

Ethics Opinion 2018-1

(Adopted by the San Diego County Bar Legal Ethics Committee May 8, 2018)

Issue: May a lawyer market legal services to mass disaster victims through targeted advertisements connected with the use of social media?

Digest: Lawyers may use geographically targeted advertisements to market their legal services on general social media sites so long as the advertisements are truthful, and contain the information required to be included in attorney communications.

Factual Background

A mass disaster results in injuries and deaths to a relatively large portion of a community. Based on a reasonable preliminary investigation, Lawyer believes that Company is a significant cause of the disaster and seeks to help as many of the victims as possible.

To further these efforts, Lawyer uses a sponsored advertisement on a major social media platform that targets those within 25 miles of the disaster. When users within this radius access the website or the corresponding application, an advertisement from Lawyer appears on the side of the page, along with other sponsored advertisements. It identifies itself as an advertisement, states that Lawyer may be able to help with claims against Company related to the disaster, and provides Lawyer's name and contact information. None of the statements in the advertisement are false or misleading or promise a particular outcome.

This sponsored advertisement automatically displays on the social media platform for those located within the designated geographic area and cannot be avoided by users. The advertisement goes live within 72 hours of the disaster, when many of the victims are still receiving treatment, burying loved ones, and otherwise have raw emotions related to the disaster.

Question

Is Lawyer's advertisement ethically permissible?

Analysis

Lawyer's advertisement is a "communication" as defined by Rules of Professional Conduct, rule 1-400(A). It is a message by a member concerning his availability for professional employment directed to the general public. Because Lawyer's advertisement identifies itself as such, is not false or misleading, does not guarantee any particular outcome, and identifies Lawyer as the attorney responsible for it, this opinion focuses on whether the Lawyer's advertisement violates rule 1-400(D)(5) and Standard (3) to rule 1-400.

Targeting tort victims to potentially become clients

Rule 1-400(D)(5) precludes a communication or solicitation from being "transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." In elucidation of this concept, Standard (3) provides that 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 is presumed to violate the rule.¹

Here, although the victims of the mass disaster may be in an emotionally-charged state, the method by which Lawyer disseminated the advertisement is not intrusive or harassing. The persons accessing a social media platform are not necessarily even victims, let alone persons in such a compromised state that they cannot exercise reasonable judgment in deciding whether to engage Lawyer to represent them. In fact, the use of general social media may be an indicator that a tort victim is emotionally ready to move forward. We are cognizant that others may, in fact, turn to the platform as of means of obtaining some form of support. But such a mere possibility falls short of a lawyer who knows or reasonably should know that the recipient of the advertisement is in a state that is compromising judgment.

The selected forum and the means of communication can impact this analysis. Notably, in Formal Opinion 2004-166, the State Bar of California Standing Committee on Professional Responsibility and Conduct (COPRAC) addressed a similar issue in a different type of forum. There, COPRAC concluded that a lawyer's communication with a prospective client in a mass disaster victims' chatroom was prohibited because it was too intrusive and likely to cause duress. The communication was with people the lawyer knew may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel because they were in an environment specifically designed to assist those trying to deal with a tragedy. Such a situation was and still is ethically impermissible.

The conclusion was reached for reasons that are not present with a regionally-targeted advertisement. First, COPRAC opined that victims chatrooms were more subject to abuse because they do not afford the same opportunity to "reflect, re-read, and analyze" as does, for example, an advertisement or an email.² The absence of a live communication with an advertisement obviates such concerns. There is no real time messaging and, in fact, no communication at all from potential clients unless and until they affirmatively reach out to somebody who they know is offering to provide legal services. There is no flashing prompt or pop up calling for an immediate answer.

¹ Proposed Rule of Professional Conduct 7.3(b) prohibits solicitation by written, recorded, electronic, telephonic, or real-time electronic contact communications if the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer, or the solicitation is transmitted in "any manner which involves intrusion, coercion, duress, or harassment."

