



## Do Our Advertising Rules Need an Upgrade?

How do the Internet and social media fit within rules that worked 30 years ago for mailers, billboards, TV and radio ads?

Ethics Opinions and the Rules of Professional Conduct are available at [www.azbar.org/Ethics](http://www.azbar.org/Ethics)



David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, a current Co-Chair of the State Bar Member Assistance Committee, and practices at David D. Dodge, PLC in Phoenix.

I must admit that I'm not a fan of much of the advertising I see lawyers doing nowadays. And it doesn't make me feel any better to know that I'm not the only lawyer who objects to what he sees on television and elsewhere: According to a recent study done by the Association of Professional Responsibility Lawyers (APRL),<sup>1</sup> most complaints about lawyer advertising come from, you guessed it, lawyers.<sup>2</sup>

The purpose of regulating lawyer advertising is, of course, to assure that consumers of legal services receive accurate, non-misleading information about services the profession offers to the public. In order to do that, we have four sporadically complex ethical rules, with 20 paragraphs of Comments, set forth on

nearly four pages in our 2016 Arizona Rules of Court publication. My objections to the contrary notwithstanding, I don't sense that any of the advertisements I consider distasteful are actually false or misleading. If they were, they would be in violation of ER 7.1 (Communications Concerning a Lawyer's Services), which prohibits false or misleading statements about the lawyer or the lawyer's services, as well as ER 8.4(c), the ethical rule that prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

What has many lawyers concerned, however, is the way technology (i.e., the Internet and social media) sometimes does not fit within rules that worked 30 years ago for mailers, legal directories, billboards, TV and radio ads and the like, resulting in problems for lawyers they didn't see coming. One example is the use by lawyers of what is known as "keyword advertising." Google AdWords employs an Internet marketing technique in which the advertiser places bids for "keywords." When an Internet user searches those keywords, the advertiser's name and message appear as a result of the search, and Google gets paid every time a user "clicks" on the advertiser's message. Some lawyers were quick to catch on to this form of advertising, bidding to get their names and qualifications before a potential client searching for information on certain problem products or diseases.<sup>3</sup> It wasn't long, however, before some lawyers saw other opportunities, not specifically prohibited by the advertising rules, but which got them in trouble nevertheless. Consider the following:

- South Carolina lawyer Zachary Steven Naert was publicly

reprimanded after he used his Google AdWords account to have his firm name and ad appear whenever an Internet user entered the name of a timeshare company against which one of Mr. Naert's clients had filed suit, as well as the names of opposing counsel. Mr. Naert's ad said, "Timeshare Attorney in SC- Ripped off? Lied to? Scammed? Hilton Head Island, SC Free Consult," which resulted in a bar complaint. The South Carolina Supreme Court found Mr. Naert's actions were in violation of South Carolina's Lawyer's Oath<sup>4</sup> requiring civility and integrity in dealing with opposing parties and their counsel and thus were considered "Misconduct" under South Carolina's Rules of Professional Conduct.<sup>5</sup>


- North Carolina lawyer David J. Turlington III, undaunted by a North Carolina ethics opinion<sup>6</sup> that states it is a violation of that state's version of ER 8.4(c) to use rival Lawyer A's name as a keyword in Lawyer B's marketing efforts, proceeded to do just that. The North Carolina State Bar Grievance Committee censured Mr. Turlington,<sup>7</sup> finding that his purchasing of keywords through Google's AdWord program so that his ad appeared whenever someone "googled" other lawyers' names, names of other law firms, and names of certain judicial officials was essentially "dishonest" and therefore a violation of North Carolina's version of ER 8.4(c).

While competitive keyword advertising hasn't made much of a hit in the Carolinas, others argue that it is beneficial for consumers and in accordance with existing laws.<sup>8</sup> Whatever Arizona will ultimately decide on this issue, assuming it does, the situation underscores the conclusion arrived at by APRL that, when it comes to lawyer marketing and protecting

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the public, we only need rules that prohibit false and misleading advertising (like ER 7.1) and that prohibit conduct that involves dishonesty, fraud, deceit or misrepresentation (like ER 8.4(c)). The APRL study concludes that the rest of the often complex rules covering what a lawyer's advertisement must state and contain<sup>9</sup> differ between the states (causing problems for lawyers with multistate practices), are unevenly enforced, are often more of a burden for the lawyer than a protection for the consumer, and can be covered by selected explanatory Comments to ER 7.1. (It should be noted here that our State Bar undertook a study in 2008 to see what, if any, changes should be made to the advertising rules. Minor changes were suggested but never acted upon. In the Lawyer Communications and Regulation Subgroup's report to the Board of Governors, not a single reference was made concerning the effects of

the increasing use of social media on lawyer marketing or of the need to modify the rules to accommodate them.)

While APRL's proposals probably wouldn't have helped Messrs. Naert and Turlington, they would encourage the profession to focus on the fact that the rules were always intended to protect the public from false and misleading marketing. APRL's suggestions would allow sufficient "wobble" in the lawyer advertising rules to accommodate the innovations that technology has brought to our profession and still provide for regulating the many ways it chooses to show its face to the public. 

### endnotes

1. 2015 Report of the Regulation of Lawyer Advertising Committee, Association of Professional Responsibility Lawyers (June 22, 2015) at [www.aprl.net/publications/](http://www.aprl.net/publications/)

APRL\_2015. APRL is a group of lawyers, law professors and judges who concentrate their practices on legal ethics and professional responsibility. Its current President is Scottsdale lawyer Lynda Shely.

2. *Id.* at 27.
3. Apparently the highest-priced keywords for many years included the word "mesothelioma," what many plaintiffs claim to have contracted as a result of exposure to asbestos.
4. South Carolina's lawyers take an oath pledging to opposing parties and their counsel fairness, integrity, and civility in all written communications and that they will employ only such means consistent with trust, honor, and principles of professionalism. Violations of the oath are considered "misconduct" subject to discipline. Arizona's Oath of Admission and its Lawyer's Creed do not

use this exact language, but violations of either are considered "unprofessional conduct" by virtue of Rule 31(a)E, ARIZ.R.S.Ct., and subject the offending lawyer to discipline pursuant to Rule 54(i) thereof.

5. [www.judicial.state.sc.us/opinions/HTMLFiles/SC/27574.pdf](http://www.judicial.state.sc.us/opinions/HTMLFiles/SC/27574.pdf).
6. N.C. 2010 Formal Ethics Op. 14 (April 27, 2012).
7. [www.ncbar.com/orders/turlington,%20iii%20david%2013g0121.pdf](http://www.ncbar.com/orders/turlington,%20iii%20david%2013g0121.pdf).
8. See Eric Goldman & Angel Reyes, *Regulation of Lawyers' Use of Competitive Keyword Advertising* (April 14, 2015) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2594435](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594435).
9. In Arizona, these are ERs 7.2 (Advertising), 7.4 (Communication of Fields of Practice) and 7.5 (Firm Names and Letterheads).