawyers and firms from using irresponsible and misleading information. Whatever form legal advertising may take, these rules ensure that the high standards of the profession are upheld.

This toolkit will familiarize lawyers with the rules and regulations of advertising in the legal profession and how they apply to different forms of advertisements. Knowing these rules and the accompanying ethical expectations can help protect lawyers from disciplinary action and help maximize their marketing messages.

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<sup>3</sup> [\[1990\] 2 SCR 232](#).

<sup>4</sup> *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at 247 [*Royal College*].

<sup>5</sup> *Royal College* at page 248.

<sup>6</sup> *Royal College* at 249.

<sup>7</sup> Gregory Siskind & Deborah McMurray, *The Lawyer's Guide to Marketing on the Internet*, Fourth Edition (Chicago: American Bar Association, 2017).

# THE RULES OF ADVERTISING

## The Model Code

Following the SCC decision in *Royal College* that professional bodies should and could regulate legal advertising to protect the public's interests, law societies enshrined rules in their codes of professional conduct regulating the form and content of legal advertisements.

The Canadian Bar Association promotes harmonized standards of professional conduct. While some law societies have adopted the language in the Federation of Law Societies of Canada's (FLSC) Model Code of Professional Conduct, there are important distinctions between the law society codes in different jurisdictions. Although the Model Code's basic principles have been adopted with some consistency, it is imperative lawyers consult the code(s) of conduct in their jurisdiction(s) to ensure compliance with their respective professional obligations. Do not assume that a rule in one jurisdiction is the same or similar to a rule in another jurisdiction.

The relevant sections in the [Model Code](#) are sections 2.1, 3.3-1, 4.1-2, 4.2-1, and 4.3.

## General Rules

The Model Code sets out the overarching principle of integrity to guide a lawyer's conduct:

### 2.1 INTEGRITY

**2.1-1** A lawyer has a duty to carry on the practice of law and discharge all responsibility to clients, tribunals, the public and other members of the profession honourably and with integrity.

The duty of integrity applies to a lawyer's practice and associations with clients, tribunals, and notably, the public. In the commentary, the Model Code highlights the fact that public confidence in the administration of justice and in the legal profession may be eroded by irresponsible conduct. As a result, a lawyer's conduct should reflect favourably on the legal profession and inspire confidence, respect, and the trust of clients and the community. Based on this principle, lawyers should avoid even the appearance of impropriety.

Advertising, as it is broadly defined in this toolkit, is a significant source of communication between lawyers and the general public and lawyers must take care when creating content to avoid any behavior that conflicts with their duty of integrity.

## Advertising Rules

To help lawyers uphold the professional duty of integrity, the Model Code includes several rules that specify how a lawyer may market their professional services:

### **MAKING LEGAL SERVICES AVAILABLE**

**4.1-2** In offering legal services, a lawyer must not use means that:

- a) are false or misleading;
- b) amount to coercion, duress, or harassment;
- c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or
- d) otherwise bring the profession or the administration of justice into disrepute.

Although this section does not pertain directly to advertising and marketing, it does specify that when offering services, a lawyer must not use means that are false or misleading or otherwise bring the profession or administration of justice into disrepute. (We will see later that these requirements are easily overlooked and a lawyer who does not carefully consider these principles may easily contravene them.)

### **MARKETING**

#### **Marketing of Professional Services**

**4.2-1** A lawyer may market professional services provided that the marketing is:

- a) demonstrably true, accurate and verifiable;
- b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;
- c) in the best interests of the public and consistent with a high standard of professionalism.

In the commentary, the Model Code offers examples of behaviours that may contravene this Rule:

- a) Stating the amount of money recovered for a client or referring to the lawyer's degree of success unless accompanied by a statement that provides past results are not indicative of future results and that the outcome will vary according to the facts of individual cases;
- b) Suggesting qualitative superiority;
- c) Raising expectations unjustifiably;



- d) Suggesting or implying the lawyer is aggressive;
- e) Disparaging or demeaning other persons, groups, organizations or institutions;
- f) Taking advantage of a vulnerable person or group; and
- g) Using testimonials or endorsements that contain emotional appeals.

### **ADVERTISING NATURE OF PRACTICE**

**4.3-1** A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

The commentary for this Rule states that the purpose of advertisements is to help potential clients choose a lawyer with the appropriate skill and knowledge for their particular legal matter.

Many law societies have formulated other ethical duties on legal advertising that members must follow. In Ontario, for example, commentary for Rule 4.2-1 states that lawyers should not refer to awards, rankings, and third-party endorsements that are not *bona fide* or are likely to be misleading. Further, the Ontario commentary states that including terms like “best”, “super” and “#1” contravene this Rule.

