

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 661 – 3/15/94 (57-93)

Topic: Advertising; fictional client testimonials

Digest: Dramatized versions of actual client testimonials are proper only if (1) the client authorizes use of the testimonial, (2) appropriate disclosure is used to correct any misleading information or imagery as to the identity of the clients and (3) reasonable disclaimers are expressed as to any statements or results the lawyer has achieved; it is proper to advertise using fictional situations and characters without client “testimonials”; it is improper to advertise fictional client “testimonials.”

Code: DR 2-101(A), (B); EC 2-10

QUESTIONS

(1) Is it ethical for a lawyer to advertise on radio or television using actors in dramatized versions of actual client “testimonials”?

(2) May a lawyer use fictional situations and characters without client testimonials in a radio or television ad?

(3) May a lawyer use fictional client testimonials in a radio or television ad?

OPINION

In N.Y. State 614 (1990), this Committee declines to adopt a per se rule prohibiting use of client endorsements and testimonials¹ in radio and television

¹ Testimonials include testimonials, endorsements and recommendations which in some manner describe results obtained by the lawyer or assess the lawyer’s performance.

advertising. Rather, the Committee held improper certain client endorsements describing prior results, which are potentially misleading in that they contain statements of overblown assurances of client satisfaction, create unjustified expectations or false hopes, or fail to contain sufficient information. The Committee also held improper those client endorsements describing prior results that are not joined with a disclaimer 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.

For the reasons stated in N.Y. State 614, this Committee declines to adopt a per se rule prohibiting use of dramatizations of actual client testimonials in which actors are used to portray real clients in factual circumstances that in fact occurred. A fictional portrayal of the client's testimonial may be used, however, only if the client is willing to authorize dramatized use of his or her testimonial.² See DR 2-101(C)(2)(permitting the use of names of regularly represented clients with their prior written consent) and DR 2-101(B)(prohibiting claims that cannot be verified). Furthermore, a dramatization of a testimonial must accurately reflect the actual testimonial and meet the standards set forth in N.Y. State 614. Captions, announcements or other disclosure must accompany the advertisement and must be sufficient to ensure that the advertisement is neither false nor misleading. Attorneys using dramatized testimonials must be sensitive to the need to make clear that the presentation is a dramatization of actual events in which the real clients are portrayed by actors. For example, where a celebrity actor is used in such a dramatization, particular care must be taken to ensure that the presentation is not false, deceptive or misleading to a lay person of average education and intelligence (who may, for example, think the actor is a real client rather than an actor being paid for his or her performance).³ See DR 2-101(A).

² It would be unethical for the lawyer to compensate or give anything of value to the client to obtain the client's authorization for dramatized use of his or her testimonial. DR 2-103(B).

³ In determining the sufficiency of the disclosure, attorneys should keep in mind the nature of television and radio advertising. "Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider." *Committee on Professional Ethics & Conduct v. Humphrey*, 377 N.W.2d 643, 646 (Iowa 1985)(footnote omitted), app. dism., 475 U.S. 1114 (1986). This Committee recognizes the potential impact of electronic media advertising described by the Iowa Supreme Court in *Humphrey* within subscribing generally to that opinion which upholds a prohibition of lawyer advertising on radio or television containing background sound, visual displays, more than a single, nondramatic voice or self-laudatory statements.

This Committee also declines to adopt a *per se* prohibition of dramatizations using fictional situations and characters without client testimonials. Dramatizations of fictional events can be used in a radio or television advertisement in much the same way as a drawing or photograph can be used in a print medium to illustrate a situation to the viewer, provided the dramatization is done in a manner that is not false or misleading. Dramatization of an event that reasonably could occur (without use of a fictional client testimonial) is not *per se* false or misleading merely because the particular circumstances did not occur, the services were not actually performed by the lawyer and the persons portrayed (as well as the actors) are not past or present client of the lawyer. Again, the lawyer must be sensitive, where appropriate, to the need to make clear that the presentation is a dramatization and that the actors are not real clients.

On the other hand, a dramatization using a fictional client testimonial is unethical because it is inherently false, deceptive and misleading. A fictional testimonial contains claims regarding the quality of the lawyers' legal services and claims that cannot be measured or verified where it describes prior results that were not actually achieved or assesses conduct or makes an endorsement based upon conduct that did not actually occur. See DR 2-101(A); DR 2-101(B); see also EC 2-10. Although captions, announcements or other devices may be used in an advertisement to indicate a presentation is a dramatization, such a disclaimer could not overcome the inherently deceptive nature of a presentation in which the testimonial is false.⁴

CONCLUSION

For the reasons stated, questions one and two are answered in the affirmative and question three is answered in the negative.

⁴ 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. In N.Y. State 614, while acknowledging the protections afforded by the Supreme Court even to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and their progeny, this Committee recognized that "[t]he right of a lawyer to advertise ... is not plenary, and the lawyer can be restricted from commercial speech that is false or misleading."