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Lawyer Marketing: An Ethics Guide

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**Eleventh Annual
McGuireWoods LLP
Ethics Program**

**LAWYER MARKETING:
AN ETHICS GUIDE**

Hypotheticals

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Hypothetical 1

You have always enjoyed dealing with complex constitutional issues, and jumped at the chance to represent a law firm whose television advertisement was targeted by your state's bar. The bar has sought an injunction prohibiting your client from airing its television advertisement. You are now preparing for the injunction hearing before a federal district court.

The advertisement depicts a conference room in which four people are seriously discussing some topic. The title "Legal Strategy Session: Insurance Company" appears on the screen, along with the following disclaimer: "Dramatization by Actors. No specific result implied. The actors are paid spokespeople." As the camera focuses on the person who appears to be the senior-most member of the group, he asks: "How do you suggest we handle this claim?" A younger member of the group replies: "It's a large claim, a serious auto accident. . . we could try to deny it or delay, see if they'll crack."

The senior man then asks: "Who's the lawyer representing the victim?" When the junior man answers with the name of your client, a loud, metallic gong sounds. The senior man's demeanor instantly changes when he hears the name of your client. His eye brows shoot up, his eyes widen, and then he looks downward. With his mouth in a grim line, the senior man says: "Let's settle this one."

Your state's bar has sought an injunction against further use of the advertisement. The bar argues that the ad is inherently misleading because it implies that insurance companies settle cases based on the reputation of the lawyer rather than on the particular facts of the case. You intend to argue that the advertisement is protected commercial speech. The client has asked you for an assessment of its chance of success in the upcoming hearing.

Are you likely to succeed in your argument that the advertisement is protected commercial speech and should not be enjoined?

YES

NO

Hypothetical 2

As the managing partner of a medium-sized firm, you have read all the articles about the difficulties of medium-sized firms surviving in the next decade. Over the last six months, you have spoken with a number of managing partners of similar firms, and you have just unveiled your plans for a network of medium-sized firms throughout the Southeast. You envision sharing library resources, certain computer hardware, and other non-confidential materials.

You see the main benefit as being able to claim that you are “affiliated” with other law firms that combined would have over 300 lawyers. However, you do not plan to actually merge with the other firms. Instead, you intend to remain independent in the selection and representation of clients -- although you expect there to be some joint clients and multiple referrals among members of the group.

- (a) May you indicate on your web site and in other places that you are “affiliated” with the other law firms in the group?

YES

NO

- (b) Will your firm be able to take cases against clients represented by the other firms in the group?

YES

NO

- (c) Will such an arrangement render your firm potentially liable for the malpractice of the other firms in the group?

YES

NO

Hypothetical 3

Several years ago, you moved from a large city big firm practice to a much smaller firm located in the town where you were born and raised. In addition to what you see as lifestyle advantages, you think that the move will allow you to market your services by calling upon your relationships with childhood friends who now enjoy prominent positions in many professional service firms in your home town. Because you never had to confront marketing issues like this in your previous big-city practice, you want to make sure that you do not violate any ethics rules in taking such steps.

May you do the following:

- (a) Establish an informal referral arrangement (without any written agreement or obligation on either side) with a financial planner you have known since childhood?

YES

NO

- (b) Arrange a formal "referral agreement" under which you agree to refer your legal clients to a small accounting firm managed by a high school classmate, with the accounting firm agreeing to refer to you any of its clients requiring legal advice?

YES

NO

- (c) Establish an "of counsel" relationship with another lawyer in town who will not work with your firm on a continuous basis, but seems to be a good source of referral business?

YES

NO

Hypothetical 4

You have been quite successful advising franchisees in setting up their businesses and dealing with franchisors. Over the years, you have found that your clients look to you as much for business advice as for legal advice. For tax and other reasons, you would like to set up a subsidiary of your law firm to provide business advice to franchisees.

- (a) Will your conduct and the conduct of others working for the subsidiary be governed by your state's ethics rules?