## **Additional Rules**

In addition to the specific rules on advertising and the general duty to act with integrity, the code of conduct may contain additional rules that affect a lawyer’s ability to advertise. For example, the duty of confidentiality in the Model Code is common across many jurisdictions.

### **CONFIDENTIAL INFORMATION**

**3.3-1** A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- a) expressly or impliedly authorized by the client;
- b) required by law or a court to do so;
- c) required to deliver the information to the Law Society; or
- d) otherwise permitted by this rule.

### **USE OF CONFIDENTIAL INFORMATION**

**3.3-2** A lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

These rules obligate lawyers to hold all information concerning their clients in strict confidence, subject to several exceptions. According to the commentary for this rule, lawyers should not unnecessarily disclose that they have been retained by a person about a particular matter whether that person is a current client or not.

## Overview

Although we focus on the rules and requirements in the Model Code, every lawyer is responsible for reviewing and adhering to the requirements of the regulatory body of their jurisdiction(s). Despite differences between jurisdictions, however, the rules on legal advertising may all be distilled to one basic principle: advertisements cannot be misleading.<sup>8</sup>

You can find more information about the specific rules and requirements in each law society's Code of Conduct:

- Law Society of [Alberta](#)
- Law Society of [British Columbia](#)
- Law Society of [Manitoba](#)
- Law Society of [New Brunswick](#)
- Law Society of [Newfoundland and Labrador](#)
- Law Society of [Northwest Territories](#)
- [Nova Scotia](#) Barristers' Society
- Law Society of [Nunavut](#)
- Law Society of [Ontario](#)
- Law Society of [Prince Edward Island](#)
- Barreau du [Quebec](#)
- [Chambre des notaires](#)
- Law Society of [Saskatchewan](#)
- Law Society of [Yukon](#)

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### LEARN MORE:

- Law Society of Alberta "[Ethical and Effective Advertising](#)"

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<sup>8</sup> Gregory C. Sisk, "[The More Things Change, the More They Remain the Same: Lawyer Ethics in the 21st Century](#)" (2019) 9:2 St Mary's J on Legal Malpractice & Ethics 342.

# COMMON MISTAKES IN LEGAL ADVERTISING

The following issues are common mistakes lawyers make when advertising their services:

## Rankings

Third party rankings such as ‘Best Lawyer’ and ‘Canada’s Best Lawyers’ published every year by The Globe and Mail are an increasingly popular way for lawyers to stand out in their respective markets.

Although only the Ontario Rules specifically comment on the unprofessionalism of this practice, participation in third party ranking systems may also contravene the standards in the Model Code as well as the rules in other jurisdictions.

According to the Ontario Rules of Professional Conduct commentary, there is nothing untoward with fair and objective ranking systems based on valid and meritorious processes. The commentary adds that if the rankings are likely to be misleading, confusing or deceptive, they contravene the Rules.

In its guide to Ethical and Effective Advertising, the Law Society of Alberta likewise advises that references to awards or honours that genuinely reflect a lawyer’s professional or civic service do not contravene the rules. Third-party endorsements that are not *bona fide*, and are likely to be misleading, confusing or deceptive (such as references to lawyers as “the best”) are prohibited by a lawyer’s duty not to be misleading, as potential clients have little understanding or appreciation of how these rankings are generated.

One way in which lawyers may ethically use these rankings is to include a description of the award’s meaning. For example, the advertisement can explain that “best lawyers” represents a vote from colleagues and not a comment on the lawyer’s quality of work.

Care should be taken when relying on these awards as advantageous advertising tools to avoid misleading the public. The requirement to not be misleading is prevalent in the Model Code and all law society codes of conduct. Ranking systems that are not *bona fide* may be a source of misinformation and amount to inappropriate and unethical advertising.

In a decision by the Law Society Tribunal in Ontario, a lawyer acknowledged marketing services that suggested qualitative superiority over others, and referencing third party endorsements in a misleading manner and specialization in the absence of proper certification. On the use of rankings, the Tribunal determined that some of the rankings did not (i) include an evaluation of his specific legal knowledge or experience; (ii) reflect his performance as a personal injury lawyer; or (iii) include any input or evaluation of him

by clients or others familiar with his work. As a result, he was found guilty of professional misconduct.<sup>9</sup>

Several popular Canadian lawyer rankings are conducted by legal media groups:

- [Canadian Lawyer Magazine](#)
- [Best Lawyers](#)
- [Lexpert](#)

Regardless of whether a lawyer is named in these or other ranking systems, methods should be reviewed to determine whether the assessment is truly *bona fide* or whether it is a popularity contest where the lawyers with the most votes are lauded as the 'best' or 'top' lawyers in their field or a pay-for-your-reputation based ranking system where lawyers are ranked based on financial contributions.

