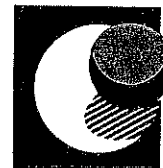


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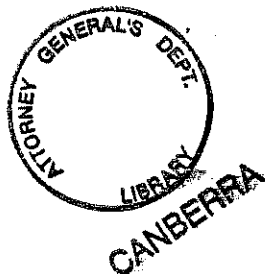
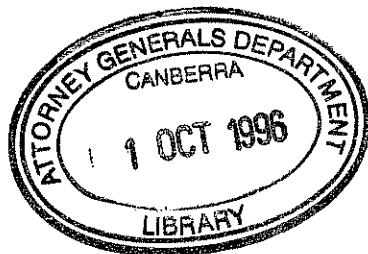
**GUIDELINES
FOR THE
ADVERTISING OF
LEGAL SERVICES**



FEDERAL BUREAU OF

*Consumer
Affairs*

**July
1996**



GUIDELINES FOR THE ADVERTISING OF LEGAL SERVICES

Preamble

Advertising is one important way that consumers find out about goods and services that they may wish to purchase or use. Information provided in an advertisement can assist consumers to make the most appropriate purchasing decision.

The Australian legal services sector, like many other sections of the economy, has for some time been undergoing important and far reaching reforms. Part of this reform has meant that restrictions on the ability of lawyers and other providers of legal services to advertise their services have been significantly relaxed.

Lawyers and other providers of legal services in most parts of Australia are now able to advertise in much the same way as other providers of goods or services, either in their own capacity or through an agency arrangement. In an effort to ensure that this transition to consumer-oriented advertising is made smoothly and with the minimum of harm to consumers, the Federal Government, in consultation with representatives of the Law Council of Australia, State and Territory Justice and Attorney-General's Departments, the Consumers' Federation of Australia and the Australian Consumers' Association, has produced these guidelines. A public consultation process also sought comment on the guidelines¹.

A primary purpose of the guidelines is to assist lawyers and other *legal service providers*². The guidelines have, however, been framed broadly enough to have relevance for other organisations and individuals with an interest in the advertising of legal services. The guidelines aim to do three things.

Firstly, the guidelines aim to assist consumers to better understand advertisements for legal services by encouraging advertisers to place advertisements providing clear and understandable information upon which consumers can base purchasing decisions.

Secondly, the guidelines aim to assist lawyers and other providers of legal services to frame advertisements that best meet the needs of consumers and to avoid any charge of being misleading and deceptive (whether within the meaning of section 52 of the *Trade Practices Act 1974* or otherwise). The guidelines recognise that, for lawyers, advertising is a relatively new activity. For that reason, it should be closely risk managed to take account of the prospective audience. This will ultimately be good for professionals in business.

Thirdly, the guidelines should assist advertisers, including advertising agents engaged by lawyers and other legal service providers, to identify 'areas of risk' that demand careful attention during the production of an advertisement.

¹The content of these advertising guidelines does not necessarily represent the views of any or all organisations represented on the Working Group or consulted during the drafting of the guidelines.

² See Glossary.

These guidelines do not have the force of law. Where doubt arises about the misleading and deceptive nature of an advertisement, expert advice should be sought before the advertisement is published or broadcast. In the absence of such advice, common sense dictates the publication or broadcast of such advertisements should be avoided.

The guidelines aim to foster the publication and broadcast of legal services advertisements that:

- are fair and informative;
- have regard to the knowledge level of the target audience;
- contain information which discourages misinterpretation; and
- have advantageous to both consumers and legal service providers.

Qualifications of Legal Service Providers

1. Can anyone describe themselves as a lawyer in an advertisement?

No. To practise as a lawyer a person must be qualified to do so and permitted to call himself or herself a lawyer (barrister and/or solicitor) by law. Non-lawyers are not permitted to hold themselves out as lawyers and it would be misleading for them to do so.

In some States and Territories, only lawyers can carry out legal work. In other States and Territories, non-lawyers are able to carry out some legal work such as conveyancing and other routine legal transactions.

Consumers specifically seeking the services of a barrister or a solicitor, and who are unsure about the qualifications of the person advertising, may seek clarification from that person or from the Law Society or Bar Association in their State or Territory.

