

Barristers and advertising – ought it be an ethical question?

By Talitha Fishburn

A significant evolution in our state's professional conduct rules governing barristers was the removal in the late 1980s of the ban on barrister advertising. But given the rise of social media platforms in our present times, is it time to rethink unfettered advertising by barristers or has the world moved on, #2late? What is the place of ethics in our brave new hashtag-adorned world?

Until 1987, professional conduct rules governing barristers at the NSW Bar were embodied in internal rules of the Bar Association styled, *The New South Wales Bar Association Rules* (former rules). Each edition was signed off by the president of the Bar Association.

The former rules expressly prohibited a barrister advertising his services. As an aside, the language of the former rules presupposed all barristers were male.

The scope of the advertising prohibition was extensive. Both direct and indirect means of solicitation were banned as well as any conduct that led to the reasonable inference that its purpose was advertising. Suffice to say, until the late 1980s, 'advertising' was a dirty word in connection with barristers as well as

other professions such as medicine. The only accepted means of 'advertising' by a barrister was limited to one's name plaque at chambers or 'word of mouth'.

Under the former rules, a barrister was prohibited from disclosing to the public that he was a barrister. Likewise, he was prohibited from sending his résumé or using business cards or stationery identifying himself as a barrister. A barrister was not permitted to include his university degrees or other qualifications on professional stationery. A barrister was prohibited from sending a memorandum containing his name, address or the fact that he was a barrister – except in the event of informing an instructing solicitor of his change in address or telephone number. A barrister could not even publish his areas of law or jurisdictions of any court in which he practised.

Appraised through today's mod lens, the advertising prohibitions which remained in place until 1987 appear arcane and overly restrictive.

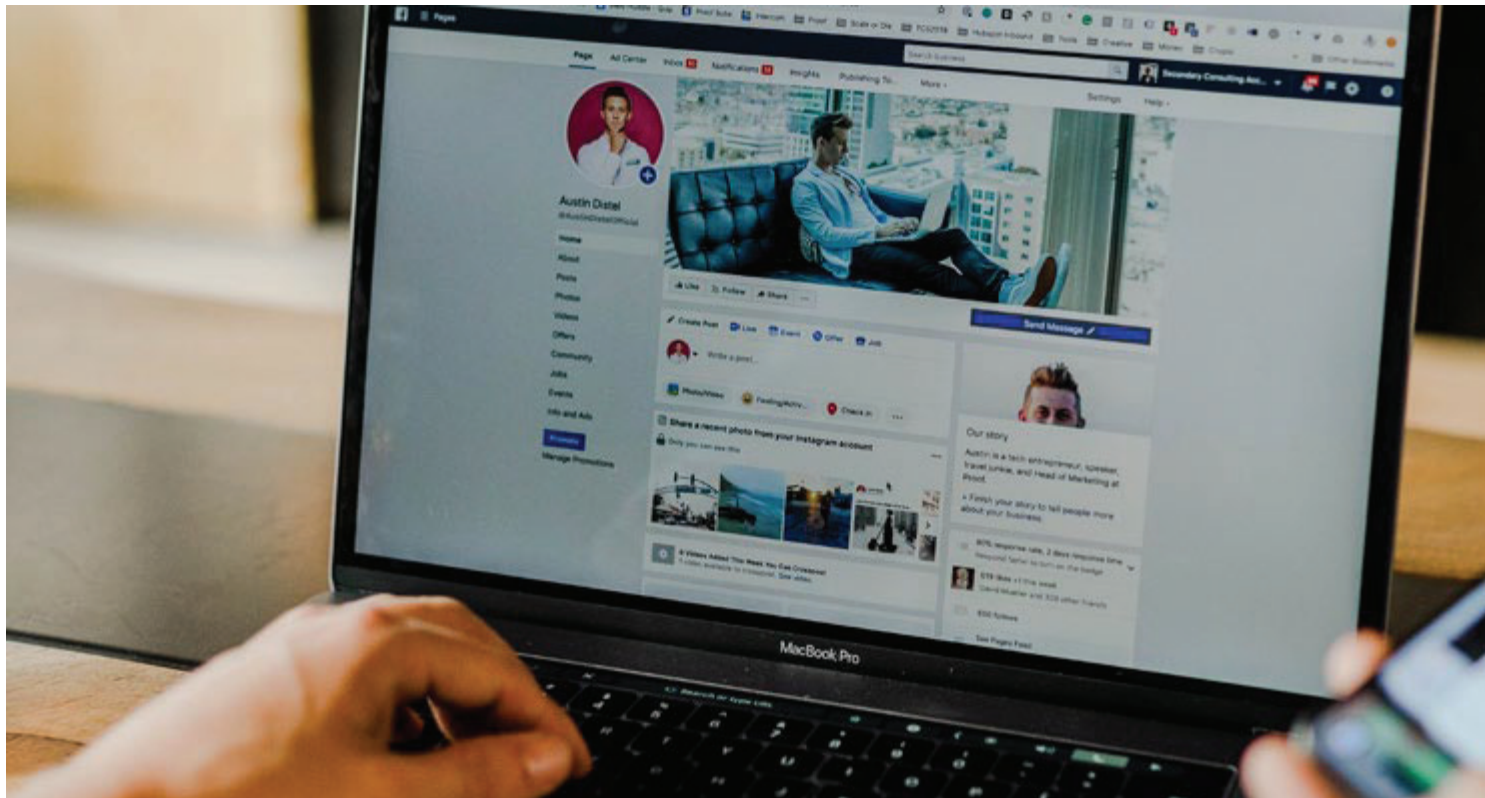
Nowadays, it is commonplace for barristers to not only provide résumés but to maintain detailed current résumés and publish them online. The New South Wales