## Expertise/Specialization

It has been suggested that expertise is the most important factor for many clients when looking for legal advice.<sup>10</sup> As the number of qualified legal professionals has trended higher, lawyers and clients alike have turned to the perception of specialization as a tool to distinguish one lawyer from another.

Specialization is common in professions such as medicine and dentistry, but most Canadian legal institutions and administrative bodies do not offer specialization certificates. Some codes of conduct prohibit lawyers from characterizing themselves as specialists. In jurisdictions where lawyers are permitted to advertise a specialty, potential clients must be able to verify the claim, or the designation may be misleading.

Rule 4.3-1 of the Model Code states that a lawyer must not advertise that they are a specialist unless so certified. The commentary outlines that the purpose of advertising is to offer information to potential clients and to assist them in choosing a lawyer who has the appropriate skills and knowledge for their issue. The Rule explains that claiming expertise or specialization implies that a lawyer has met an objective standard which is presumably regulated and recognized by their governing body.

Alternatively, when a law society offers certification for a specialization, such as in Ontario, it may be appropriate to include this information in an advertisement. The commentary in the Model Code outlines that if a firm or lawyer practices in more than one jurisdiction, one of which offers certification, it does not offend this Rule if media circulated concurrently refers to that certification and identifies the certifying authority.

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<sup>9</sup> *Law Society of Ontario v. Mazin*, 2019 ONLSTH 35.

<sup>10</sup> Sally J. Schmidt, *Marketing the Law Firm: Business Development Techniques* (New York: Law Journal Press 2004) at 1.2.

The parallel rules implemented by law societies across Canadian legal jurisdictions have varying requirements outlining how and when lawyers can hold themselves out as experts. The following table outlines each law society's rule parallel to Model Code Rule 4.3-1:

**Alberta Law Society**

**Rule**

4.3 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

**Commentary**

Same as Model Code

**British Columbia Law Society**

**Rule**

4.3-0.1 A lawyer may state in any marketing activity a preference for practice in any one or more fields of law if the lawyer regularly practises in each field of law in respect of which the lawyer wishes to state a preference.

4.3-1 Unless otherwise authorized by the Legal Profession Act, the Law Society Rules, or this Code or by the Benchers, a lawyer must:

- a) not use the title "specialist" or any similar designation suggesting a recognized special status or accreditation in any other marketing activity, and
- b) take all reasonable steps to discourage use, in relation to the lawyer by another person, of the title "specialist" or any similar designation suggesting a recognized special status or accreditation in any marketing activity.

**Commentary**

n/a

**Manitoba Law Society**

**Rule**

4.3-1 A lawyer or firm may advertise that the lawyer or firm is in general practice if such is the case.

4.3-2 A lawyer may advertise that the lawyer has a preferred area of practice provided the advertisement does not contain a claim either directly or indirectly that the advertising lawyer is a specialist or expert.

4.3-3 A lawyer may advertise that the lawyer's practice is restricted to a particular are or areas of the law or may state that the lawyer practises in a certain area or areas of the law if such is the case.

**Commentary**

The commentary for this rule maintains that a lawyer may advertise areas of practice if the

representations are accurate, but does not include a specific allowance to permit specialist certifications from other jurisdictions.

### **New Brunswick Law Society**

#### **Rule**

4.3-1 The marketing of legal service by a practising lawyer or law firm shall not use the words “specialist”, “specializing”, “expert”, or synonyms thereof.

#### **Commentary**

Same as Model Code

### **Newfoundland Law Society**

#### **Rule**

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

#### **Commentary**

Same as Model Code

### **Northwest Territories Law Society**

#### **Rule**

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

#### **Commentary**

Same as Model Code

### **Nova Scotia Law Society**

#### **Rule**

4.3-1 The marketing of legal services by a practising lawyer or law firm shall not use the words “specialist”, “specializing” “expert”, “expertise” or synonyms thereof.

#### **Commentary**

Adopted Model Code commentary [1], [3] and [4].

### **Nunavut Law Society**

#### **Rule**

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

#### **Commentary**

A note that the Law Society of Nunavut does not have a process for certification was added to the Model Code commentary

## Ontario Law Society

### Rule

4.3-1 A lawyer shall not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Law Society.

### Commentary

[2] was adapted as follows: In accordance with s. 20(1) of the Law Society's By-Law 15 on Certified Specialists, the lawyer who is not a Certified Specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

## Prince Edward Island Law Society

### Rule

4.2-1 The marketing of legal services by a practising lawyer or law firm shall not use the words "specialist", "specializing", "expert", "expertise", or synonyms thereof.