2. What is the difference between a lawyer and a non-lawyer?

A lawyer is a person who has completed a necessary course of study and has been admitted to practice as a lawyer by a court. Technically a lawyer is 'admitted' as an officer of a court (usually the Supreme Court of a State or Territory or the High Court of Australia) and as such owes particular duties to the Court as well as to clients. Appearance in court on behalf of clients, particularly higher courts, is generally work that is specifically reserved to lawyers by law. Lawyers do, however, carry out a diverse range of other tasks connected with the provision of legal advice and legal services.

A non-lawyer providing legal services is usually a person who does not possess the qualifications that are required for formal admission as a lawyer. However non-lawyers may possess particular qualifications relevant to their field of practice. Non-lawyers should also be encouraged to give full details of professional memberships rather than using initials only, as few consumers would know what initials actually signify.

3. What qualifications can be quoted in an advertisement for legal services?

In simple terms, lawyers and other providers of legal services should not advertise that they have qualifications they do not have. Further, the qualifications should be represented for what they are and not exaggerated to create a false or misleading impression of their worth.

Similar care should also be taken when claims are made about links with professional and industry organisations. In these instances claims of membership should always reflect up to date membership status. The professional and industry bodies of which membership is claimed should actually exist and not be created for the sole purpose of quotation in an advertisement.

Consumers who have doubts may approach the advertiser directly or contact the relevant State or Territory Law Society, Bar Association or other relevant professional association to ask for an explanation of what the qualifications mean.

Expertise

4. Can a lawyer or other provider of legal services describe himself or herself as an expert?

The use of the term 'expert' is an area of potential risk for advertisers of legal services as it is difficult to define strictly and can mean different things to different people. As long as such a claim is well founded, there is usually no problem with a lawyer or other person advertising himself or herself as an expert. In simple terms, best practice in this area would dictate that lawyers and other legal service providers should not claim in advertisements to have any capabilities that they do not in fact have.

5. Is it plausible to claim expertise in all areas of the law?

Probably not. Although conceivable, it would be difficult for any law firm (or other legal service provider) to claim comprehensive knowledge and practice in absolutely every area of the law. The law is simply too big and complex.

Consequently, there may be circumstances where advertising expertise in 'all areas of the law' could be misleading, particularly when an objective assessment of the firm's or the individual's expertise does not support such a claim. Where doubt arises, it would be preferable for advertisements to accurately reflect the nature of the expertise held by referring to a list of those topics most commonly or most capably handled by a particular legal service provider.

Care should also be taken to ensure that an advertisement does not create an unrealistic expectation of the capacity of a given lawyer or legal service provider to accept and pursue a matter.

Specialisation

6. How should the term 'specialist' be handled in an advertisement?

Misuse of the term specialist is another area of risk for advertisers of legal services. Like the term 'expert', the term 'specialist' can mean different things to different people. Consumers may construe this term, in its broadest sense, as implying expertise as opposed to a preferred area of practice. In some States and Territories there are no specific restrictions on the use of the term 'specialist'.

In some States and Territories, lawyers can call themselves specialists on the basis of a particular experience. In other States and Territories, lawyers are permitted to call themselves specialists only after completing special programs of study and obtaining particular experience. Further, in some States and Territories, lawyers who meet these requirements are recognised as 'accredited specialists'.

In all jurisdictions claims of being a specialist should not be misrepresented in an advertisement. Any claim to specialisation should be genuine. Further, claims of membership of professional associations should not be fictitious.

Representation of Rates of Prior Success

7. Is it potentially misleading for advertisements to include past rates of 'success' (for example, 'we win 75% of cases we take on')?

Advertisements quoting past rates of success can imply to consumers that future cases will have the same chance of success, are likely to be misleading and deceptive and should be avoided.

Aside from concerns about how these past rates are calculated and expressed, every case is different. Even minor differences in facts between similar cases can bring about very different results in court. It may not be easy, therefore, in an advertisement to counterbalance the impression of the chance of success with disclaimers and qualifications.

At the same time, lawyers and other providers of legal services are free to make existing and prospective clients aware, by way of advertisements, of the availability of legal rights and remedies in given circumstances. These advertisements should, however, avoid generic representations as to the chances of success.

