

The Ethics of Legal Marketing Communication



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Overview of Legal Marketing



- ▣ *Marketing* – everything you do to move towards making the sale
- ▣ *Sale* – agreement to exchange your services for money or other compensation
- ▣ *Marketing Cycle*: Create awareness, inform, educate, persuade, ask for the business-sell.

Marketing Musts

- ▣ *Marketing Message:* Who you are, what you do, for whom. (Clients/Prospects/Referral Sources)



- ▣ *Marketing Plan:* Defines your practice/mix; clients/mix; prospects; referral sources; goals; targeted marketing activities/mix; budget; calendar and tracking results to refine your plan. Your road map to success.

California Rules of Professional Conduct



- ▣ - “...regulate professional conduct of members of the State Bar through discipline...to protect the public and to promote respect and confidence in the legal profession...[are] binding on all members.”
- ▣ Goal: To eliminate legal communications that are *false, misleading, deceptive or confusing*.

Key Rules



- ▣ Rule 1-400 Advertising and Solicitation
- ▣ Rule 5-120 Trial Publicity
- ▣ *California Business and Professions Code*
 - ▣ BP §6068(a)
 - ▣ BP §6103
 - ▣ BP §6106
 - ▣ BP §6128
 - ▣ BP §17529

Rule 1-400 Advertising & Solicitation

- ▣ Do's and Don'ts
- ▣ 15 presumptive "Standards"
- ▣ Justification: To protect the public from having to discern the commercial intent of attorney **communications** strictly from the content of the message, indicating "*clearly, expressly, or by context, that they are communications or solicitations.*"

Key Points of Rule 1-400



- ❑ **Communication:** “any message or offer made by you or on your behalf to any *former, present* or *prospective* client concerning your availability for professional employment.

- ❑ **b. Solicitation:** “*communication* concerning professional employment for pecuniary gain, *made in person or by telephone*, initiated by or on behalf of a lawyer or law firm.

- ❑ Prohibits (1) soliciting anyone *unless* you have a *family* or *prior professional relationship* with them and (2) a wide range of communication from an attorney to a prospect known to be represented by counsel in a related manner.

Rule 5-120 Trial Publicity

(“Just the facts, ma’am”)

Defines appropriate pre-trial and trial public statements made by, or on behalf of, State Bar members involved in the investigation or litigation of a matter



- ▣ Justification: To *balance* the 1st Amendment /Constitutional right to *free speech* with the right to a *fair trial*
- ▣ Goal: To limit/prohibit attorneys from making statements that have a “*substantial likelihood of prejudicing an adjudicative proceeding.*”

Rule 5-120 Trial Publicity

- ▣ Prohibits “...an extrajudicial statement a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”



- ▣ Identifies Exceptions:
 - (1) Requests for help with evidence or information
 - (2) Warnings of dangerous behavior of involved persons
 - (3) Responses to/clarifications of an adversary's statements
(by attorneys and others)

Rule 5-120 Considerations

- ▣ Revealing your legal strategies to the public = Possible malpractice



- ▣ Publicity Options under Rule 5-120

- “No comment”

- Offer *general* information on similar cases

- Offer *specific* info allowed *upon request*

- Distribute* specific information

- (news releases, press conferences, etc.)

California Business and Professions Code

Sections Affecting Marketing & Trial Publicity

- ▣ BP §6068(a)* requires that attorneys:
 - Support the U.S. and California Constitutions
 - Not attempt to mislead the judge/judicial officer
 - Not reveal confidential information *except* to warn of dangerous behavior;
 - Not to advance facts prejudicial to a party/witness *except* in pursuit of justice

California Business and Professions Code Sections Affecting Marketing & Trial Publicity

- ▣ BP §6103: “...*any violation of the oath taken by him, or of his duties as such attorney...*” and BP §6106: “...*any act involving moral turpitude, dishonesty or corruption...*” “...*constitute causes for disbarment or suspension...*”
- ▣ BP §6128: “Every attorney is guilty of a misdemeanor who...[is] guilty of any *deceit* or collusion, or consents to any deceit or collusion, with *intent to deceive the court or any party...*”



California Business & Professions Code Spam



BP §17529 Restrictions On Unsolicited Commercial E-mail Advertisers [i.e., Spam]

- Defines Terms & Penalties
- Prohibits a person/entity to initiate or advertise in an unsolicited commercial e-mail advertisement from (or sent to CA) or advertise in an unsolicited commercial e-mail advertisement sent from California.

