

## **NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**

### **No. 12-04**

A LAWYER MAY ADVERTISE USING ANY MEANS OR METHODS, INCLUDING TESTIMONIALS, SO LONG AS THE CONTENT OF THE ADVERTISING IS NOT FALSE OR INHERENTLY MISLEADING. ALL ADVERTISING MUST COMPLY WITH ALL OF THE RULES OF PROFESSIONAL CONDUCT THAT MAY APPLY TO THE CONTENTS OF AN AD. APPROPRIATE DISCLOSURES OR DISCLAIMERS SHOULD BE ADDED TO ANY ADVERTISEMENT THAT HAS THE POTENTIAL TO MISLEAD OR DECEIVE THE PUBLIC.

### **QUESTION PRESENTED**

WHAT ARE THE CURRENT ETHICAL STANDARDS REGARDING USE OF TESTIMONIALS IN ADVERTISING BY LAWYERS?

### **FACTS**

A lawyer asks whether testimonials can be used in advertising his services, and if so, (1) whether they can be provided by anonymous sources; (2) whether there are any limits on content; and (3) whether the content must be objectively verifiable.

### **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

§ 3-507.1. 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.

## COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by [Rule 7.2](#). Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading 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. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. 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 a prospective client.

### § 3-507.2. Advertising.

(a) Subject to the requirements of Rules [7.1](#) and [7.3](#), a lawyer may advertise services through written, recorded or electronic communication, including public media.

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## COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal

services, and lawful communication by electronic mail is permitted by this Rule. But see [Rule 7.3\(a\)](#) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

## DISCUSSION

Rule 7.2(a) allows lawyers to advertise as long as they obey rules 7.1 and 7.3. None of these rules prohibits any particular method or means of advertising, so the short answer to this inquiry is that testimonials are allowed. The American Bar Association has revised its recommended wording of these rules several times in recent years, mainly to keep up with the decisions of the courts interpreting lawyer free speech rights under the First Amendment. Even so, the general language of the current version of the rules leaves some questions about the limits on content unanswered. The comments help with interpretation but do not add obligations to the rules, as the preamble to the rules explains in paragraph 14. Lawyers planning to advertise can look to court decisions for guidance on the likely answers to questions about the contents of ads.

The relevant decisions are a mixture of disciplinary and declaratory actions that began with *Bates v State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates* the Supreme Court ruled that lawyer advertising is commercial speech that is protected by the First Amendment to the Constitution of the United States, but subject to some regulation. One clear rule is that states are allowed to prohibit false or inherently misleading advertising by lawyers. This is essentially what Rule 7.1 says. In addition, the First Amendment case law allows states to impose reasonable restrictions on advertising that has the potential to mislead. Courts have approved mandatory disclosures or disclaimers in those cases. *Bates, id.*; *In re R.M.J.*, 455 U.S. 191 (1981); *Zauderer v Office of Disciplinary Counsel, Supreme Court of Ohio*, 471 U.S. 626 (1985). But before a “potentially misleading” ad can be regulated, the state must prove that the risk of misleading the public is real, not merely speculative or conjectural, and that regulation will

materially alleviate the risk. *Florida Bar v Went For It, Inc.*, 515 U.S. 618 (1995).

A lawyer planning to advertise must first of all recognize the difference between ad content that is in fact false or misleading, and content that is only potentially misleading. Actual falsehood is uniformly prohibited and not difficult to identify. For example, “A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results.” *Public Citizen, Inc. v Louisiana Attorney Disciplinary Board*, 632 F.3d 212, 218 (5<sup>th</sup> Cir. 2011). An attorney who has never tried a case to conclusion may not call himself an experienced trial lawyer. *In re Shapiro*, 780 N.Y.S.2d 680 (App.Div. 2004).

But simply telling the truth is not always enough to comply with the rules. Rule 7.1 also recognizes that a truthful ad can be misleading, and therefore the subject of discipline, if it leaves out important qualifying facts. Whether an ad is potentially misleading, and if so, what needs to be added to it, has been the subject of First Amendment cases.

Occasionally, the conclusion that an ad needs to say more to alleviate its potential to mislead is based on nothing more than the wording of the ad itself. For example, in *Zauderer, supra.*, the Court held that “the 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.” 471 U.S. 626, 653. In *Milavetz v United States*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1324 (2010), the Court upheld Bankruptcy Code amendments enacted by Congress that require lawyers to identify themselves as “debt relief agencies” and disclose the fact that their services may involve bankruptcy relief, finding that the disclosures were factual statements “intended to combat the problem of inherently misleading commercial advertisements.” 130 S.Ct., at 1340.

Other times, truthful ads that are not proven to be potentially misleading will not require added disclosures or disclaimers. These cases demand evidence, not just arguments, about the misleading character of the ad. For example, in

*Peel v Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the court reversed a lawyer's censure by the Illinois Supreme Court. He advertised on his office letterhead that he was certified by the National Board of Trial Advocacy without including a disclosure explaining what that meant. The Illinois court had reasoned that the ad was a misleading representation of his skills. The Supreme Court held that the lawyer's reference to his certification was not actually false or misleading. And since the public could find out the standards to obtain certification, there was no basis to argue without proof that there was a real potential to mislead that justified prohibiting the ad. In the end, the "possibility of deception in hypothetical cases" did not justify the punishment. *Peel, id.*, 496 U.S. at 111.