Expectations of Results in a Legal Matter

8. Is it potentially misleading to advertise in terms of 'win' or 'loss'?

Yes. It is potentially misleading to advertise in terms of 'win' or 'loss'. The use in advertising of terms such as 'win' or 'loss' should be handled carefully to ensure that it does not create the impression that the result of any given case is a foregone conclusion. What is considered a win by one person may not necessarily be the same to the next person. Many cases are settled out of court and such settlements are difficult to classify as either a win or loss.

In many instances the outcome of a case is complex and not easily expressed in simple win or loss terms, particularly in an advertisement. For instance, in a claim for compensation or damages, even though a claimant may 'win' the case from one point of view, there may be other factors that will result in the amount of compensation being reduced or not meeting the cost of the action.

Comparative Advertising

9. What are the pitfalls of comparative advertising?

In some States and Territories lawyers are prohibited from comparative advertising. Providers of legal services and advertisers should exercise particular caution in comparing services not of a comparable type.

Comparative advertising is an area of particular risk for advertisers of legal services because of the difficulty in comparing like with like and the risk of it being potentially misleading, deceptive or defamatory. Particular caution should be exercised in relation to services which are not of a standard type. Indeed, avoiding misleading and deceptive comparative advertising has proven to be a continuing concern for other advertisers, particularly retailers.

To best avoid breaching the law, comparative advertising should at least:

- (i) be accurate;
- (ii) disclose any basis for the comparison;
- (iii) only compare like with like; and
- (iv) make claims that will be current for the life of the advertisement (e.g. for the life of a telephone directory edition).

In many situations disclaimers and other explanatory notes can help to remove ambiguities or potentially misleading and deceptive material. The disclaimers and explanatory notes themselves should, however, also be clear and accurate.

Fee Advertising

10. How can an advertisement avoid creating a misleading impression about the full cost of a particular service?

Fee advertising is one way of imparting to consumers information about potential costs of a particular legal service or legal service provider. However, it is often very difficult to predict accurately the final cost of a particular legal assignment. This is because costs are often dependent on the performance of certain activities by third parties or clients or on other factors outside the control of a lawyer or other legal service provider.

Advertisements that include references to legal fees and costs should always be presented accurately and in such a way that consumers know the difference and can make a fair assessment of price differences between competing service providers. In addition, where fees are advertised, the advertisement should seek to disclose at least the possibility of other additional costs and fees that will go to make up the total cost of the service. The distinction between professional costs and disbursements should, where appropriate, be clearly made.

The use of the term 'first appointment free' can also create a great deal of confusion for consumers. Some legal service providers have taken the view that a first appointment is necessarily followed by a second, with a bill for a second appointment being sent even where the consumer did not contract with them to do their legal work after the initial appointment. Some consumers have formed the view that all lawyers operate on a 'first appointment free' basis, although in reality this practice is far from universal.

An advertisement of 'first appointment free' should be capable of being read at face value. What constitutes the 'first appointment' could also be a source of confusion for consumers. Lawyers who only regard the first 20 minutes of the first appointment as free should make sure the consumer is aware of this before beginning to charge. To avoid misleading consumers, advertisements that offer a 'first appointment free' should clearly spell out the terms and conditions of the offer.

11. What do the expressions 'No Win - No Fee' and 'No Win - No Pay' mean?

On the face of it these expressions appear to refer to those circumstances where a lawyer or other legal service provider agrees to waive his or her professional fees in the event that a particular legal action is unsuccessful. There does not appear to be an obvious distinction between the two terms and in practice they are often used interchangeably.

For consumers, however, these expressions could have the effect of implying that a legal transaction is entirely free of charge. This is almost never the case because there are often disbursements and other costs that are payable by the consumer even in the event of a win. If a case is lost the costs to the consumer may be even higher, with the possibility of the losing party being saddled with the other party's costs. Care should be taken to ensure that fees that could be payable

regardless of the outcome of a case (in particular the possibility of liability for disbursements and other party costs) are clearly disclosed in advertisements that use the terms 'No Win - No Fee' and 'No Win - No Pay' or similar terms.

Testimonials and Endorsements

12. Are recommendations in advertisements from former clients a reliable indicator of the performance of a particular legal services provider?

The answer to this question lies in the amount of trust an individual is willing to place in a testimonial or endorsement in an advertisement.

