LEGAL ETHICS OPINION 1750

LAWYER ADVERTISING AND SOLICITATION

Committee Opinion: March 20, 2001
Committee Revised Opinion: April 4, 2006
Committee Revised Opinion: December 18, 2008
Supreme Court Approved: April 20, 2018
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The Standing Committee on Lawyer Advertising and Solicitation reviewed all of its previous opinions, and issued a compendium opinion March 20, 2001, summarizing many of the existing advertising opinions and incorporating previously issued legal ethics opinions on the subject of lawyer advertising. The Committee updated this opinion in 2005 and 2008 to reflect rule amendments and lawyer advertising amendments that had been adopted since 2001. The Standing Committee on Legal Ethics is now further updating the opinion to incorporate the significant rule changes effective July 1, 2017.

Some of the issues addressed in this opinion include: use of actors; use of the phrase "no recovery, no fee;" laudatory statements by third parties; use of specific or cumulative case results; participation in a lawyer referral service; communications involving listing of inclusion in publications such as *The Best Lawyers in America*; and the use of the terms "Specialist" or "Specializing In." The prohibition in Rule 7.1 concerning advertising which is false or misleading applies to all public communications and includes communications over the internet.

In order to provide all members of the Bar with better access to the advertising opinions, this compendium opinion, issued by the Standing Committee on Lawyer Advertising and Solicitation, will be published as a Legal Ethics Opinion. *See* Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10; Virginia State Bar Bylaws, Article VII, Section 5.

Opinion

The appropriate and controlling rules of professional conduct relevant to the questions raised are Rules 7.1 and 7.3(d):

RULE 7.1. Communications Concerning A Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.3. Solicitation of Clients.

* * *
(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:
* * *
(2) pay the usual charges of a legal service plan or not-for-profit qualified lawyer referral service.

A. Use of Actors in Lawyer Advertising.

The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The Committee is of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading. For example, some advertisements feature actors who use first person references to themselves as lawyers or as members of the law firm being advertised. When the advertisement implies that an actor is actually a lawyer or client of the law firm, a disclosure that the actor is not associated with the firm, or that the depiction is a dramatization, is necessary to prevent the advertisement from being misleading.[1]

B. Use of "No Recovery, No Fee."

The Committee considered whether the language "no recovery, no fee" or language of similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was false or misleading pursuant to Rule 7.1, as the client might still be responsible for advanced costs and expenses regardless of whether any recovery was obtained.

The Committee determined that use of the explicit phrase "no recovery, no fee" in the solicitation of contingent fee cases is misleading when the lawyer or law firm may or will require the client to remain responsible for costs and expenses of litigation. According to Rule 1.8(e), a lawyer is permitted, but not required to, make repayment of costs and expenses contingent on the outcome of litigation. Thus, an advertisement or other public communication may only use the phrase "no recovery, no fee" when the lawyer or law firm has already made the decision that the client's responsibility for advanced costs and expenses will be contingent on the outcome of the matter. If the lawyer or law firm intends that the client will be ultimately responsible for the costs and expenses of litigation, it is misleading to use the phrase "no recovery, no fee" with no additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the terms "fee" and "costs." *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-3 (1985) (finding that "[t]he State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed"). The statement "no recovery, no fee" is misleading if a client is or may be liable for costs even if there is no recovery. *See* Rule 1.8(e).

Also, the Committee considered the propriety of such phrases as "we guarantee to win, or you don't pay," "we are paid only if you collect," "no charge unless we win," or other language not making explicit reference to a legal "fee." Language of this type that does not make explicit reference to a "fee" may be false and misleading in violation of Rule 7.1 if the language includes the implication that the client will not be required to pay either expenses or attorney's fees if there is no recovery, but the lawyer does not intend to make the costs and expenses contingent on the outcome of the matter. *See also* Rule 1.8(e).

C. Firm Names and Offices.

The question arises whether and under what circumstances attorneys may advertise using a corporate, trade, or fictitious name which is not the name or names of the firm, the attorney, or the attorneys in the firm. Comments 5 and 6 to Rule 7.1 allow a firm to use a trade or fictitious name as long as it is not misleading. For example, a firm may use the name or names of lawyers associated with the firm or a predecessor of the firm, or the name of a member of the firm who is deceased or retired from the practice of law. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. The firm name also may only state or imply a partnership between lawyers when that is the fact. A firm may not call itself "Smith and Jones" unless Smith and Jones are actually associated as partners in the firm.

It is also misleading under Rule 7.1 for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. Use of a name which is not the name used in the practice is misleading as to the identity, responsibility, and status of those using such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign. Furthermore, the usage of such

name shall comply with applicable laws, including Sections 13.l-542 *et seq.* or Sections 59.l-69 *et seq*. of the Code of Virginia.

It is also potentially misleading under Rule 7.1 for a lawyer to advertise the use of a non-exclusive office space, including an executive office rental, if that is not actually an office where the lawyer provides legal services. *See* LEO 1872, which cautions that:

> [A] lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case.

