

NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 614 - 11/21/90 (10-90) Topic: Advertising; client testimonials.
Clarifies N.Y. State 539 (1982) Digest: It is proper to advertise client testimonials provided reasonable disclaimers are expressed about any statements or results the lawyer has achieved.
Code: DR 2-101(A), (B), (C)(2); EC 2-10.

QUESTION

May a lawyer advertise on radio or television by using client testimonials?

OPINION

A lawyer proposes to advertise on radio and television by using client testimonials in which actual clients whose cases have been completely resolved will state certain objective facts concerning the client's case and express the client's satisfaction with the law firm's services and the result obtained.

The United States Supreme Court had an opportunity recently to answer the proposed question, but declined to do so after hearing oral argument. *Oring v. State Bar of Cal.*, ___U.S. ___, 109 S. Ct. 858 (1989).

It is common knowledge that word-of-mouth endorsements and recommendations by former clients are an effective way to build a legal practice. DR 2-101(C)(2) permits advertising by the use of "names of clients regularly represented, provided that the client has given prior written consent."

The inquirer asks, however, whether a lawyer can also provide client endorsements and testimonials in the advertisement itself, rather than simply listing the names of previous clients. Although the Committee believes that this particular type of advertising has the potential to be misleading to an unsophisticated potential client, we decline to adopt a per se rule prohibiting this type of advertising.*

* Our opinion is necessarily limited to ethical issues under the Code of Professional Responsibility, which must be interpreted in the light of controlling constitutional authority developed in such cases as *Peel v. Attorney Disciplinary Comm.*, ___U.S. ___, n. 17, 110B S. Ct. 2281, 2292 (1990); *Oring v. State Bar of Cal.*, ___U.S. ___, 109 S. Ct. 858 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Since 1977, the United States Supreme Court has recognized the value of legal advertising (commercial speech) in facilitating well informed consumer decisions in the selection of an attorney. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). "It is a matter of public interest that ... [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 765 (1976). A recent survey report stated that almost one-third of all lawyers now engage in some form of advertising. Reidinger, *Law Poll*, 73 ABA J. 25 (1987). The right of a lawyer to advertise, however, is not plenary, and the lawyer can be restricted from commercial speech that is false or misleading.

DR 2-101(A) states, "A lawyer ... shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, [or] misleading" EC 2-10.

DR 2-101(B) proscribes claims that are puffery, self-laudatory claims regarding the quality of the lawyers' legal services, and claims that cannot be measured or verified. The Supreme Court has stated that advertising claims regarding the quality of legal services and, "are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977).

Although not adopted in New York, a review of the ABA Model Rules may be helpful in understanding the permissible scope of restrictions on lawyer advertising. Rule 7.1(a) states that a communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially misleading." If the advertisement is "likely to create an unjustified expectation about the results the lawyer can achieve," then Rule 7.1(b) proscribes it. In this respect, the official comment to Model Rule 7.1(b) offers guidance. It states that claims of past success "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." It further states that this limitation "would ordinarily preclude advertisements about the results obtained on behalf of the client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements." (Emphasis added.)

DR 2-101(B) prohibits advertising that contains "claims regarding the quality of the lawyers' legal services or claims that cannot be measured or verified." Accordingly, a lawyer may not directly or through selected edited utterances present former clients' testimonials describing prior results in a manner that:

1. Fails to contain sufficient information to allow an informed decision on whether to seek the lawyer's services;

2. Creates unjustified expectations or "false hopes." *In re R.M.J.*, 455 U.S. 191, 200 n. 11 (1982); or
3. Offers overblown assurances of a client's satisfaction. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988).

Notwithstanding the penumbra of protection afforded by the First Amendment, valid and legal restrictions, other than a total ban, on lawyer advertisement and solicitation remain. We decline, however, to adopt a per se prohibition on any client endorsement, as some states have opted to do. See, e.g., D.C. Code of Professional Responsibility DR 2-101(C)(2) (1988); Indiana Rules of Professional Conduct Rule 7.1(d)(3) (1988) (prohibiting lawyer advertising which "contains testimonial about or endorsement of a lawyer"); Conn. Bar Ass'n Op. 88-3 (1988), summarized in Law. Man. ABA/BNA 901: 2057 (restricting distribution of an article which "compares one lawyer with another lawyer and includes a client endorsement"); Penn. Bar Ass'n Op. 88-143 (1988), summarized in Law. Man. ABA/BNA 901: 7313 (prohibiting brochures containing client endorsement).

Instead, we prefer to adopt a narrower rule "designed to prevent the potential for deception and confusion [that is] no broader than reasonably necessary to prevent a perceived evil." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Thus, we hold improper those client endorsements describing prior results that are potentially misleading in the various ways described herein, e.g., statements of "overblown assurances of client satisfaction", statements that create unjustified expectations or "false hopes" or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading. Additionally, some disclaimer should be joined with client endorsements describing prior results to the effect that the endorsement does not guarantee or predict a similar outcome with respect to any future matter on which the lawyer may be retained.

The United States Supreme Court has sanctioned the use of disclosure requirements reasonably related to protecting the public from misleading or deceptive advertisements or from misunderstanding the significance of a stated fact. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). See also, *Peel v. Attorney Disciplinary Comm.*, ___U.S. ___, n. 17, 110B S. Ct. 2281, 2292 (1990). Disclosure requirements are constitutional as long as they are reasonably related (and not necessarily the least restrictive means available) to protecting consumers from deceptive or misleading advertising. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 651-52 n. 14. "[D]isclosure requirement[s] trench much more narrowly on the advertiser's interest than do flat prohibitions of speech." Id. at 651.

On the issue of whether the lawyer's advertisement may include client statements on the outcome of the concluded case, we refer the reader to N.Y. State 539 (1982). An ad that makes no distinction among various legal and

factual nuances in each sui generis case has the potential to mislead the public. To a layperson of average education and intelligence, unaware of these nuances, such an ad may suggest that a similar substantial recovery or result may be obtained in every such case. Thus to avoid unjustified expectations or false hopes by the consumer, a disclaimer should be inserted in the advertisement that facts and prior results in an earlier case do not guarantee or predict a similar outcome with respect to any future matters on which the lawyer may be retained.

CONCLUSION

A lawyer may advertise by using client testimonials provided reasonable disclaimers with respect to description of prior results obtained are inserted where necessary to avoid unjustified expectations by the consumer and provided the advertisement otherwise complies with existing disciplinary rules and opinions.
