

By Michael H. Hoeflich* and Karenbeth Farmer **

Introduction

For decades, the organized bar in the United States opposed lawyer advertising and characterized most forms of advertising as unethical. However, in the latter half of the twentieth century, as the nature of legal practice changed and accessibility to lawyers and the legal system became higher priorities for the profession, attacks on traditional advertising bans proliferated. Finally, in *Bates v. State Bar of Arizona*¹ the Supreme Court of the United States ruled that many forms of restrictions on lawyer advertising were constitutionally impermissible. For the next quarter century, the ethical rules on legal advertising were relatively clear.² However, over the past decade – and gathering steam over the past several years – the rapid development of the Internet has made the rules less certain. The increasing use of the Internet by law firms has brought the ethical limits on lawyer advertising to the forefront.

Much has been written about this subject,³ but a simple guide to the subject is still needed. Kansas lawyers who do not respect and follow the Kansas Rules of Professional Conduct [KRPC] may find themselves sanctioned or even disbarred. But in the world of cyberspace, what are the rules that govern Kansas lawyers?

FOOTNOTES

* This article is an expansion of a CLE presentation on the Legal Ethics of Advertising on the Internet, presented on June 9, 2000 by Michael H. Hoeflich, John H. & John M. Kane Distinguished Professor of Law, Courtesy Professor of History, University of Kansas School of Law. Parts of this article have been included in Chapter 10 of the Supplement to the KBA Ethics Handbook.

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1. *Bates v. State Bar Association of Arizona*, 430 U.S. 350; 97 S. Ct. 269 (1977).

2. In Kansas, KRPC 7.1 – 7.5, regulates communication of legal services.

3. See, for instance, Eric G. Kraft, *The Increasing Use of the Internet in the Practice of Law*, 69 JKBA, 15 (February 2000), for a recent article on the use of the Internet by lawyers practicing in Kansas.

The focus of this article is on advertising – but in discussing this topic it is important to keep in mind that:

- The Internet remains a frontier and one that is changing at an unprecedented pace;
- The KRPC [and rules in other states] cannot and will not change as rapidly as technology;
- Each state will continue, into the foreseeable future, to make the rules for the practice of law within its borders and so there will continue to be a tension between defined geographic areas and the borderless world of cyberspace; and
- The rules that are impacted by the Internet are not confined solely to the general area of disseminating information about legal services – but run the spectrum, from practicing without a license, to when an attorney-client relationship has been established, to confidentiality and attorney-client privilege.

The extent of the problem and the potential for running afoul of the rules are illustrated by the following statistic: in 1998 – 80% of small firms surveyed by the American Bar Association used the Internet, up from 38% in 1996.⁴ The number of small firms using the Internet has inevitably grown over the past two years to something that now may be approaching 100%. The Internet is used for communicating, advertising, soliciting and transferring documents⁵ – and each and every transaction can put an attorney at risk.

Rules Governing Information About Legal Services

In the area of advertising and communications about legal services, the first broad and somewhat ephemeral question is whether a communication is *commercial* speech.⁶ This question applies whether the communication is a web page on the Internet, an ad in the yellow pages, advertising on television, a direct mail letter to a prospective client or a firm brochure. If it is commercial speech, then it may be regulated. The Supreme Court has defined commercial speech as speech where the purpose is “to propose a commercial transaction” and “related solely to the economic interests of the speaker and its audience.”⁷ The *intent* of the firm web page may be informational but it is *content* that determines whether it is commercial speech and therefore falls within the regulation of the KRPC on advertising.⁸ For firms preparing to put a web page on the Internet or firms that currently have a web page – there should be an **expectation** that they are proposing commercial transactions and thus will be governed by KRPC 7.1 – 7.5.

