



COMMITTEE ON ATTORNEY ADVERTISING

Appointed by the Supreme Court of New Jersey

OPINION 46

Geo-Fencing, Geo-Targeting, and Similar Electronic Advertising Techniques

The Committee on Attorney Advertising received an inquiry from a lawyer about new types of electronic advertising techniques such as “geo-fencing” and “geo-targeting.” Specifically, the inquirer asked whether lawyers may, consistent with the rules governing attorney advertising, engage the services of a marketing company that will use “geo-fencing” or “geo-targeting” techniques to deliver digital advertising for a law firm to persons in or from a certain geographical area. The Committee finds that such techniques are not flatly prohibited but advertisements may not appear in certain geographical areas or target victims of a mass-disaster event, and the lawyer’s advertisement must appear adjacent to the content of the website the internet user is visiting and may not “pop-up” or be presented in a way that the user must watch it for a designated period of time before allowing the user to reach the chosen website.

Smart phones and similar devices often transmit their location, which enables a marketing company to target the user of the device. An advertiser can specify a geographical area, such as a pharmacy, office building, sports arena, or the like, and erect a “fence” around it

(“geo-fencing”). Whenever a person with an active location-transmitting smart phone enters the fenced-in area, the advertisement will appear on a website visited by that person on his or her phone.

Marketing companies may offer to send digital advertising to smart phones and similar devices based on the device’s IP address (the unique ID number assigned to every device that provides location information) (“geo-targeting”). Companies may also offer to further sort the recipients of digital advertisements by income, gender, and age.

Internet users are generally aware that advertisements that appear on websites they visit are somehow targeted to them. Real estate agents are likely to display advertising on websites about vacation properties; personal injury lawyers are likely to display advertising on websites providing information about whiplash or other injuries common to motor vehicle accidents. Techniques such as geo-fencing and geo-targeting try to reach an audience that may be receptive to the lawyers’ message, though if the user does not transmit a location or does not browse on the device when entering a “fenced” area, the advertisement will never appear to that user.

Rule of Professional Conduct 7.3 provides:

- (a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).
- (b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
 - (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
 - * * *
 - (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

- (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances

Lawyers employ geo-fencing and geo-targeting techniques to present advertising to people who, based on their location or characteristics, may be in need of certain legal services. A wills and estates lawyer may want to target people at a funeral home, a personal injury lawyer may want to target people seeking medical care, or a criminal defense lawyer may want to target people at a police station. Rule of Professional Conduct 7.3(b)(1) prohibits any contact, direct or indirect, with a prospective client when the “lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.” There are geographical areas within which at least some of the targets of digital advertising are reasonably likely to be in a compromised physical, emotional, or mental state. These areas include, but are not limited to, emergency rooms, hospitals, urgent care centers, funeral homes, police stations, courthouses, and accident sites. Presenting attorney advertisements to people in such areas would violate this Rule.

Lawyers who employ geo-fencing and geo-targeting techniques to present advertising to people in other, permitted locations are subject to certain restrictions. As noted above, such advertising techniques are designed to target people who may be in need of certain legal services due to the person’s location or characteristics. These targeted and tailored communications often concern a “specific event,” which is broadly construed to “include situations, conditions or occurrences which now, or in the future will, give rise to a cause of action.” CAA Opinion 12

(January 1992). Communications to prospective clients regarding a “specific event” are governed by Rule of Professional Conduct 7.3(b)(5).

Rule of Professional Conduct 7.3(b)(5) prohibits “unsolicited direct contact with a prospective client concerning a specific event.” The Committee differentiates between digital advertisements that appear on a website the targeted person is browsing on his or her device, such as Facebook or the Weather Channel, and more traditional “direct” communication, like an email message sent to a recipient. The Committee finds that an attorney whose advertisements appear adjacent to the content of the website the internet user is visiting is not engaged in “unsolicited *direct* contact” with the recipient. Rather, the attorney is making indirect contact via the website that the recipient has opened and is viewing; the attorney advertising is secondary to the user’s chosen website and the user is not forced to view the advertisement, it merely appears above or to the side of the material the user is viewing.

There may be some types of “pop-up” advertisements that significantly interfere with the user’s visit to the chosen website by, for example, requiring the user to watch for a designated period of time before allowing the user to reach the chosen website. The Committee finds these types of advertisements to be substantially equivalent to other forms of “direct contact” with the user and they are prohibited by Rule of Professional Conduct 7.3(b)(5).

Lastly, Rule of Professional Conduct 7.3(b)(4) prohibits lawyers from making “unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event.” This prohibition is intended to provide the prospective client with some breathing space to adequately consider whether the lawyer is an appropriate fit for the person’s legal needs and to prevent lawyers from overreaching. Targeted communications from a lawyer after a mass-disaster event carry a certain authority and convey the impression that the lawyer is

aware of the vulnerable recipient's legal needs and is offering a solution. If a digital advertisement were specially-tailored to victims of a mass-disaster event and the geo-fencing or geo-targeting techniques were designed to deliver that advertisement to victims, the Committee finds that the effort would violate Rule of Professional Conduct 7.3(b)(4). The startling presence of such a targeted and specific advertisement on a vulnerable user's digital device at such a time and place – even if the advertisement is presented adjacent to the chosen website – is substantially equivalent to “direct contact” with the recipient.

In sum, lawyers' use of “geo-fencing” or “geo-targeting” techniques to deliver digital advertising is not flatly prohibited. However, such advertisements may not appear in geographical areas where at least some of the targets of digital advertising are reasonably likely to be in a compromised physical, emotional, or mental state. These areas include, but are not limited to, emergency rooms, hospitals, urgent care centers, funeral homes, police stations, courthouses, and accident sites. Further, the lawyer's advertisements must appear adjacent to the content of the website the internet user is visiting and may not “pop-up” or be presented in a way that the user must watch for a designated period of time before allowing the user to reach the chosen website. Lastly, digital advertisements specially-tailored to victims of a mass-disaster event delivered to those victims by geo-fencing or geo-targeting techniques are prohibited.