### Commentary

Adopted Model Code commentary [1], [3] and [4].

## Quebec Law Society

### Rule

Title II, Chapter I, Division I (lawyers) 10. A lawyer must not claim specific qualities or skills relating, in particular, to his competence or to the extent or efficiency of his professional services, unless he can substantiate those claims.

Moreover, he must not claim specific qualities or skills relating to the competence or to the extent or efficiency of his professional services, unless he can substantiate those claims.

Code of Ethics of notaries, Chapter 1:3. A notary must promote measures of education and information relevant to the areas in which he practises.

### Commentary

n/a

## Saskatchewan Law Society

### Rule

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

### Commentary

Same as Model Code with additional: [5] A lawyer shall not use the title "specialist", "expert", "leader", or any similar designation suggesting a recognized special status or accreditation in an advertisement, public communication, or any other contact with a prospective client, unless authorized to do so in accordance with this rule.

## Yukon Law Society

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

### Commentary

Same as Model Code

While some jurisdictions adopt the Model Code language verbatim, others make small changes including more specific rules about use of words like ‘specialized’ or ‘expert’ or have included alternative commentary. Some jurisdictions chose not to reflect the Model Code’s language at all and maintain instead their unique rules on references to expertise or specialization.

In a decision by the Law Society of Alberta’s disciplinary tribunal, a lawyer was formally reprimanded for advertising that they were an expert in immigration law without formal certification to substantiate their claim.<sup>11</sup>

In another decision, the Law Society of Ontario’s disciplinary tribunal disciplined a member for misleading advertising where ads referenced past success without a disclaimer and specialization in the absence of certification. The Tribunal noted:<sup>12</sup>

The website was misleading, confusing, deceptive and inaccurate because it marketed to clients on the basis that Mr. D’Alimonte’s firm was a substantial experienced firm when the truth was that the firm was comprised of a relatively inexperienced sole practitioner. This is a particularly egregious breach because clients seek lawyers, and lawyers market to clients, based on skill and expertise.

Before referring to specialization in a given area, it is important to determine whether designation is permitted in the jurisdiction in question. If so, the qualifications to hold oneself out as a specialist must be met. If not, the Model Code recommends indicating a preference for or experience in a desired area of practice instead of unfounded statements of expertise.

## Testimonials

It may seem beneficial to include testimonials from former clients in advertisements. Product or service reviews are heavily relied on by the public in their purchasing decisions.

If including testimonials in advertisements, lawyers must first ensure that testimonials

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<sup>11</sup> *Law Society of Alberta v. Hansen*, 2013 ABL5 5.

<sup>12</sup> *Law Society of Ontario v. D’Alimonte* 2018 ONLSTH 86 at paras 45-46.



are not forbidden by their code of conduct. If testimonials are permitted, lawyers must take care that the testimonials are true, not misleading, and freely provided or that any exchange of value through payment or gifts is disclosed. In addition, before a lawyer makes a former client's testimonial public, they must receive permission from the client. Failure to do so may inadvertently reveal confidential information.

## Comparatives

The desire to stand out to potential clients in a competitive market pushes lawyers to seek new means to distinguish their services from competing providers.<sup>13</sup> By nature, legal services are intangible, complex and very personal. In essence, law firms are not selling the law, they are selling the expertise and abilities of the firm's lawyers.<sup>14</sup> Marketing and advertising are essentially tools of self-promotion. One effective way lawyers have attempted to stand out from the crowd is to use comparisons that create the perception that one or some lawyers are better or more successful than others.

Using comparatives or superlatives in advertising such as "best" or "better, greatest, fastest", or most skilled, is both subjective and unverifiable. Comparisons suggest qualitative superiority over other lawyers or legal service providers, contravening Rule 4.2-1 of the Model Code. As most law societies include a similar rule in their code of conduct, using comparatives and superlatives will likely contravene the rules of a lawyer's code of conduct.

Ultimately, lawyers are responsible for the language used to advertise their professional capabilities. As members of the bar, regardless of the jurisdiction, each lawyer has a duty to know the rules that apply to them and to abide by them.

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### LEARN MORE

- William W. Yavinsky, "A Comparative Look at Comparative Attorney Advertising: Why Efforts to Prohibit Evaluative Rankings Spark Debate from Buffalo to Buenos Aires" (2007) 20:3 Geo J Legal Ethics 969.

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<sup>13</sup> William W. Yavinsky, "A Comparative Look at Comparative Attorney Advertising: Why Efforts to Prohibit Evaluative Rankings Spark Debate from Buffalo to Buenos Aires" (2007) 20:3 Geo J Legal Ethics 969.