Bar Association itself facilitates the option of a personal résumé being published via its website, an opportunity that has been widely adopted by many barristers for several years. Likewise, résumés are typically published on chambers' websites or at least stated to be 'made available on request'.

The once forbidden but now permitted business card has dwindled in popularity. They are mostly redundant given the ease and reliability of online means of accessing the details of a barrister such as the Bar Association website, chambers' websites or digital platforms such as LinkedIn. Even a basic web browser search is likely to quickly yield a barrister's details, such is the extent and accuracy of modern day digitisation of the advertising of barristers' services and contact details.

The prohibition on advertising under the former rules was partly based on ethical considerations connected with the professional standing of barristers. For example, an ethical reason given in support of the advertising prohibition was the notion that because the bar is inextricably linked to the judicial system, its members should not be seen to advertise their services.





Likewise, advertising was thought to carry a risk that it promoted exaggeration and possibly dishonesty and was therefore contrary to barristers' ethical requirements of utmost honesty and integrity as members of the legal profession and officers of the court.

At that time, advertising of one's barrister services was considered to be antithetical to the professional call of a barrister. There was concern that advertising would encourage a more commercial 'cut throat' atmosphere within the profession. This in turn was thought to risk reducing trust in the profession and increasing the likelihood of barristers neglecting their ethical duties to the court. Advertising was considered to place too much emphasis on achieving personal success and distract from a barrister's important ethical duties including the paramount duty to the court. Similarly, advertising was thought to promote the offering of cheaper and more competitive services which carried the risk that barristers might be tempted to cut corners and provide lower standards and thus bring the profession into disrepute. A more practical consideration underlying the prohibition on advertising was that misleading advertising was thought to be extremely difficult to police. Moreover, it was widely considered unnecessary to advertise; the notion being that regular work ought to flow by simply being a member of the bar.

By the early 1980s, there was increasing debate in the legal profession in both the solicitor and barrister branches about whether the prohibition on advertising

remained valid or whether it unfairly curtailed the free economy.

In 1982, the NSW Law Reform Commission reviewed and reported on the issue of advertising in the legal profession, including by barristers. It recommended a relaxation of some of the restrictions against advertising for both solicitors and barristers. It recommended that barristers should be permitted to advertise about their willingness to accept work in particular fields in publications circulated to lawyers. However, it recommended against barristers being permitted to advertise themselves as 'specialists' or 'experts' in particular fields, whether subject to meeting specified qualifications or otherwise.

At that time, a key argument in favour of easing advertising restrictions was to promote greater awareness of barristers and their areas of practice. This was said to better inform solicitors so as to enable them to make informed briefing choices. This was thought to be particularly apt for new barristers or those returning to practice.

Relatedly, although not mentioned in the report, is the notion that but for a degree of advertising, it is difficult for a new barrister to form connections and be known if they do not have pre-existing social or business contacts. This might be especially relevant to persons of diverse backgrounds who might not (especially back then) have 'family' connections to the legal profession or people from less privileged backgrounds who did not have the 'old boys' network' to rely on.

In this sense, a prohibition on advertising perpetuated institutional biases and was therefore highly undesirable.

The recommendations of the NSW Law Reform Commission were initially vehemently opposed by both the Bar Association and the Law Society of NSW. The prevailing view in the legal profession remained that advertising was seen as an affront to the classic model of the profession. Ultimately however, its recommendations prevailed and prohibitions on advertising were relaxed by force of legislation.

As at 1987, the prohibition against advertising by barristers was removed with the introduction of the *Legal Profession Act 1987* (NSW). Under section 38J, barristers and solicitors were permitted to advertise their services. Notwithstanding the significant legislative reform, many barristers continued to eschew advertising and did not carry business cards because advertising was seen to be inconsistent with the profession.

In the last decade, significant changes have taken place in the way barristers practise. For example, direct briefing, once mostly non-existent, is an increasing trend particularly among sophisticated corporate clients, in-house lawyers and government agencies and regulators. The role of the clerk has also evolved. It is now more managerial and involves raising the profile of their barristers and organising marketing activities such as seminars and networking events. The 'chambers' model itself has been disrupted from the classical Selborne



Wentworth model on Phillip Street. There are now close to 100 sets of chambers in New South Wales offering different membership structures and accommodation options. There is now an expectation that chambers will maintain a website, and a decent one at that, and provide detailed biographies about its barristers available to the public.