KRPC 7.1 articulates the key to any evaluation of a lawyer’s communication – “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” KRPC 7.1 goes on to define when a

communication is false or misleading, such as 7.1(a) when it contains a “materially misleading representation,” or 7.1(b) when it is “likely to create an unjustified expectation about the results a lawyer can achieve,” or 7.1(c) when it “compares the lawyer’s services with other lawyer’s services, unless the comparison can be factually substantiated.”

KRPC 7.2 governs advertising, permitting advertisement through public media and written or recorded communication. A lawyer is required to keep a copy of an advertisement or communication for two years, along with a record of when and where it was used. [KRPC 7.2(b)] A lawyer cannot give anything of value to a person for recommending a lawyer except for paying the reasonable cost of advertisement. [KRPC 7.2(c)] And any communication made under this rule must contain the name of at least one lawyer responsible for its content. [KRPC 7.2(d)]

KRPC 7.3 governs a lawyer’s direct contact with prospective clients. This rule is specifically designed to prevent a lawyer from unduly influencing a prospective client through methods that overwhelm and intimidate thus impairing the individual’s capacity for “reason, judgment and protective self-interest.” KRPC 7.3(a) states that a lawyer cannot contact a prospective client in-person or by live telephone to solicit professional employment when a “significant” motive for the lawyer’s contact is pecuniary gain, unless the prospective client is a family member or they have had a prior professional relationship. To further restrict direct contact with prospective clients, KRPC 7.3(b) forbids solicitation either in written or recorded communication or by in-person or telephone contact, even when not prohibited under 7.3(a), if the prospective client has previously informed the lawyer they do not wish to receive solicitations or the solicitation involves coercion, duress or harassment. In cyberspace, an example of the latter would be an attorney using the technique known as “spamming” to contact a group of prospective clients repetitively, jamming their email with solicitations. Under KRPC 7.3(c), any written or recorded communication from a lawyer soliciting professional services to prospective clients must include the words “Advertising Material” on the outside of the envelope and at the beginning or the end of any recorded message. However, the “advertising material” tag is not required on information requested by a potential client or on general announcements, including changes to personnel or office location. Organizations operating group or prepaid legal plans can use in-person or telephone contacts to solicit memberships or subscriptions as long as the plan or organization is not operated, directed or owned by a lawyer. [KRPC 7.3(d)]

KRPC 7.4 quite simply allows a lawyer to communicate that they do or do not practice in particular fields of law.

4. See, Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 Duke L.J., 147, 150 (October 1999).

5. See, Kansas Digital Signature Act.

6. See, William E. Hornsby, Jr., *The Ethical Boundaries of Selling Legal Services in Cyberspace*, www.computerbar.org/netethics/abawill.htm (William E. Hornsby, Jr. is staff counsel to the American Bar Association Commission on Advertising, in the Association’s Legal Services Division. This article

was first published in the *National Law Journal* and includes a disclaimer that it should not be construed to reflect the policies of the ABA).

7. *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512-13 (1993). For those interested in the constitutional dimensions of lawyer advertising and solicitation, the seminal book is the 1995, *Lawyer Advertising at the Crossroads*, published by the Commission on Advertising.

8. See, W. Hornsby, Jr., *op. art.* n. 6, above.

While lawyers are allowed to state what fields they practice, they should be cautious about how they categorize their practice as the certification of specialties is not yet recognized in some jurisdictions, including Kansas.

Finally, KRPC 7.5 governs the use of firm names and letterheads. Under KRPC 7.5(a), "A lawyer may not use a firm name, letterhead or other professional designation that violates [KRPC] 7.1" – at all times avoiding the use of false or misleading communications. KRPC 7.5(b) states that while a law firm with multiple offices in different jurisdictions may use the same firm name for each office, individual lawyers within the firm must identify their jurisdictional limitations where applicable. KRPC 7.5(c) restricts the use in the name of a law firm of a lawyer serving as a public official unless the lawyer is "actively and regularly" practicing with the law firm. And finally, KRPC 7.5(d) states that lawyers cannot state or imply they practice in a partnership or other type of organization when, in fact, they do not.