<sup>14</sup> Sally J. Schmidt, *Marketing the Law Firm: Business Development Techniques* (New York: Law Journal Press 2004) at 2.02.

# FORMS AND PITFALLS OF TRADITIONAL ADVERTISING

## Overview

The term ‘advertising’ can be construed narrowly or broadly. This section focusses on well-recognized and traditional forms of advertising including newspaper, print, radio, television and billboard advertisements and analyzes common ethical issues related to each.

## Print Advertising

Print advertising is often associated with ads in newspapers, magazines and flyers. It can also include the use of billboards or other publicly placed signs. While mediums such as newspapers, magazines and flyers have showed signs of decline in recent years, some may still find these options useful, depending on who they are trying to target.<sup>15</sup>

Print ads that resort to humour or shock to stand out and attract potential clients may send the wrong message and be outside the ambit of the code of conduct. Tag lines like “we won’t let you settle cheap”, “an honest attorney but not enough to hurt your case”, “want to smoke pot on probation?”, or “successful greedy attorneys” use misleading implications or unguaranteeable results to attract clients. In addition to language, lawyers should take care not to rely on images that may convey equally misleading or unprofessional messages.

Although an advertisement may not blatantly contravene the marketing and advertising rules, a lawyer’s conduct is still subject to Rule 2.1-1 of the Model Code and should uphold public confidence in the administration of justice and the legal profession as a whole. Lawyers should take care not to use language or images that cross the line between being funny, creative or shocking and being professional.

## Video and Radio Advertising

Advertising through local radio or television stations can effectively boost brand awareness in a targeted geographical market. As with print advertising, lawyers must be careful to avoid resorting to tactics that are unprofessional or may bring the profession or administration of justice into disrepute.

Advertisements that make or infer promises about results unjustifiably raise expectations and are false or misleading. Lawyers are also cautioned about using video content in ads that mocks or demeans other persons, groups, organizations or institutions or comes across as unprofessional through inappropriate humour.

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<sup>15</sup> Josh Kern, “[Getting Started with Law Firm Advertising \(with Examples!\)](#)” Clio (March 8, 2022).

Failing to be professional may not be in direct contravention of the rules in a code of conduct, but it may denigrate public opinion of the profession.

## Summary

With the uptake in legal marketing, it has become more difficult for lawyers and law firms to stand out. Lawyers who use traditional advertisements must be take care that their efforts to be more creative and stand out do not resort to absurdity to procure attention. Ads that are too provocative or sensational may diminish the reputation of the profession as a whole or mock the administration of justice.

## FORMS AND PITFALLS OF MODERN ADVERTISING

### Overview

With the advent of the internet age, advertising has expanded beyond traditional forms of media and print. The internet has exploded as the favored medium of communication across all aspects of life and law is no exception.<sup>16</sup> This explosion of new technology has shattered traditional concepts of advertising and raised new ethical issues to be aware of when employing these techniques. Modern platforms for advertising include firm websites, podcasts, blogs, YouTube, and social media such as Instagram, TikTok, LinkedIn, Facebook, Twitter and internet chatrooms like Reddit.

According to the *ABA Tech Report 2021*, 86% of surveyed law firms had a social media presence<sup>17</sup> and according to a Clio survey, 35% of lawyers who use social media and 42% of small firms have gained clients. Social media can improve visibility and relatability, target specific communities, and track the effectiveness of ad campaigns. These platforms may be used to promote firms or specific lawyers to gain attention and spread information. On the other hand, as lawyers use social media for both personal and professional purposes, the line between sharing information and advertising has become blurrier.<sup>18</sup>

Although many may not agree that using these platforms amounts to advertisement, the term advertising may be construed broadly. For example, the Law Society of British Columbia has included a definition for 'marketing activity' in their Code of Conduct:

**“marketing activity”** includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead,

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<sup>16</sup> Daniel Backer, “Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet” (70:6 Fordham L Rev 2002) at 2409.

<sup>17</sup> Josh Kern, “Getting Started with Law Firm Advertising (with Examples!)” *Clio* (March 8, 2022).

<sup>18</sup> William I. Weston, “The Ethics of Advertising and Other Issues Related to Law Firm Web Sites” (2005) 2005 Prof. Law. Symp. Issues 69.

business card, listing in a directory, a public appearance or any other means by which professional legal services are promoted or clients are solicited.

The Law Society of Ontario has defined “marketing” to include advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

These definitions are broad and can easily be extended to the forms of modern advertising reviewed below and others. Canadian law societies have consistently demonstrated their intent to apply a broad definition to advertising and interpret their codes of conduct as applying to any form of promotional activity. As a result, we highlight ethical issues and common pitfalls to be aware of when using these modern forms of advertising.