In more recent years, the marketing and advertising of barristers' services has also increased and is often deliberate and highly strategic. Professional development seminars have been hosted on 'marketing' a barrister's practice and 'optimising digital engagement'. Many chambers have engaged marketing experts to assist with attracting work flow to chambers and host sophisticated SEO-enabled websites.

The timing of the shift to more overt means of advertising seems to correlate to the confluence of the widespread use of the internet, the prevalence of social media in everyday life and the use of smart phones. It is assumed that barristers have smart devices and can be contacted via mobile phone perhaps more readily than a landline at chambers. Solicitors most commonly 'find' a barrister on a smartphone in today's world. A smorgasbord of social medial platforms exist; Facebook, Twitter, Instagram, TikTok, YouTube and LinkedIn to name just a few. It is not uncommon for a barrister to have at least a profile on Twitter and LinkedIn and for individual chambers to maintain social media accounts for the floor. Even many of the courts maintain an online social media

presence. Thriving online legal communities have been created such as 'Lawyer Mums Australia' and 'Ladies Who Lawyer' with thousands of active online members including solicitors and barristers.

Such online networking forums have obvious benefits. They are cost and time efficient, immune to geographical restrictions and even pandemic proof. They also create a permanent imprint and are not subject to temporal limitations of live networking events. They offer a treasure trove of information and contain smart ways of filtering large quantities of data to increase the relevance of the platform to users.

But there are also downsides to online networking forums. Questions arise as to whether enduring and trust based relationships can form in a digital setting. For example, many platform 'connections' may not be genuine connections but mere accessories to a bigger agenda of 'brand building' and developing an 'online presence'. Many of us have probably observed the banality of 'comment' that is sometimes made on an online post which appears to have no purpose but to 'attract online traffic' and generate algorithmic preference on the platform. Likewise, does the algorithmic nature of social media platforms encourage us to offer gratuitous 'advertising' material? Similarly, does the deliberately gamified addictive user experience of social media platforms distract us from careful and ethical decision-making?

A fine line separates whether or not a 'post' on social media comprises legitimate 'knowledge sharing' or crude and offensive advertising that might not shed the profession in the best light. For example, many of us will have noticed posts that pepper LinkedIn commencing with words to the effect, 'I am truly humbled to accept [said recognition]' followed by reference to a relatively obscure industry award or even the mere nomination of said industry award. Does such content, which is clearly not 'humble' comprise the sharing of valid information about a barrister's services or is it just the brash trumpeting of advertising? If it is mere advertising, is it problematic from an ethical standpoint despite not being expressly prohibited under professional conduct rules?

Given the potentially wide reach of a post to social media, a controversial post by a barrister on social media carries a heightened risk of compromising the ethical duty to not bring the profession into disrepute. A poignant recent example of this occurred with widespread social media commentary surrounding the Federal election. Is it appropriate for a barrister with a public profile to make personal political views on social media forums and 'post' or 'share' or 'like'

disparaging material about certain members of political parties or enter into fervent online debate about a preferred candidate or party? In particular, given LinkedIn is regarded as a business platform rather than personal, is it appropriate to offer personal views on a topic such as politics on that forum noting that the majority of 'connections' are likely to be members of the legal profession and the unsaid rule of the forum is that it is for business related discussion?

Now that the prohibition on advertising has been removed from the conduct rules, whether or not certain advertising is ethically problematic is a matter for the individual barrister to consider. The Legal Services Commissioner, John McKenzie stated about the legal profession:

compliance with relevant rules is necessary to prevent wrongdoing. But the basis of the legal profession's claim to its special place as a profession in our society is based on a good deal more than compliance with rules and laws. Integrity is often said to be a cornerstone of legal professional behaviour. A useful definition of 'integrity' is the promotion of behaviour that adheres to moral and ethical principles. So compliance is only a pre-condition to achieving the integrity which our profession strives to attain. Something more is required of lawyers, something in the nature of an obligation to abide by moral and ethical principles

Bearing in mind this wisdom, how ought barristers approach advertising in today's world so as to maintain integrity? The gates have swung wide open to a fecund field of advertising potential. But despite the green light, how far should we go and to what extent is this decision informed by ethics and professional considerations? To what extent is advertising inconsistent with the conception of a professional person who serves the community and is bound by strict rules of conduct in dealings with the court, clients and colleagues? To what extent is advertising an affront to integrity?

As with many ethical matters, the issue of advertising and barristers is a grey area. The adoption of the trappings of modern life, such as social media platforms is inevitable and itself unobjectionable. But we ought to use them mindfully and with a keen eye to observing our professional obligations as officers of the court. As we adopt contemporary and new ways of practising law, our age old commitment to professional standards must remain inviolable. In other words, it ought never be the case of #2late when it comes to upholding ethical conduct notwithstanding the increasingly more liberal and autonomous trappings of practice at the bar.

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