Social Media Do's & Don'ts



- ▣ Follow Rules 1-400 & 5-120
- ▣ Comply with relevant BP sections
- ▣ Establish written employee policies & acknowledgments
- ▣ Beware of soliciting, “adopting” or “claiming” online testimonials by clients and others

Ethics Resources



- ▣ State Bar Ethics Hotline
- ▣ California Rules of Professional Conduct
- ▣ California Business and Professions Code
- ▣ California Compendium on Professional Responsibilities

California Rules of Professional Conduct
Rule 1-400 Advertising and Solicitation

(A) For purposes of this rule, "**communication**" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "**solicitation**" means any communication: (1) Concerning the availability for professional employment of a member or a law firm in which a **significant motive is pecuniary gain**; and (2) Which is: (a) **delivered in person or by telephone**, or (b) **directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication**.

(C) A **solicitation shall not be made** by or on behalf of a member or law firm to a prospective client with whom the member or law firm has **no family or prior professional relationship**, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation **to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited**.

(D) A **communication or a solicitation** (as defined herein) shall not: (1) Contain any **untrue** statement; or (2) Contain any matter, or present or arrange any matter in a manner or format which is **false, deceptive**, or which tends to **confuse, deceive, or mislead** the public; or (3) **Omit** to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or (4) **Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation**, as the case may be; or (5) Be transmitted in any manner which involves **intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct**. (6) State that a member is a "**certified specialist**" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt **standards** as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as **presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules**. "presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Standards: (for Rule 1-400)

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400: (1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter." (3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel. (4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility. (5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof. (6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization. (7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists. (8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular. (9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community. (10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case. (11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.) (12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. (13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import. (14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs. (15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case. (16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

California Rules of Professional Conduct
Rule 5-120 Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets.

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California Business & Professions Code

1. BP §6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(d) ...never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. (

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

2. BP §6103 - A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

3. BP §6106 - The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. [SNIP]

4. BP §6128 - Every attorney is guilty of a misdemeanor who either:
(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party. [SNIP]

5. BP §17529 Restrictions On Unsolicited Commercial E-mail Advertisers. Prohibits a person/entity to initiate or advertise in an unsolicited commercial e-mail advertisement from (or sent to a CA email) or advertise in an unsolicited commercial e-mail advertisement sent from California.

SOCIAL MEDIA/Ethical Considerations by Terry Graham

Social media posts by a firm's employees may qualify as State Bar defined "communications" which contain "false, misleading and deceptive statements" that violate professional ethics rules on "communications" and pretrial publicity, and even put your firm at risk of being sued. To avoid problems, tell employees of your firm's written policies regarding their online discussions/endorsements of your services, use of your logo and other firm identifiers. Some firms prohibit employees from posting any information linking them to the firm, while others require them to use disclaimers when referencing the firm ("My personal belief is..."). Require employees to sign an acknowledgment that they have been informed of your online policies and the consequences of violating them. (See Rules 1400 and 5-120)

Beware of soliciting, "adopting" or "claiming" online testimonials by clients or peers from independent websites such as avvo.com, yelp.com and/or LinkedIn recommendations. State bar policies vary, but a [South Carolina Ethics Advisory \(Op. 09-10\)](#) requires lawyers to monitor such "claimed" listings to make sure they conform to ethics rules governing attorney advertising, stating that lawyers are responsible for all communications they ask to be placed or disseminated for them regarding their law practice. The [American Bar Association's Model Rule 4.1](#) (duty of candor) prohibits making false statements, including exaggerations of your experience or capability.