## **Additional ethical concerns of modern advertising**

Before reviewing specific social media platforms and their relevant risks, it is worth noting several additional rules that lawyers should be aware of and careful not to contravene when advertising through social media.

### a) Confidentiality

Use of social media or other less traditional forms of advertising may result in inadvertent disclosure of privileged or confidential information including the identity of current, former or prospective clients. Regardless of which platform a lawyer uses, either personally or professionally, they should take care not to inadvertently divulge privileged or confidential information. A lawyer offering advice to a person on a social media platform that can be seen by the general public may be in breach of this duty.

### b) Privacy

Another ethical issue arising out of social media advertising is privacy and the use of modern advertising tactics through big data. Today, all aspects of life are increasingly intertwined with the internet and online profiles.<sup>19</sup> People share their photos online, declare their relationship status, seek personal advice, and follow and disseminate topics of personal interest. Some people even share their location. Access to all this information and more allows advertising to target specific groups of people based on their expressed or observed interests and the data collected from them. This technique is called microtargeting.

For example, a divorce lawyer may target social media users who post about relationship

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<sup>19</sup> Seth Katsuya Endo, “Ad Tech & The Future of Legal Ethics” (73:1 Alabama Law Review 107 (2021)at 119.

issues or who change their relationship status. The lawyer could go a step further and track people who are travelling on holidays to target potential clients going through stressful experiences. Advertising strategies that stray to microtargeting may cross the line into solicitation as they target specific groups or people and offer legal assistance for a specific matter.

In a 1995 ethics decision, the Law Society of Saskatchewan concluded that sending letters offering services to persons known to be facing foreclosure amounted to direct solicitation and was in bad taste.<sup>20</sup> In a 2013 decision, the same committee observed that advertisements and marketing strategies that target individuals in a 'weakened state' are unethical.<sup>21</sup>

### c) Networking and Inadvertent Relationships

Another pervasive issue of online and social media advertising is the risk of creating inadvertent relationships. Networking is a great way to connect with a community or group of people and is extremely convenient through social media. As discussed in the Retainers and Fees Toolkit, however, lawyers must exercise caution not to inadvertently enter a lawyer-client relationship through what may feel like casual conversations about a friend or acquaintance's legal issues.

This risk exists whenever a lawyer connects with someone who may be casually seeking legal advice. Online posts, tweets, video recordings, responses to legal questions or suggestions to courses of action may all be construed as consultations that result in lawyer-client relationships or create potential conflicts of interest. While this is not a new ethical issue, social media platforms significantly increase the opportunity, and consequently the risk, that lawyers will inadvertently cross that line.

For more information on what determines whether a lawyer-client relationship exists, see [Retainers and Fees Toolkit > Communicating with Prospective Client](#).

### d) Viral Content and Jurisdiction

"Going viral" is somewhat of a badge of honour and refers to the level of popularity a specific post or video has garnered. In essence, viral content capitalizes on an online version of word-of-mouth marketing<sup>22</sup> and reaches millions of people in a relatively short time. While going viral seems like an exciting prospect for many advertisers, lawyers

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<sup>20</sup> 1995 SKLSPC 16.

<sup>21</sup> 2013 SKLSPC 3.

<sup>22</sup> Radoslav Baltezarevic & Ivana Baltezarevic, "Viral marketing communication on social networks: ethical dilemmas" (December 2020) ResearchGate.

must remember that once they post something online, they no longer have control over who sees it, or who uses it. This phenomenon may result in a lawyer giving advice in a jurisdiction where they have no authority to practice law, or in consumers taking advice that was not given in their specific situation.

## Types of Modern Advertising

### a) Websites

The primary point of information for many firms is their website. Legal websites are an easy, effective and cost-efficient way to advertise, enhance a firm's or lawyer's image, disseminate information and maintain 24-hour accessibility to clients.<sup>23</sup> While content will vary from firm to firm, websites have become a primary source of information for a wide range of legal information including newsletters, legal services, practitioner bios and practice areas, press releases, case summaries and blogs.

Whatever information is included in a website, lawyers must ensure information does not contravene the advertising standards or other provisions in their code of conduct.

For example, many law firm websites include testimonials or summaries of past cases, including client names. The details of client identities and retainer agreements are confidential and before this information is used in advertising, client consent must be obtained. Even if the client's identity is not explicitly divulged, the shared information in the summarized case may divulge confidential and private information.<sup>24</sup> Client consent is vital even when a lawyer is counsel of record or believes their involvement in a case is publicly known.