YES

NO

- (b) What considerations should you keep in mind as you act through such a subsidiary and coordinate actions by your law firm and the subsidiary?

Hypothetical 5

As part of a total revamping of your firm's marketing focus, you have decided to choose a new name for your law firm. You are considering a number of possibilities, but you want to assure that you comply with the ethics rules.

- (a) May your firm's name include the name of a retired partner who is still alive but in a nursing home?

YES

NO

- (b) May your firm's name include the name of a retired partner who lives in Florida and occasionally drafts or revises wills for her friends?

YES

NO

- (d) May your firm's name include the name of a former partner who is now a state senator?

YES

NO

- (d) May your firm's name include the name of a former partner who was practicing at your firm when he was suspended from the practice of law?

YES

NO

Hypothetical 6

In an effort to improve your firm's recognition in your community, you want to start using a trade name, and also select a domain name that is likely to draw the attention of the increasing number of clients that are selecting lawyers over the Internet.

May you use the following names for your law firm?

(a) "The West End Law Firm"

YES

NO

(b) "The Best West End Corporate Law Firm"

YES

NO

(c) "westendlawfirm.com" (as a domain name)

YES

NO

Hypothetical 7

As one of your firm's youngest partners, you have been pushing your firm to hire a consultant who can help with expanding your firm's web site and use of the Internet to market your law firm. Your firm's managing partner just put you in charge of the job, and now you have a few questions about ethics.

- (a) Will your law firm's web site be considered an "advertisement" for ethics purposes?

YES

NO

- (b) If so, will your law firm's web site have to comply with all ethics requirements governing advertisements?

YES

NO

- (c) May your law firm add its name to an Internet "referral service" that lists lawyers practicing in certain substantive areas?

YES

NO

- (d) If so, may you pay the Internet "referral service" based on the number of "hits" on your web site?

YES

NO

Hypothetical 8

As your law firm's partner chiefly responsible for ethics issues, you field questions and complaints from state bars. You just received calls from two state bars. Each of the bars complains about several statements on your firm's web site. Your firm has a two-lawyer office in the capital of one of the states whose bar has complained about your web site, and one of your 500 lawyers is licensed in the other state whose bar has complained.

- (a) Must your firm web site comply with the advertising rules of the state in which you have a two-lawyer office?

YES

NO

- (b) Must your firm web site comply with the advertising rules of the state whose bar members include one of your lawyers?

YES

NO

Hypothetical 9

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

- (a) A fictionalized depiction of a client conference (using real firm lawyers and real clients).

YES

NO

- (b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors).

YES

NO

- (c) A client testimonial (from a real client) saying that your law firm is the "one of the best" that your client ever employed.

YES

NO

- (d) A client testimonial (from a real client) saying that your firm's lawyers always returned the client's phone call quickly.

YES

NO

Hypothetical 10

Your firm's executive committee members have become increasingly frustrated by what they perceive to be your chief law firm competitors' aggressive advertising and marketing techniques. The committee asked you to assess the ethical propriety of some statements in your competitors' print advertisements.

Do generally applicable ethics standards allow your competitors to include the following statements in their print advertisements:

- (a) The firm's real estate department has "the best" in the area.

YES

NO

- (b) The firm has an anti-trust department that is "second to none" in providing anti-trust advice.

YES

NO

- (c) The law firm is one of the "leading firms" in its city.

YES

NO

- (d) The law firm is a "full service firm."

YES

NO

(e) The law firm's lawyers are "committed" to obtain a successful result for their clients.

YES

NO

(f) The law firm provides "quality legal services."

YES

NO

(g) The law firm has been designated "one of the best in the city" for three years in a row by a local business magazine.

YES

NO

(h) The law firm has sixteen lawyers who have the highest rating in Martindale-Hubbell.

YES

NO

Hypothetical 11

You know that your firm's advertisements must include the license status of each lawyer in the firm -- especially for those lawyers practicing law in offices located in the states where the lawyers are not licensed to practice law.