D. Advising That an Attorney Must Be Consulted.

The question arises whether it is permissible for an advertisement to state that an individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual "will have to consult an attorney," the proposed advertisement would be in violation of Rule 7.1.

E. Participation in Lawyer Referral Services.

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false or misleading. *See* Rule 7.1. Lawyers may pay the "usual charges" of a legal service plan or not-for-profit lawyer referral service. *See* Rule 7.3(d) and LEO 1751. The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are misleading. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral services would create automatic rules violations by the participating attorneys. The following practices of lawyer referral services are misleading:

1. Implying in advertising that a lawyer is selected for participation in a Lawyer Referral Service based on quality of services or some other process of independent endorsement when in fact no bona fide quality judgment has been objectively made;

2. Stating or implying that the Lawyer Referral Service contains all of the lawyers or law firms eligible to participate in the Service by the objective criteria of the Service when in fact the Service is closed to some lawyers or law firms who meet the objective criteria;

3. Stating or implying that there are a substantial number of attorneys or firms participating in the Service when in fact all calls in a geographic area will be directed to one or two attorneys or firms;

4. Using the name of a Lawyer Referral Service or joint marketing arrangement in a way which misleads the public as to the true identity of the advertiser; or

5. Advertising participation in a Lawyer Referral Service which is not a true, qualifying Lawyer Referral Service as defined in this opinion, based on the American Bar Association Model Supreme Court Rules Governing Lawyer Referral Services.[2]

In order to qualify as a lawyer referral service for purposes of these rules, the service must: be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or removal of a lawyer from any panel; and not make any fee-generating referral to any lawyer who has an ownership interest in the service, or to that lawyer's law firm. *See also* LEOs 910, 1014, and 1175.

F. Advertising Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements.

The Committee considered the question of whether it is misleading to the public for an attorney to advertise results obtained in a specific case or to advertise cumulative results obtained in more than one specific case, e.g., "We've collected millions for thousands," or "We've collected $30 million in 1996."

The Committee determined that it can be misleading to the public for an attorney to advertise specific case results, whether individually or cumulatively, for two reasons:

1. The results obtained in specific cases depend on a variety of factors, and any advertisement of the results obtained in a specific case or cases that does not include all factors can be misleading. This is true, in part, because it is generally impossible to know all factors that have influenced a specific result or an accumulation of specific results.

2. Each legal matter consists of circumstances that are peculiar or unique to the specific case, and the result obtained under one set of circumstances may not provide useful information to the public as a predictor of the result likely to be obtained in a case that necessarily involves different circumstances.

An example will illustrate why information describing a specific case result or a blanket statement of cumulative results may be entirely accurate, but nonetheless misleading. An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would be misled if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly misleading if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial. More importantly, since no member of the public is likely to have a case in which the circumstances precisely duplicate the advertised verdict, the report of a specific case result may mislead the consumer "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." Rule 7.1, Comment 2.

The 2017 amendments to Rule 7.1 shifted the focus from a mandatory disclaimer with a number of technical requirements for language and placement to an assessment of whether a particular statement is misleading, and if so, whether there is a disclaimer or additional information that would put the statement in the proper context and avoid any misleading implications. Rule 7.1 no longer requires a specific disclaimer to precede any statement of case results, although Comment 2 does clarify that the inclusion of "an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

For example, the above statement of a "one million dollar verdict" obtained after a two million dollar settlement offer was refused would need to include the full context in order not to be misleading. Nor would the boilerplate disclaimer language previously required by Rule 7.1 be sufficient to avoid the misleading implication – the communication would have to state the fact that a two million dollar settlement offer was made prior to the trial in which the one million dollar verdict was obtained. Another example of a misleading statement of case results would be a statement that a lawyer obtained an $8 million jury verdict in a medical malpractice case, when the court reduced the award to the statutory cap of $2.25 million. A lawyer advertising such a result must include the fact that the award was reduced by the court.

On the other hand, a lawyer who advertises that she has obtained pre-trial dismissal of criminal charges after prevailing on a motion to suppress evidence, when that is a complete and true statement of what happened in the case, may do so without including any disclaimer or limiting language. Similarly, a lawyer may truthfully advertise that he obtained a $5 million settlement following a three-day mediation.

The Committee has repeatedly opined that the use of claims such as "the best lawyers," "the biggest earnings," and "the most experienced" are self-laudatory and amount to comparative statements that cannot be factually substantiated, in violation of Rule 7.1. *See also* Comment 2 to Rule 7.1. This Committee

continues to adhere to the belief expressed in Comment 2 that statements that use extravagant or self-laudatory words that cannot be factually substantiated are designed to and in fact mislead laypersons to whom they are directed and, as such, undermine public confidence in our legal system. *See also* LEOs 1229 and 1443.

