



Committee on Professional Ethics

Opinion 883 (10/27/11)

Topic: Attorney advertisement;
fictitious law firm

Digest: An attorney advertisement may include the portrayal of a fictitious law firm so long as it is not misleading as to the association of lawyers in the advertiser's firm.

Rules: 7.1(c).

QUESTION

1. May an attorney advertisement include the portrayal of a fictitious law firm, such as the portrayal of an argument against fictitious opposing counsel?

OPINION

2. Rule 7.1(c)(2) of the New York Rules of Professional Conduct (the "Rules") states that an attorney advertisement may not "include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case."

3. Strictly read, the rule would appear to bar portrayal of a fictitious law firm in any form, including, for example, an advertisement depicting the advertising lawyer opposing a fictitious adversary firm or in other situations where the depiction was not misleading as to the advertiser's practice. The word "otherwise" in the final clause of the rule, however, suggests a narrower reading: that portrayals of a fictitious law firm are prohibited only if they imply that lawyers are associated in a law firm with the advertising lawyer, or are part of the advertising law firm, if that is not the case. We believe this narrower reading best corresponds with the purpose of the rule, which is to bar advertising techniques that are misleading.

4. For example, a comment to the rule on advertising explains that the prohibition of certain attorney advertising techniques hinges on whether the result is misleading to the viewer. That Comment states, "Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so

long as those techniques do not render the advertisement false, deceptive or misleading.” Rule 7.1, Cmt. [4] (emphasis added). The portrayal of a fictitious law firm is not by its nature misleading – it may be used as a humorous attention-getting device, for example. Rule 7.1(c)(2) read as a whole indicates a limiting principle to the prohibition, which is that a portrayal of a fictitious law firm is barred only when it implies that the advertising lawyer is associated in a law firm with other lawyers when that is not the case.

5. This narrower reading is supported by an interpretation that the Attorney General offered, and the United States Court of Appeals for the Second Circuit accepted, in the context of a challenge to the rule. Rule 7.1(c)(2) was among those challenged in *Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010), on the ground that it unconstitutionally prohibited non-misleading speech. In that case, an attorney, his law firm, and a consumer rights non-profit organization argued that the current rules regarding attorney advertising infringed their First Amendment rights by prohibiting “truthful, non-misleading communications that the state has no legitimate interest in regulating.” *Id.* at 86. The Second Circuit agreed, affirming, with one exception, the District Court’s conclusion that the content-based restrictions in the disputed provisions of the Rules impermissibly regulated commercial speech protected by the First Amendment. *Id.* at 89. The one exception was Rule 7.1(c)(2), the rule at issue in this opinion. In considering that rule, however, the court noted that the only categories of commercial speech “clearly exclude[d] from protection are speech that is false, deceptive, or misleading, and speech that concerns unlawful activities.” *Id.* at 89 (citation omitted). The court accepted a narrowing interpretation that the State offered, apparently in order to avoid the constitutional question. The court wrote:

The provision prohibiting advertisements including fictitious firms is susceptible to more than one interpretation. But we need not decide whether it would be constitutional to prohibit dramatizations in which an advertising law firm portrays itself arguing against a fictitious opposing counsel. At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this legislation as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., “The Dream Team”). (Oral Arg. ~ 12:38:25) We accept this interpretation. So read, this portion of §1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of a firm), and such advertising is not entitled to First Amendment protection. See *Florida Bar*, 515 U.S. at 623-24, 115 S.Ct. 2371. Accordingly, and subject to the above-mentioned construction, we reverse the District Court’s invalidation of that portion of § 1200.50(c)(3) that prohibits advertisements that include fictitious firms.

Id. at 90.

6. In response to the *Cahill* decision, the Appellate Divisions of the New York Supreme Court amended the Rules, but left the text of what became Rule 7.1(c)(2) unchanged. Amendment of Rule, New York Rules of Professional Conduct, 33 N.Y. St. Reg. 92 (May 18, 2011) (to be codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (2011)). The narrow interpretation of the rule accepted by the Second Circuit is thus not explicitly stated in its text. Nevertheless, in view of the final clause of the rule and the narrowing interpretation that the State offered in the face of a constitutional challenge, we believe that the language of the rule should be read in context to apply only where portrayal of the fictitious firm would be misleading as to the advertiser's practice. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989) (adopting New York City's "narrowing construction" of a noise ordinance so as to avoid unconstitutionality).

7. We note that any portrayal of a fictitious law firm must comply with other rules, which will reduce the risk of a portrayal of a fictitious firm misleading viewers or listeners. In particular, Rule 7.1(c)(3) states that an attorney advertisement shall not "use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same." In light of this disclosure requirement, where a fictionalized law firm is portrayed using actors or fictionalized events or scenes, viewers are unlikely to be misled as to the existence of a real law firm in an advertisement. The bar on portrayals of fictionalized law firms would, however, itself prevent the kind of "portrayal" of a law firm cited by the Attorney General in its argument to the Second Circuit – an advertisement that described a team of lawyers from different firms by an overarching description such as "The Dream Team" in such a way as to suggest that the lawyers were associated in a single firm.

CONCLUSION

8. An attorney advertisement may include the portrayal of a fictitious law firm so long as the advertisement is not misleading as to the association of lawyers in the advertiser's law firm.

(30-11)