You first want to understand what a lawyer in such a situation can and cannot do. The situation to undertake the analysis just presented itself, because a lawyer currently practicing in downtown Washington, DC will be joining your firm in two months and move to your Tysons Corner office. The new lawyer wants to know what she can and cannot do if she decides not to join the Virginia Bar.

May non-Virginia lawyers engage in the following activities while practicing in a Virginia office of a multi-state law firm:

- (a) Practice exclusively before federal administrative agencies (if the lawyer is admitted to practice before them)?

YES

NO

- (b) Give advice solely about federal law?

YES

NO

- (c) Give advice exclusively about the law of a state in which the lawyer is licensed to practice law?

YES

NO

(d) Give advice about the law of a state in which the lawyer is not licensed to practice law.

YES

NO

(e) Act as a "legal clerk," with all of their work reviewed by and ultimately approved by a lawyer licensed in that state.

YES

NO

(f) Practice law while waiting to waive into the Virginia Bar or take the Virginia Bar exam?

YES

NO

(g) Act as an in-house lawyer for a Virginia company?

YES

NO

Hypothetical 12

You were honored several years ago to be selected as a trial court judge, and you thoroughly enjoyed serving on the bench and leaving the “rat-race” of private practice. However, about six months ago you reluctantly decided to return to private practice because of your children’s impending enrollment in expensive colleges. You think that your years on the bench will serve you in good stead when you return to private practice, and you would like to highlight this experience in your marketing efforts.

May you do the following once you return to private practice:

- (a) Refer to yourself as a “retired Judge” on your letterhead and business cards?

YES

NO

- (b) Allow others in your firm or outside your firm to use the word “Judge” when speaking with you?

YES

NO

Hypothetical 13

You have enjoyed a successful and varied career as a commercial litigator. Your firm's new marketing director wants to highlight your experience both in firm brochures and on your firm's website.

May you do the following as part of your firm's marketing efforts (assuming that the descriptions are accurate):

- (a) Describe one of your cases (in which you represented a plaintiff) as producing the "largest verdict in the history of the state?"

YES

NO

- (b) Describe some of your successful jury trial results?

YES

NO

- (c) Link to judicial decisions in a number of cases in which you were successful?

YES

NO

Hypothetical 14

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than retain a law firm because of its general reputation. You and your marketing director want to highlight your firm's lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

(a) "Limits her practice to domestic relations matters."

YES

NO

(b) "Specializes in anti-trust issues."

YES

NO

(c) "Certified specialist in patent law."

YES

NO

(d) "Certified by the Texas Supreme Court as a trial lawyer."

YES

NO

(e) "Expert in securitization transactions."

YES

NO

(f) "Authority" in ethics matters.

YES

NO

Hypothetical 15

You just started your own firm with two law school classmates, and you think that direct mail marketing can provide “more bang for the buck” than television or media advertising. However, before you get started you want to make sure you understand the ethics rules.

- (a) May you send targeted direct mail to people involved in serious automobile accidents (and whose names appear in the newspaper)?

YES

NO

- (b) May you send direct mail marketing to folks who have just declared bankruptcy (and whose names appear in the newspaper)?

YES

NO

- (c) Will your direct mail marketing have to comply with any specific requirements, include disclaimers, etc.?

YES

NO

Hypothetical 16

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want not start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

- (a) Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

YES

NO

- (b) Calling members of your church to see if they would like some estate planning advice?

YES

NO

- (c) Setting up appointments to see the general counsel of local companies?

YES

NO

Hypothetical 17

Your state prohibits solicitation of potential clients unless you have formerly represented them or they are family members or close friends. One lawyer fresh out of law school just sent you an e-mail to tell you that she thinks your firm's web site and your lawyers' involvement in "chat room" discussions and their use of e-mail violate this ethics rule.

- (a) Does your firm's web site violate the anti-solicitation ethics rule?

YES

NO

- (c) Do your lawyers violate this anti-solicitation rule by participating in "chat room" discussions?

YES

NO

- (d) Do your lawyers violate this anti-solicitation rule by sending e-mails to prospective clients?

YES

NO