For each of the rules, the first question is always whether the information can be considered "false or misleading." Yet, in the wilderness of the Internet, the question of what is "false or misleading" can quickly get lost in the heady atmosphere of the new frontier. The rules identified above govern lawyers practicing in the state of Kansas, but advertising or web pages on the Internet are not confined by geographic boundaries; they are available for anyone to read, whether they are in Salina, Kansas, Des Moines, Iowa, New York City, London or Hong Kong. What rules apply to an attorney in Kansas who has a web page that is accessible or accessed by someone in Des Moines or New York City?

Consideration of the ABA Proposed Rules 7.1, 7.2 and 7.3 may provide some insight into how the profession is generally attempting to apply the rules in the uncharted wilderness of the Internet and can therefore provide some guidelines for lawyers in Kansas. However, it is important to remember that these are proposed ABA rules – the ABA House of Delegates or the Kansas Supreme Court has not yet adopted them.

ABA Proposed Rule 7.1 [Communications Concerning a Lawyer's Services] the text has now been changed to a short, simple statement:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

The Comment section now provides examples and definitions – key to advertising are [2] and [3] which discuss how truthful but misleading statements are also prohibited by the Rule.

[2] Truthful statements that are materially misleading are also prohibited by this Rule. A statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not misleading. A truthful statement is also misleading if there is substantial likelihood that it

will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

ABA Proposed Rule 7.2 [Advertising] is substantially unchanged except for the inclusion of the terms electronic communication and electronic record. If Kansas adopted the changes as proposed by the ABA, the results would be as italicized:

(a) *Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, or through written, recorded or electronic communication.* "Electronic communication" would include the Internet.

(b) Changes in (b) would allow firms to retain copies of advertisements and communications in *electronic* record of advertisement, thus expanding the record keeping options.

An important note to lawyers' communicating on the Internet with clients, is the new language included in Comment [3]:

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be

advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly worldwide websites can be an important source of information about legal services and communication by electronic mail is permitted by this Rule. **But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic conversation that is not initiated by the prospective client.**

Guarding the Borders

Kansas lawyers should also be aware that the rules governing advertising can vary widely state-to-state. State court systems and legislatures are becoming increasingly vigilant in guarding their borders from out-of-state lawyers who advertise or promote their legal services, and in so doing are beginning to look at activity on the Internet.¹³ For instance, effective July 1, 2000, out-of-state attorneys who advertise or promote their legal services in South Carolina must comply with the state rules regarding solicitation and advertising.¹⁴ These rules prohibit in-person solicitation of clients, payments to runners to find clients, direct mail appeals to personal injury victims until 30 days after an accident, and most client testimonials. Sanctions for lawyers disciplined under the South Carolina rules can include any form of discipline authorized by the lawyer ethics rules and refund of all legal fees from clients gained by the advertising or solicitation.¹⁵ While the Internet is not specifically mentioned in the rules, an Internet advertisement may be construed to imply that a lawyer is licensed to practice law in the state when in fact he or she is not.

Pennsylvania Inquiry 98-85 concludes that a lawyer or firm may be subject to personal jurisdiction of another state based on Internet activities. The opinion says that a state may assert jurisdiction for the unauthorized practice of law or for improper solicitation of clients in addition to the lawyer's home state bringing its own disciplinary action. While Connecticut Opinion 97-29 and Illinois Opinion 96-10 do not go that far, the ethics rules in these states do prohibit false and misleading statements on the Internet but find that a web site cannot violate solicitation rules if not directed toward a specific recipient.¹⁶

The Florida State Bar Association designed new rules to address Internet advertising specifically in December 1999. Unsolicited e-mail messages to prospective clients are permitted but are subject to many of the same requirements as direct mail solicitations. Messages must be filed for review and must contain the location of a bona fide law office. In addition, the subject line must say "legal advertisement." Web pages do not have to be reviewed by the Bar but they still must conform to regulations regarding disclosures and illustrations.¹⁷ The Texas Bar requires attorneys to submit their web pages for approval. In addition, the Bar's advertising committee is looking at attorney's "banner ads."¹⁸

