

# **Ethics and the Business of Law**

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*The Business of Law*

Presented by:

**Nancy Carruthers**

**Law Society of Alberta**

**Calgary, Alberta**

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## ETHICS AND THE BUSINESS OF LAW

### INTRODUCTION

The purpose of lawyers' ethical codes is to protect the public and, in particular, that segment of the public who hire lawyers. The business of law can accordingly never be considered as a matter entirely separate from lawyers' ethical obligations.

There are ethical considerations involved in attracting clients, in keeping clients, and in getting paid. This paper addresses advertising, conflict management, enforcement of fee agreements and transferring client files, though there are certainly many other topics which could have been included.

### ADVERTISING

#### Overview of the Rules

The implementation of Alberta's new *Code of Conduct* in 2011 did not significantly change the regulation of lawyer advertising. The advertising rules are contained in Chapter 3 of the current Code, and their primary goal is to ensure that the public is protected from misleading, confusing or deceptive advertising. As a "catch all", the rules also state that advertising must not bring the profession or administration of justice into disrepute, and marketing must be in the best interests of the public and consistent with high standards of professionalism.<sup>1</sup> Lawyer advertising rules cannot and do not regulate or define good taste.

There are not many examples of disciplinary hearings arising from violations of advertising rules. In Alberta, lawyers generally modify their advertising on a voluntary basis if concerns are raised. Typically, complaints do not come from the general public, but come instead from other lawyers.

In Alberta, the *Code* requires that advertising must:

- not be false, misleading, confusing or deceptive, or likely to mislead, confuse or deceive;
- be demonstrably true, accurate and verifiable;

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<sup>1</sup> Code of Conduct, Rules 3.01(2) and 3.02(1) - <http://www.lawsociety.ab.ca/docs/default-source/regulations/code.pdf?sfvrsn=2>

- not take advantage of a vulnerable person or someone who has suffered a traumatic experience;
- not amount to coercion, duress, or harassment;
- be in the best interests of the public and consistent with a high standard of professionalism;
- not bring the profession or the administration of justice into disrepute;
- not suggest qualitative superiority to other lawyers;
- not raise expectations unjustifiably;
- not suggest or imply a lawyer is aggressive;
- not disparage or demean other persons, groups, organizations or institutions;
- not use testimonials or endorsements that contain emotional appeals;
- not refer to the lawyer's degree of success in past cases, unless such statements are accompanied by the qualification that outcomes will vary according to the facts in individual cases.

Lawyers may advertise fees as long as the advertising is precise and states whether other amounts, such as disbursements or taxes, will be charged in addition to the fee. Lawyers must strictly adhere to advertised fees in every matter.

Lawyers are not allowed to advertise that they are specialists or experts in Alberta and, as such, should avoid use of derivative words such as "specialize" or "expertise". Other jurisdictions do certify specialists, and lawyers with the appropriate certification may make reference to their status as a specialist in another jurisdiction when advertising in Alberta. Alberta lawyers typically identify their preferred practice areas in their advertising, and this serves the fundamental purpose of assisting clients to identify a lawyer who may provide the service they need.

Lawyers are not allowed to advertise that they make loans to clients, whether those loans are characterized as loans or cash advances against claims. This rule applies to lawyers in their personal capacity, as well as to entities related to or controlled by lawyers.

The advertising rules also regulate firm names. Firm names may include trade names, initials, logos, symbols, or the names of individuals or their professional corporations, provided they are not misleading or confusing. An example of a misleading name is the use by a sole practitioner of the phrase "and Company" or "and Associates" after the lawyer's surname, as it suggests a firm of more

substantial size and resources. Trade names may not imply connections to other institutions, such as universities. Geographical trade names are improper if they lead the public to conclude that a law office is a public agency, or is the only law office available in that geographic area. A trade name may include a reference to a lawyer's practice area, as long as it is not misleading.

Firm names may include names of lawyers who are no longer alive or who may no longer be practicing with the firm. Names of former firm members who are now judges may continue to be in the firm name, but firm members may not appear in front of that judge as long as the judge's name forms part of the firm name. Firm names may include names of individuals currently or formerly entitled to practice law in Canada or in other jurisdictions and, conversely, must not include the name of an individual or entity not entitled to practice law.

It is a common misconception that lawyers must make reference to their professional corporations in their firm names. This is not required as professional corporations do not offer any liability protection and there is no liability limitation of which the general public must be made aware. As such, there is no statutory or policy requirement that a reference to the professional corporation be included in the firm name.

Other relevant prohibitions are found in the rules governing fees and disbursements (Rule 2.06). For example, lawyers must not pay referral fees, or otherwise split fees, with any non-lawyers who refer clients to them. Lawyers are also prohibited from giving financial or other rewards to non-lawyers for the referral of clients. The underlying policy reason for this prohibition is that non-lawyers are often not in the best position to determine who might be the best lawyer for a particular client's matter. They may be motivated instead by the potential for financial gain and will refer clients to lawyers who are simply willing to pay them a fee. In contrast, lawyers may pay referral fees to other lawyers. Generally, lawyers will be able to identify colleagues who may better be able to serve the client's needs and the payment of a referral fee is therefore not seen as objectionable. Keep in mind, however, that the *Code* does not allow the payment of referral fees if the referral is made necessary by a conflict of interest which prevents the referring lawyer from acting (see Rule 2.06(6)).

The rules do not prevent lawyers from engaging in promotional activities or making reasonable expenditures on promotional items or activities that may result the referral of clients. It is permitted to take clients out for meals or provide tickets to sporting or other events, or to sponsor client functions. Lawyers are also able to pay non-lawyers for reasonable advertising costs, including lawyer referral services, and are allowed to compensate employees for marketing and public relations