² Without opining on Constitutional issues, we note that the Supreme Court of the United States concluded that advertising by lawyers is protected commercial speech. (*Bates v. State Bar of Arizona* (1977) 433 U.S. 350.) Although commercial speech has less protection under the First Amendment than noncommercial speech, courts have found First Amendment protection for a lawyer's targeted mail solicitation of prospective clients from a blanket ban because written communication is not as coercive nor intimidating as in-person solicitation. (See e.g., *Shapero v. Ky. Bar Assn.* (1988) 486 U.S. 466 [distinguishing targeted direct mail from in-person solicitation]; cf., *Fla. Bar v. Went For It, Inc.* (1995) 515 U.S. 618 [upholding a 30-day prohibition on targeted direct mail to accident victims and family members].)

Second, ordinarily, the *raison d'être* for a victims chatroom is emotional support for victims and family members. In such a location, it would not reasonably be anticipated to find an active conversation with a lawyer looking to be engaged.

By contrast, people access social media websites for numerous reasons. Although admittedly they may be there to seek emotional support, it is also possible for them to be there for social, business, or other reasons.³ At present, when accessing a website, finding a pop-up advertisement or one displayed in the margins may be more usual than not. Accordingly, these types of advertisements are neither as intrusive as an active, live invitation to discuss--such as in a chatroom--nor are they targeting those who a lawyer knows are too emotionally vulnerable to exercise reasonable judgment regarding the engagement of counsel.⁴

Timing of advertisement

Some jurisdictions have hard line rules for the timing of advertisements following the occurrence of mass disasters. For example, New York's Disciplinary Rule 7-111 provides a 30-day anti-solicitation period for communications after incidents involving personal injury or wrongful death. Florida Rule of Professional Conduct 4-7.4(b)(1)(A) provides a similar 30-day prohibition. But California has no such ban.⁵

Different victims will be ready to proceed at different times. Although a greater space of time may lead to a greater likelihood that all victims of a disaster are ready to consider whether to engage a particular lawyer (or any lawyer at all) to assist with recovering damages for their injuries or other losses, there is no period of time that will universally determine when all people will be ready. For that reason, we are unable to conclude that proximity in time to a disaster will be the lone factor determining whether a lawyer should reasonably know that a potential client is incapable of exercising reasonable judgment.

In our scenario, the communication is not live and not in real time. These facts preclude a lawyer from reasonably learning that the person reading the message is not emotionally ready to proceed. And such facts also mitigate against the likelihood that the communication improperly targets the vulnerabilities of potential clients.

An online advertisement is not fundamentally different than one in print media. It is static, allowing the reader to decide whether to reach out to initiate contact. The significant difference is that it simply

³ Some social media platforms even have a "recommendation feature" that allows users to seek or provide recommendations for services; a mass disaster victim could be using social media to seek recommendations for a grief counselor, a lawyer, or a mortuary.

⁴ Additionally, we note that there may be public policy reasons to promote such advertisements, including access to justice. This is particularly true where the services in the targeted advertisement are free. (See *In re Primus* (1978) 436 U.S. 412 [upheld ACLU lawyer's in person solicitation of victims for free legal representation]; see also *United Transp. Union v. Mich. State Bar* (1971) 401 U.S. 576 [upheld union representative's recommendation to hire union-approved lawyer during in person visits with injured members].)

⁵ The proposed Rules of Professional Conduct that the State Bar of California submitted to the Supreme Court of California also do not contain such a ban.

happens in a different media form that is increasingly being used for information in lieu of print media. That does not impact the analysis of whether the advertisement is permissible. Nor should it matter that the lawyer is advertising to a limited geographic market that might be more interested in engaging the lawyer to provide services. Such a decision is akin to advertising in a local paper, rather than a regional or widely circulated one. The public would not be better protected in such instances by requiring the lawyer to presumably pay more money for a statewide, national, or global advertisement of services. The same victims would receive the same information in the same manner.

Conclusion

Following a mass disaster, some victims may need more time than others before they are ready to engage a lawyer. But, California has not adopted an anti-solicitation rule to protect those who may need longer to recover and make decisions regarding the engagement of counsel. Although lawyers who advertise online to targeted geographic areas shortly after disasters have occurred may risk upsetting those not ready to make such decisions, the advertisements do not violate California's Rules of Professional Conduct.