Testimonials are spoken or written recommendations from existing or former clients and are an advertising tool designed to entice consumers into choosing one particular firm over another. An endorsement can be described as a truncated testimonial that usually consists of an attestation or approval by a particular person, and in the case of advertising, usually by a celebrity. Accurate and credible testimonials or endorsements can be useful advertising tools.

The use of testimonials or endorsements does come with a certain amount of risk for advertisers and great care should be taken with their use.

Testimonials that have been paid for or scripted are of particular concern as consumers may believe that they are true and place considerable faith in them. Aside from anything else, consumer confidence in a particular lawyer or legal service provider will be severely affected should the testimonials be exposed as not genuine.

Testimonials or endorsements are most likely to mislead or deceive consumers when the text of legitimate clients is manipulated, when the claim itself is not legitimate, and/or where someone is falsely attributed as having used the service in question.

Other guidelines in this document will also apply to the content of a testimonial as the claim made by the person providing the testimonial may be considered by the consumer as indistinguishable from the overall claim being made by the advertiser of the legal service.

Identification of Advertisements

13. When is an advertisement an advertisement and when is it not?

An advertisement will ultimately seek to convey a message that a particular service should be obtained from a certain provider over and above everyone else. Sometimes, however, this purpose is obscured and the advertisement made to look or sound like something that it is not. Presumably this is to avoid potential readers or listeners of the advertisement ignoring it for the mere fact that it is an advertisement.

To avoid misleading consumers about the true nature of a publication or broadcast, advertisements should be clearly described as such if it is not otherwise immediately obvious. This would mean that advertorials ('editorial' text that is aimed at attracting custom) and other forms of indirect advertising would be clearly labelled as such.

Referral Agents

14. Does the advertisement of legal services through a referral agent present risks for advertisers and consumers?

Some organisations advertise the availability of legal services but do so without providing those services themselves. The organisation itself may be promoted as the initial point of contact for consumers, but in reality the legal service is provided by a third party. In these situations the advertiser of the service in effect acts as a referral agent. The risk present in these circumstances is that consumers may not always be able to tell the difference between accessing a legal service directly or via a referral agency which is presented as being the principal service provider.

Consumers are unlikely to be aware that a referral agency may receive a portion of the fee paid to the legal service provider as a referral fee. Making it clear that an advertisement is an agency advertisement and that a referral fee is ultimately payable will greatly enhance the ability of consumers to make informed decisions about the nature of the legal service they may wish to access.

Misleading and Deceptive Advertisements

15. What penalties can apply to individuals and organisations that produce misleading and deceptive advertisements?

Persons who engage in misleading and deceptive advertising may be subject to actions for damages, injunctions and/or requirements to produce corrective advertising under provisions of the *Trade Practices Act 1974* or a State or Territory Fair Trading Act. Heavy fines may also apply for breaches of other provisions covering false representations.

Misleading and deceptive conduct, including misleading and deceptive advertising, may also amount to unprofessional conduct and can be the subject of consumer complaint.

For more information on this contact the Law Society in your State or Territory or the Australian Competition and Consumer Commission.

Further Information

16. Where can I obtain further information or advice?

Further information about the advertising of legal services can be obtained from the Law Society or Australian Competition and Consumer Commission office in your State and Territory.

Glossary

Listed below are a number of terms which have been defined for the purposes of these guidelines. Many of these terms are commonly seen in advertisements for legal services.

Attorney: The word attorney can be another name for a lawyer.

Award: An award is made by a court or tribunal and usually is in the form of money compensation.

Barrister: A barrister is a lawyer who works primarily as an advocate in court as well as providing both oral and written advice in respect of contentious and non-contentious matters. Barristers are sometimes referred to as counsel.

Barrister's Clerk: An administrator able to take instructions on behalf of and arrange work for a group of barristers.

Comparative Advertising: Advertising that compares one product or service with another one or more specific products or services. A claim that ABC's conveyancing is 'better and cheaper' than XYZ's conveyancing is a simplified example of what a comparative advertisement could look like.

Compensation: Usually money paid to a person, pursuant to an award as a replacement for something that they have lost. For example, an injured worker may get compensation for the loss of the ability to use an arm.