In *Ibanez v Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994), the court reversed the Florida Supreme Court's discipline of a lawyer who included references to her certification as a CPA and financial planner in her advertising materials. The court refused to allow "rote invocation of the words 'potentially misleading'" to take the place of proof of harm that is "potentially real, not purely hypothetical" as a justification for restricting commercial speech. *Ibanez, id.*, 512 U.S. at 146. In *Mason v Florida Bar*, 208 F.3d 952 (11<sup>th</sup> Cir. 2000), the court reversed the Florida court's effort to force a lawyer to add a disclosure to his reference to his Martindale-Hubbell rating. The Court of Appeals rejected inferences that the ad threatened to mislead the public that were based on "mere speculation" and "unsupported conjecture" stating: "Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Mason, id.*, 208 F.3d 958.

Some courts have focused on the question of whether ad content could be objectively verified. In *In re PRB Docket No. 2002.093*, 868 A.2d 709 (Vt. 2005), the Supreme Court of Vermont affirmed discipline of a lawyer whose yellow pages ad proclaimed that his firm were "Injury Experts" and listed areas in which "We are the experts." The court found that the ads violated the Vermont rule because the content made claims "that are not susceptible of measurement or

verification” that were “likely to create an unjustified expectation and differentiation among those reading the advertisement about the results which can be achieved by a lawyer claiming to be an expert.” *PRB, id.*, at 712. On the other hand, the fifth circuit court in *Public Citizen, supra.*, concluded that unverifiable subjective statements included in testimonials could not be prohibited when there was no proof that they were likely to mislead the public. *Public Citizen, supra.*, 632 F.3d at 221-223.

Controversy almost inevitably follows the effort to develop a comprehensive set of rules on these subjects, with uneven results. For example, in *Alexander v Cahill*, 598 F.3d 79 (2<sup>nd</sup> Cir. 2010), the court reviewed four rules that were adopted by the New York Appellate Division in 2006. Each of the rules prohibited certain content in lawyer ads. The court struck down all of the following rules on First Amendment grounds: (1) a rule prohibiting an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending; (2) the portrayal of a judge in an ad; (3) techniques to attract attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; and (4) nicknames, monikers, mottos or trade names that imply an ability to obtain results in a matter.

In *Public Citizen, Inc., supra.*, the court reviewed six rules that were adopted by the Louisiana Supreme Court in 2009, with the following results: (1) a state may prohibit ads promising results; (2) but it may not prohibit all references or testimonials to past results; (3) nor may it prohibit ads including portrayals of a judge or a jury; (4) but it may require disclosure of the fact that an actor plays the part of a client, or that a reenactment is a reenactment, or that a picture or drawing is a reproduction; (5) and it may prohibit use of a nickname, moniker, motto or trade name that states or implies an ability to obtain results; (6) but it may not specify font size and the speed at which a disclaimer is read during an ad, or require both spoken and written disclaimers in television and electronic ads.

These cases illustrate the unsettled state of the law on this subject. The court decisions and advisory opinions are not uniform in part because of the variety of rules that states have adopted on the subject. Only a few standards are clear. A testimonial cannot be false or inherently misleading. Ads promising or suggesting future results based on past performance must be produced with caution, if at all. But subjective, unverifiable statements are not prohibited unless there is proof that the public will in fact be harmed, and that prohibition or mandatory disclaimers will alleviate the harm. *Public Citizen, supra.*, 632 F.3d at 221-223; *Alexander, supra.*, 598 F.3d at 91-93. The proof of harm to the public must be real, not simply speculative or conjectural. *Florida Bar v Went For It, Inc., supra.*

A lawyer planning to advertise must comply with all of the rules of professional conduct that may apply to the contents of an ad. In addition to 7.1 and 7.2, these include: 7.3, regarding direct contact with prospective clients; 7.4 regarding advertising specialty practice; 7.5 regarding use of trade names; 8.4(c), regarding dishonesty, fraud, deceit or misrepresentation; 8.4(e), regarding any suggestion of an ability to achieve results by prohibited means; and 1.6 and 1.9 regarding confidentiality. Other rules may be implicated, depending on the specific contents of the advertising materials. The comments, while not adding substantive requirements, will provide insight into the likely interpretation of the rules in any specific situation. When in doubt, an appropriate disclosure or disclaimer, carefully written, should be added to avoid an argument that the ad is in fact misleading or that its potential to mislead is real and not just speculative.

Ethics advisory opinion 81–9, and all other opinions of this committee that contradict this opinion, are rescinded.

## **CONCLUSION**

Lawyers may advertise using any means or methods, including testimonials, so long as the content of the advertising is not false or inherently misleading. All advertising must comply with all of the rules of professional



conduct that may apply to the contents of an ad. Appropriate disclosures or disclaimers should be added to any advertisement that has the potential to mislead or deceive the public.