Missouri Supreme Court Rules 4-7.1 – 7.5 govern the communication of legal services. Several Informal Advisory Opinions have been provided that give guidance to firms advertising or providing information on the Internet. These opinions, available on the Missouri Bar Association's website,¹⁹ include opinion numbers 20000057 (using trade names on the Internet may be permissible as long as they

In considering both the current Kansas Rules and the ABA Proposed Rules, it is important to keep in mind that the critical question is always whether a proposed communication runs afoul of KRPC 7.1 – 7.5. For instance, will a prospective client be unduly influenced or misled by the manner in which you are communicating on the web? Will your web-based message be considered arms-length solicitation allowing the prospective client to choose whether or not to contact you, or will it be deemed an "in-person" solicitation because of the use of chat rooms and real-time dialogue on the net?

The ethical issues of Internet advertising just keep getting more complicated. A recent article in *The Wall Street Journal*⁹ highlighted one of the newest twists in the continuing debate of legal ethics and the Internet. "Type the keyword 'Ritalin' into a personal computer's search engine, and what might you find? Among other things, a solicitation to join a potential class-action lawsuit."¹⁰ Should the use of such meta-tags be considered "on-line ambulance chasing"¹¹ or is this just the newest advertising gimmick – no different than using a billboard or yellow pages ad?

While the legal ethicists may debate these questions in national journals, lawyers and law firms practicing in Kansas would be well advised to find their way carefully in these uncharted waters. While the First Amendment may arguably protect the use of advertising and web pages on the Internet, the Kansas Supreme Court and the Disciplinary Administrator's Office may see the use of meta-tags and other "lures" to attract prospective clients to legal websites as pushing the rules on solicitation too far. In fact, Kansas Ethics Opinion 94-10¹² advises that the use of trade names is permissible as long as they do not convey a specialty to the public. Does the use of a meta-tag suggest an expertise or specialty to a prospective client? Are those surfing the net misled by the nature of the business and information contained on a website with the meta-tag, "Ritalin"? Until there is some resolution of these new and still unexplored areas, lawyers practicing in Kansas should exercise great caution.

9. *Seeking Clients, Lawyers Find Them on the Net*, *The Wall Street Journal*, B1 (Friday, June 16, 2000).

10. See, *id.*

11. See, *id.*

12. See, Kansas Bar Association Ethics Opinion 94-10.

13. Kathy Prentice, *Advertising in Cyberspace Raises Sticky Questions for Lawyers*, www.office.com (April 28, 2000); see, also, E. Kraft, *op. art.*, n. 3, above, at p. 18.

14. Arthur Garwin, *Way Over the Client Limit: Out-of-state lawyers who angle for business can face sanctions, loss of fees*, 85 A.B.A.J. 71 (October 1999).

15. See, *id.*

16. See, *id.*

17. See, K. Prentice, *op. art.*, n. 12, above.

18. See, *id.*

19. See, Mobar@mobar.org

are not false, misleading or deceptive), 970161 (use of internet for advertising and general legal consultation) and 970038 (Internet advertising falls under Rules 4-7.1 through 7.5).

In addition to the disciplinary and criminal exposure a lawyer or law firm may run afoul of state bar rules on practicing law without a license, and the specific requirements individual states may have on advertising and soliciting, there is also the danger a web page or advertisement may be deemed false or misleading. In order to prevent such accusations, web pages should provide disclaimers – clearly stating in which jurisdictions the firm, or individual lawyers within the firm, is licensed to practice law. The same individual state rules that now govern advertisement and legal services communications will govern lawyers within those states or soliciting to do business within those states. Like a yellow pages ad or even a firm informational packet, a web page is not, on its face, considered solicitation – but it should probably identify that it is providing information on legal services or is an advertisement about legal services. Rules concerning the retention of copies of advertisements should be followed in accordance with state ethics rules. Thus in Kansas, pursuant to KRPC 7.2, lawyers must retain copies of all advertisements [i.e., all versions of a web page] for two years.