Conditional or Contingency Fees: The concept of conditional or contingency fees involves a lawyer taking on legal work on the condition that he or she does not receive payment for professional services unless a monetary award is obtained for the client. Disbursements will generally still be the responsibility of the client irrespective of whether an award is secured or not. It should be noted that the rules governing the charging of these types of fees vary markedly from State to State as does the terminology used to describe them. Some of the terminology used in connection with conditional and contingency fees includes uplift fees, speculative and percentage fees.

Conveyancing: The process of transferring interests in property.

Damages: An award made by a court or tribunal as compensation for a loss.

Disbursements: Disbursements are out of pocket expenses incurred during the course of working on a case. Disbursements can include such things as stationery, barrister fees, photocopying, postage, telephone calls and fees paid to expert witnesses. Disbursements are usually charged separately to professional fees and are almost always the responsibility of the client. Depending on the outcome of a particular case, at least a proportion of disbursements may be reimbursed.

Firm: A firm is a group of lawyers or other legal service providers who practise under the one business name, often in partnership.

Jurisdiction: A jurisdiction is the geographical area within which a law will operate. For example, a Tasmanian law will generally only operate in Tasmania. Tasmania can, therefore, be referred to as a separate jurisdiction for legal purposes. The word jurisdiction can also refer to the powers of a court.

Lawyer: A lawyer is a person who has completed a necessary course of study and has been admitted to practice as a lawyer by a court. Technically a practising lawyer is an officer of a court (usually the Supreme Court of a State or Territory or the High Court of Australia) and as such owes particular duties to the Court as well as to clients.

Legal Aid: Financial assistance, provided by governments, to allow individuals to obtain legal services in circumstances where they are not otherwise able to afford those services.

Legal Service Provider: For the purposes of these guidelines, a legal services provider includes lawyers such as barristers, solicitors, academic lawyers (if entitled to practise), government lawyers, corporate lawyers and non-lawyers such as conveyancers and law clerks, often referred to as paralegals.

Litigation: Legal work involving a contested matter that may require determination by a court or tribunal.

Notary Public: A person specially authorised to certify certain documents.

Pro bono: Pro bono is a term used to describe the work a lawyer volunteers to do free in cases of particular merit or need. Many lawyers will waive their professional fees to conduct public interest and other work.

Probate: A term referring to carrying out wishes expressed in a will as authorised by a court.

Professional Fees: The fees that lawyers and other providers of legal services charge for their professional time are often referred to as professional fees. These fees are supposed to relate to the amount of professional knowledge, skill and experience that a lawyer spends on a case. Professional fees can be quoted on an hourly, daily or 'complete job' basis.

Solicitor: A solicitor is a lawyer who provides legal services to clients primarily in the form of providing advice or preparing legal documents. Solicitors may appear as advocates, and often do, however, they more commonly work in a non advocacy capacity. In some States and Territories practitioners can practice as both solicitors and barristers.

Guidelines for the Advertising of Legal Services

Top 10 Checklist

	Yes	No
Does the advertisement accurately describe the status and qualifications of the legal service provider?	<input type="checkbox"/>	<input type="checkbox"/>
Does the advertisement accurately describe the level of expertise or specialisation of the legal service provider?	<input type="checkbox"/>	<input type="checkbox"/>
Does the advertisement avoid making comparisons between different types of legal services?	<input type="checkbox"/>	<input type="checkbox"/>
Does the advertisement avoid making unrealistic claims about the expected results of a legal action?	<input type="checkbox"/>	<input type="checkbox"/>
Are the fees for the legal service advertised in such a way that a consumer can see the advertised costing structure at face value?	<input type="checkbox"/>	<input type="checkbox"/>
If the advertisement makes reference to a 'no win - no pay' arrangement, does it avoid inferring that the whole transaction will be free regardless of the eventual outcome?	<input type="checkbox"/>	<input type="checkbox"/>
Are any testimonials or endorsements used in the advertisement genuinely obtained and reproduced?	<input type="checkbox"/>	<input type="checkbox"/>
If a first appointment is advertised as being free, are important conditions on this offer communicated to consumers in the advertisement?	<input type="checkbox"/>	<input type="checkbox"/>
Is the advertisement capable of being identified as an advertisement by the ordinary observer?	<input type="checkbox"/>	<input type="checkbox"/>
Does the advertisement avoid making claims about the success of future cases based on the results of previous matters handled?	<input type="checkbox"/>	<input type="checkbox"/>