Additional factors lawyers may wish to consider for their website content:

- Does my bio use comparatives, superlatives or claim expertise?
- Does my bio refer to third party rankings that do not have fair and unbiased assessment processes?
- Does a blog post I wrote give legal advice?
- Do my posted case summaries mislead the public or diminish the administration of justice?
- Do reports of my successes explain that success will depend on the facts of each individual matter?
- If testimonials are permitted in my jurisdiction, do they mislead the public?

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<sup>23</sup> Vanessa S. Browne-Barbour, *Lawyer and Law Firm Web Pages as Advertising: Proposed Guideline* (28:2 Rutgers Computer & Tech LJ (2002) at 275.

<sup>24</sup> Law Society of Alberta "Ethical and Effective Advertising", [Confidentiality](#).

- Do these testimonials breach the duty of confidentiality?
- Did I incentivize previous clients to leave positive testimonials?

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#### LEARN MORE

- Elaine Craig, “Examining the Websites of Canada’s Top sex Crime Lawyers’: The Ethical Parameters of Online Commercial Expression by the Criminal Defence Bar” (2015) 48(2) UBC Law Rev 257
- Vanessa S. Browne-Barbour, “Lawyer and Law Firm Web Pages as Advertising: Proposed Guidelines” (2002) 28:2 Rutgers Computer & Tech LJ 275.

#### b) TikTok and Instagram

Modern video image and video platforms such as TikTok and Instagram offer opportunities to significantly expand an intended audience. These platforms can help lawyers convey simplified complex legal concepts, demonstrate knowledge, engage with prospective clients, and appear relatable and approachable.<sup>25</sup> These platforms can attract attention and gain followers who may subsequently approach a lawyer with their legal needs.

TikTok and Instagram are powerful, far-reaching platforms. When using TikTok as an advertising platform, do so ethically and professionally with content that cannot be construed as misleading. The effectiveness of these platforms is often directly related to the obtained number of followers, and lawyers must not resort to inappropriate or unprofessional antics to increase those numbers.

A lawyer who uses these platforms personally should take care not to cross ethical boundaries relating to the practice of law. Code of conduct breaches may also occur if a lawyer fails to uphold the duty of confidentiality. Whether or not there is an intent to advertise, conduct may be deemed self promotion and subject to the rules in the law society’s code of conduct.

Like websites, content on these platforms can include pictures, videos, snippets of legal wisdom, lawyer biographies or client testimonials. Whatever is posted must follow jurisdictional rules.

If followers reach out for legal advice through these platforms, a lawyer must not inadvertently create a client-lawyer relationship or conflict of interest, or offer advice to someone outside of the legal jurisdiction or in instances where unqualified to do so.

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<sup>25</sup> Josh Kern, “[Getting Started with Law Firm Advertising \(with Examples!\)](#)” Clio (March 8, 2022).

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#### LEARN MORE

- [Clio “TikTok for Lawyers”](#)
- [“TikTok for Lawyers: How to Grow Your Law Firm Through TikTok Marketing \(With Examples\)”](#)
- [“TikTok for Lawyers”](#)
- [Clio “Instagram Marketing for Lawyers: Find New Clients and Grow Your Firm”](#)
- [“Instagram for Lawyers: Stories and Reels Marketing Your Law Firm”](#)

#### c) Facebook and LinkedIn

The Model Code also applies to content on Facebook and LinkedIn. In 2017, the Law Society of British Columbia concluded that rude Facebook comments about another lawyer amounted to marketing activities.<sup>26</sup>

As with Instagram and TikTok, lawyers who use these platforms for personal reasons should take care not to inadvertently do anything that could be construed as self promotion or advertising without ensuring that they are not breaching the rules set out in their code of conduct rules.

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#### LEARN MORE

- [Clio “Facebook Advertising for Law Firms: A Step-By-Step Guide”](#)
- [Clio “LinkedIn Advertising for Law Firms](#)
- [LinkedIn “Content Marketing For Law Firms: The Complete 2021 Guide”](#)

#### d) Twitter, Reddit and other virtual networking platforms

As the internet has become a common platform for discussion and socialization, lawyers who use platforms like Twitter and Reddit need to take special care not to enter into inadvertent lawyer-client relationships or create conflicts of interest.

The ethical repercussions of these conversations can be significant. These discussion platforms are not restricted by country or jurisdiction. As a result, a lawyer who offers advice there may not be qualified to opine on the issue in question. Therefore, responding to a query for legal advice, and holding yourself out as qualified to respond as a lawyer may be misleading.

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<sup>26</sup> Law Society of British Columbia Benchers’ Bulletin (Summer 2017), p 20 online.