G. Statements by Third Parties.

The Committee addressed whether a lawyer can circumvent the prohibition against comparative statements with the use of client testimonials. For example, a lawyer's television advertisement shows a former client making statements about the client's satisfaction and about the quality of the lawyer's services, using statements to the effect that the lawyer is "the best" and will get you "quick results."

Rule 7.1 prohibits statements comparing attorneys' services, unless the comparison can be factually substantiated. *See* Comment 2 to Rule 7.1. The Committee has previously opined that a lawyer's advertising of specific case results may be misleading, if the communication does not include an appropriate disclaimer or other context for the case results. Thus, an attorney has clear guidance as to the impropriety of making certain statements in his advertising. Rule 8.4(a) states that an attorney shall not violate a disciplinary rule through the actions of another. Moreover, the language of the restriction in Rule 7.1 makes no qualification as to the maker of the regulated statements. To the contrary, the rule's requirements are directed at any statements contained in the communication. Thus, there is no support in Virginia's Rules of Professional Conduct for affording greater leeway to advertising statements made by clients than to those made by attorneys. The standard is the same in both instances. Applying that standard to this hypothetical, the client's statements make a comparison ("the best") that cannot be factually substantiated. If such improper statements are contained in the lawyer's advertisement, the lawyer would be in violation of Rule 7.1.

In further clarification, even statements of opinion by clients that contain comparative statements are not appropriate. This Committee adopts the mixed approach of Philadelphia Ethics Opinion 91-17; while prohibiting testimonials regarding results and/or comparisons, it does allow "soft endorsements." Examples of "soft endorsements" from the Philadelphia opinion include statements such as "the lawyer always returned phone calls" and "the attorney always appeared concerned."

In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This Committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent rule and the spirit behind it.

H. Communications Involving Listing in Publications such as *The Best Lawyers in America.*

The Committee addressed this issue and stated that a lawyer may advertise the fact he/she is listed in a publication such as *The Best Lawyers in America*, or a similar publication, and include additional statements, claims or characterizations based upon the lawyer's inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1. If, for some reason, the lawyer is delisted by a publication, the statement in the advertisement must accurately state the year(s) or edition(s) in which the lawyer was listed.

Further, the lawyer may not ethically communicate to the public credentials that are not legitimate, such as one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is misleading to the public and therefore prohibited.

Similarly, statements that explain, and do not exaggerate the meaning or significance of professional credentials, in laymen's terms are permissible. For example, if the lawyer is communicating his "A.V." rating by Martindale-Hubbell, the lawyer may properly include a description that states that "A.V." represents "the highest rating" that particular service assigns. Also, if the lawyer is recognized and listed in

the book *The Best Lawyers in America*, that lawyer may properly note he is among those lawyers "whom other lawyers have called the best." The lawyer should be mindful to exercise discretion when communicating this information, that it be objective and not misleading. For example, although the lawyer may properly characterize inclusion in the book *The Best Lawyers in America*, he cannot properly characterize that inclusion into statements such as "since I am included in the book, that means I am the best lawyer in America," nor can the lawyer impute any such endorsement to others in the law firm not so recognized.

The Committee's decision includes objective and factual statements and claims of such inclusions and warns that descriptive characterizations and other qualitative statements must meet the requirements of Rule 7.1. *See also* LAO-0114.

I. Use of "Specialist" or "Specializing In."

Rule 7.1 permits a lawyer to hold herself out as limiting or concentrating the lawyer's practice in a particular area or field of law as long as that is a true and accurate statement.

Comment 4 to Rule 7.1 (formerly comment 1 to Rule 7.4) provides that a lawyer can generally state that she is a "specialist," practices a "specialty," or "specializes in" particular fields, as long as the statement is not false or misleading in violation of Rule 7.1. The 2017 amendments to the Rules removed the longstanding requirement that a lawyer who claims to be certified as a specialist include a disclaimer stating that no certifying organization has been recognized by the Supreme Court of Virginia. Instead, the lawyer is required to identify the name of the organization that purportedly conferred the certification, so that a prospective client or other member of the public can verify the validity of the certification and the criteria for conferring the certification. Any claim of certification as a specialist is still subject to the requirement that it is not false or misleading – the certifying organization must undertake some bona fide evaluation of lawyers rather than just awarding the certification to anyone who pays a required fee or joins an organization.

J. Use of "Expert" and "Expertise."

Rule 7.1 prohibits a lawyer from using or participating in the use of any form of public communication which contains a false or misleading statement or claim. The Committee opines that a lawyer's use of the words "expert" or "expertise" in public communications, if the claim cannot be factually substantiated, amounts to a misleading comparative statement and is therefore prohibited. *See* Comment 2 to Rule 7.1. *See also* LEOs 1292, 1406 and 1425.

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[1] There may also be legal requirements to disclose compensation given in exchange for endorsements or testimonials in advertising. These requirements are beyond the purview of the Committee. *See*, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

[2] Available at www.americanbar.org/groups/lawyer_referral/policy.html