What then may we counsel Kansas lawyers regarding web-based activities?

1. Any communication over the web must comply fully with KRPC 7.1. – 7.5;

2. The use of interactive devices on the web page, including chat rooms or real time question and answer options, may be considered direct solicitation and therefore subject to KRPC 7.3;

3. The use of any devices such as meta-tags, banners, video clips, etc., on a web page must not make the communication, or present material that may be deemed, false or misleading so as to violate KRPC 7.1; and

4. The use of web pages and other Internet communications may subject Kansas lawyers to the disciplinary rules of any state in which the web page or communication is accessed. Therefore, at the very least, web pages should contain all necessary disclaimers as to the place and nature of the practice, the name of at least one of the attorneys and the firm's address. In addition, lawyers should be cautious that they are not violating any rules of other states regarding such Internet communications.

5. Attorneys practicing near state borders should familiarize themselves with Rules of the adjoining state.

Conclusion

The potential for the Internet is vast and still to a large extent unknown – but it is certain to change the nature of the present practice of law, and with it the rules of professional conduct governing lawyers. As lawyers and law firms race ahead to embrace the promises of the Internet, they should take heed and remember that, for now, the old rules still apply as we continue to explore the new frontier of the Internet.

Resources

Two excellent on-line sources related to legal ethics and the Internet are:

1. <http://www.abanet.org/legalserv/advertising.html>

2. <http://www.legalethics.com> (this site contains the most comprehensive list of ethics opinions related to legal ethics and the Internet.)

Other good sources are:

- William W. Hornsby, Jr., *Marketing and Legal Ethics: The Boundaries of Promoting Legal Services* (Chicago: ABA, 2000) (revising and expanding Harry J. Haynsworth's book titled, *MARKETING AND LEGAL ETHICS: THE RULES AND RISKS*).

- Gregory H. Siskind and Timothy J. Moses, "The Lawyer's Guide to Marketing on the Internet" (Chicago: ABA, 1996).

- Joan C. Rogers, "Ethics, Malpractice Concerns Cloud E-Mail, On-Line Advice, 12 *Laws. Man on Professional Conduct*" (ABA/BNA), Mar. 6, 1996 at 59, 70;

- Brian G. Gilpin, "Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette," 13 *J. Marshall J. Computer & Info. L.* 697 (1995);

- T.K. Read, *Pushing the Advertising Envelope: Building Billboards in the Sky Along the Information Superhighway*, 23 *W. ST. U. L. Rev.* 73 (1995);

- Drew L. Kershen, *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 *Drake J. Agric. L.* 141 (Spring, 1999);

- Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 *Duke L. J.* 147 (October, 1999) (with a discussion of the use rules governing solicitation on 900 numbers in Kansas, see pages 91-99. The use of 900 numbers is compared to on-line exchanges with clients and how both of these mediums can create confusion as to when attorney-client relationships are formed.)

- Gail A. Form, To Infinity, and Beyond: "The ABA Re-examines the Model Rules of Professional Conduct Pertaining to client Development in Light of Emerging Technologies," 1 *J. Legal Advoc. & Prac.* 96 (1999).

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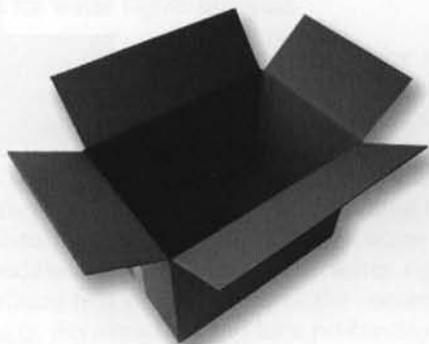
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