



## COMMITTEE ON PROFESSIONAL ETHICS

Opinion 834 (12/15/09)

Distinguishing N.Y. State 771 (2003) in light of rule changes

**Topic:** Use of disclaimer with client testimonials or endorsements.

**Digest:** Under the New York Rules of Professional Conduct, truthful client testimonials or endorsements are permitted if accompanied by the disclaimer specified in Rule 7.1(e)(3).

**Rules:** 7.1(a)(1), (d)(3), and (e)(3)

### QUESTION

1. Must an advertisement that contains a client testimonial or endorsement also contain the disclaimer: "Prior results do not guarantee a similar outcome"?

### OPINION

2. Our opinion in N.Y. State 771 (2003) concluded that as long as an advertisement containing client testimonials was not false, deceptive or misleading, it was not necessary for the advertisement to contain the disclaimer that prior results did not guarantee a similar outcome.<sup>1</sup> We now examine whether this conclusion is modified in the New York Rules of Professional Conduct that took effect on April 1, 2009 (the "Rules").<sup>2</sup>

3. Rule 7.1(d)(3) provides that an advertisement that complies with Rule 7.1(e) may contain "testimonials or endorsements of clients ... and of former clients."<sup>3</sup> Rule 7.1(e)(3) requires advertisements containing testimonials or

---

<sup>1</sup> N.Y. State 771 was decided in the context of website advertising, but the principles enunciated in that opinion applied to all forms of attorney advertising, as does this opinion.

<sup>2</sup> The rule amendments addressed in this opinion are based verbatim on language that took effect on February 1, 2007, when the Courts amended the Disciplinary Rules governing advertising and solicitation in the old Code of Professional Responsibility.

<sup>3</sup> A restriction on testimonials or endorsements from current clients is contained in Rule 7.1(c)(1), which provides that an advertisement shall not "include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending." Rule 7.1(c)(1) was declared unconstitutional and its enforcement was permanently enjoined in *Alexander v. Cahill*, 634 F.Supp.2d 239 (N.D.N.Y. 2007), but the defendants (disciplinary counsel in all four Departments) appealed to the Second Circuit, and the appeal

endorsements of clients to include the following disclaimer: "Prior results do not guarantee a similar outcome." Therefore, under the new Rules, an advertisement that contains a client testimonial requires the prescribed disclaimer concerning results.

4. At the time we decided N.Y. State 771, the New York Code of Professional Responsibility did not have a specific Disciplinary Rule dealing with client testimonials. However, DR 2-101(A) of the Code did prohibit advertisements that were "false, deceptive or misleading," so this Committee examined client testimonials under that standard. We opined under that standard that the nature of the testimonial determined whether a disclaimer of the kind now mandated by Rule 7.1(e)(3) was required. Like DR 2-101(A) of the old Code, new Rule 7.1(a)(1) prohibits testimonials that are false, deceptive or misleading, but now Rule 7.1(e)(3) always requires the disclaimer set out in that subparagraph.

### **CONCLUSION**

5. We answer the question in the affirmative. Under Rule 7.1(e)(3), an advertisement that contains a client testimonial or endorsement must also contain the disclaimer: "Prior results do not guarantee a similar outcome."

(49-09)

---

was still pending when we issued this opinion. The outcome does not affect our analysis here because Rule 7.1(c) regulates only the types of testimonials and endorsements permitted, not whether they require a disclaimer.