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## LEARN MORE

- Isabella M. Leavitt, “Attorney Advertising in the Age of Reddit: Drafting Ethical Responses to Prospective Clients in Online Non-Legal Forums,” *Georgetown Journal of Legal Ethics* 29, no. 4 (Fall 2016): 1111-1130

## Summary

Websites and social media offer excellent opportunities for lawyers to expand their reputation, share information with the public, and reach more people who are seeking help. These platforms are also fraught with potential ethical issues. Some steps a lawyer may wish to consider taking to avoid these pitfalls include:<sup>27</sup>

- using a disclaimer when sharing any kind of legal advice to ensure consumers do not believe the information is intended to create a relationship or constitute legal advice;
- remembering that after something is said, it is no longer controlled and posts or comments or videos may be read by millions of people;
- identifying yourself in online communications including name, contact information, and the authorized jurisdiction of legal practice.

By taking these steps, a lawyer can ensure their legal advertisements are not misleading and cannot be misconstrued by the people they reach.

## HANDY CHECKLISTS

Whatever the preferred medium for marketing and advertising, a lawyer’s conduct should inspire confidence, respect and trust of their clients and the community in which they practice. As a self-regulated profession, lawyers have a professional responsibility to ensure that the information they offer to the public is verifiable and consistent with promoting respect for the profession as a whole and in the administration of justice.

Although the codes of conduct are not specific to internet advertising and social media, the overarching principle of not providing misleading information can be easily and consistently applied to all forms of advertising and self promotion. If in doubt of whether an online presence is considered advertising, check to make sure content is not misleading and does not contravene any of the practices discussed above or any other rules in the applicable code of conduct.

When attempting to determine whether something constitutes advertising and adheres to the regulated rules for advertising, this checklist may be of service:

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<sup>27</sup> Monica Befu “The Ethics of ‘The Tweeting Lawyer’: Powerful Platform or Risky Undertaking?” (April 19, 2016) [Slaw online](#).

1. I use the following platforms professionally and/or personally:

Video/Radio	Facebook	Instagram	Twitter	Website
Print	LinkedIn	TikTok	Reddit	

Other: \_\_\_\_\_

2. Do my personal communications refer to my professional work as a lawyer in any way?

Yes

No

If yes, it is best to assume that said communications may amount to advertising and ensure they adhere to the rules. If no, continue this checklist with respect to professional communications only.

3. I have reviewed the rules for advertising in my Code of Conduct

4. If I or my firm have a website:

My bio does not use any comparatives

My bio does not use any superlatives

My bio does not claim expertise or specialization without equivalent certification

My bio does not refer to any unclarified or biased 3<sup>rd</sup> party rankings or awards

5. If I have authored a blog post I have checked to make sure I do not give legal advice

6. I have received permission from my clients to post case summaries and/or testimonials

7. My case summaries are accurate and do not sensationalize or mislead the public

8. Reports of success are accompanied by an appropriate disclaimer

9. My testimonials are real and accurate and do not disclose confidential information

10. My testimonials include information regarding any incentivization provided to reviewers

11. My posts on social media include disclaimers that any advice is not intended to be legal advice

12. I identify myself and my jurisdiction of practice in my online communications

13. Regardless of the medium used, the content in my advertisements is professional and does not bring the legal profession into disrepute

In addition, here are some basic Do's and Don'ts to summarize:

<b>Do</b>	<b>Don't</b>
Say you prefer to practice [insert practice area] or that your practice focuses on or is restricted to [insert practice area].	Say you are an expert or specialist unless your jurisdiction has a formal certification process and you are formally certified as such.
Ensure your content is truthful <i>and</i> transparent.	Make false or misleading statements. This includes making statements which are technically true but omit information that makes them misleading.
Assume everything you do online related to law constitutes advertising.	Use superlatives or compare yourself to others.
Get to know your advertising rules.	Assume the rules are consistent from jurisdiction to jurisdiction.
If permitted, make sure testimonials comply with the rules.	Post or print testimonials that may be misleading or compensate clients for giving testimonials.
Get permission for posting content related to your Clients.	Inadvertently reveal confidential information.

**LEARN MORE:**

- [Clio 'The complete guide to Social Media for Lawyers'](#)
- [Clio 'Lawyer Advertising Rules You Need to Know'](#)
- [Canadian Lawyer 'Legal Digital Marketing is Exploding – but don't forget: it's a relationship business'](#)
- [National Law Review 'Marketing Ethics for Lawyers to Follow in 2020 and Beyond'](#)
- [Lexicon Legal 'Marketing Ethics for Attorneys: 2021 and Beyond'](#)