

Utah Ethics Opinion

2009.

09-01. UTAH STATE BAR ETHICS ADVISORY
OPINION COMMITTEE: OPINION NO. 09-01

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MAIN OPINION:

Issued February 23, 2009

1. Issue: What are the ethical limits for the use of testimonials, dramatizations or fictionalized representations in lawyers' advertising on television or web sites?

2. Opinion: Advertising may not be "false or misleading". Testimonials or dramatizations may be false or misleading if there is substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

3. Background: As this Committee explained in Opinion No. 00-02, "The U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any form of advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and then only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading."^(fn1)

4. Since we issued our most recent opinion regarding advertising, Rule 7.1 of the Utah Rules of Professional Conduct (and of the Model Rules) has been amended to include only the simple paragraph set forth below. The amendments deleted subsections (b) and (c) which had specified that a communication was "false or misleading" if it "is likely to create an unjustified expectation about results the lawyer can achieve" or if "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." Instead these issues were dealt with less rigidly in the Comments to Rule 7.1. The ABA Ethics 2000 Commission that recommended these amendments to Rule 7.1 explained its rationale:

The Commission recommends deletion of this specification of a "misleading" communication because it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a

specific and unwarranted conclusion about the lawyer or the lawyer's services. . . . The Commission also believes that a prohibition of all comparisons that cannot be factually substantiated is unduly broad. Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person to believe that the comparison can be substantiated. . . .^(fn2)

5. While some state regulators retained the old language and other regulators adopted detailed categories of statements that are "false or misleading," a leading commentator and original draftsman of the Model Rules recommends against such an approach:

In the end, the best course for state regulators is to adopt the current simple and direct language of Model Rule 7.1 and issue interpretive guidelines Attempts to impose more burdensome and categorical prohibitions are likely to lead to little but constitutional litigation. GEOFFREY HAZARD, W. WILLIAM HODES, AND PETER JARVIS, *THE LAW OF LAWYERING* (3rd) §55.3

6. Analysis: We issue the following "interpretive guidelines" relying upon suggestions of commentators, other state's suggestions and case law. We also suggest that Utah lawyers be aware of Utah's Truth in Advertising Statute, Utah Code Ann. §13-11a-1 et. seq; Utah's Consumer Sales Practices Act, §13-11-1 et. seq. which prohibit deceptive acts or practices.

7. Rules of Professional Conduct: Rules of Professional Conduct: Rule 7.2 of the Utah Rules of Professional Conduct permits a lawyer to advertise on the "public media" as long as the ad includes "the name and office address of at least one lawyer or law firm responsible for its content" and it complies with Rule 7.1. Rule 7.1 provides:

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.

The Comments to Rule 7.1 state in relevant part: [2] . . . 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.

8. Testimonials: Some states define "any advertisement that 'contains a testimonial' to be 'false, misleading, deceptive or unfair'" creating standards of dubious constitutionality according to HAZARD, HODES & JARVIS at § 55.4 (hereinafter Hazard); see also *Alexander v. Cahill*, 2007 WL 2120024 (N.D.N.Y.) (restriction against testimonials held unconstitutional). Other states require that testimonials or endorsements be "paired with cautionary language about how results may differ depending on the case." HAZARD at § 55.4. It is legitimate to require such additional language when it is necessary to prevent the advertisement as a whole from being materially misleading or likely to create unjustified expectations. In our view when using testimonials to advertise prior accomplishments it is wise (and may be necessary depending upon the context) to include such qualifying language. Similarly, a "testimonial" should be given by the real person involved (e.g. a former client), unless the portrayal expressly states otherwise (e.g. an actor dramatizing a former client's letter of thanks) in order to avoid its being misleading.

9. Connecticut Informal Op. 01-07 (2001) addressed testimonials and concluded that client testimonials regarding a lawyer's "personal qualities such as being knowledgeable, patient or courteous, may be included in advertising copy if they are truthful." HAZARD at § 55.4 at p.55 21. However, comparative statements would require factual substantiation to avoid being misleading. *Id.* Because it is almost impossible to substantiate certain comparisons ("best attorney in town") the wiser course is to advertise qualities that can be substantiated. *Id.* At 55.4 See also *In the Matter of Wamsley*, 725 N.E.2d 75 (Ind. 2000) (ad stating "Best Possible Settlement . . . Least Amount of Time" created an unjustified expectation).

10. Lawyer's Traits and Accomplishments: Some states have attempted to ban "self-laudatory" statements about the quality of the lawyer's services. We agree with commentators HAZARD, et. al. that these bans will not withstand constitutional challenge and note some states have backed away from these rules. *Id.*; see *Mason v. Florida Bar*, 208 F.3d 952, (2000)(bar not justified in

requiring disclaimer in advertisement of Martindale-Hubbell's AV rating.)Some regulators have attempted to prohibit nicknames or trade names that suggest an ability to get results (the "heavy hitters") and to prohibit advertising techniques that have no relevance to selecting a lawyer (attorneys portrayed as giants). But these rules were recently struck down as unconstitutional in *Alexander v. Cahill*, supra. (not reported in F. Supp.). In Florida, rules now prohibit statements characterizing the quality of a lawyer's services and depictions that are not "objectively relevant" to selecting an attorney; the Florida Supreme Court ordered the discipline of lawyers who used a "pit bull" logo and phone number. *The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005).The Court reasoned that the pit bull image suggests that the lawyer "will get results through combative and vicious tactics . . . conduct that would violate our Rules of Professional Conduct." *Pape*, 918 So.2d at 246. The Florida Court then construed the prohibition against "false or misleading" advertisement to include advertising that suggests behavior or tactics that are contrary to the Rules. *Id.* We note that statements "implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules . . . or other law" are, according to Comment [4] to Rule 7.1, prohibited by Rule 8.4(e). In our view it is unnecessary and unwise to twist the meaning of "false and misleading" to additionally prohibit statements that already violate Rule 8.4(e).

11. However, lawyers' factual statements about themselves can run afoul of the rule if they are not scrupulously factual or if they are misleading. Thus, we have opined that a lawyer on inactive status in another state may not ethically communicate by means of letterhead or otherwise that the lawyer is "admitted" in the state unless (i) the lawyer also affirmatively discloses the lawyer's inactive status or (ii) the lawyer reasonably concludes that the communication would not be materially misleading under the circumstances as a whole, *Opinion No. 00-02*. Similarly, a Utah lawyer cannot have a firm name "and Associates" unless there are at least two lawyer associates. *Opinion No. 138 (1994)*.

12. Dramatizations and Fictional Performances: Some states have tried to ban dramatizations and fictional performances while other states require that these performances be accurately identified. HAZARD at §55.4. New York sought to prohibit the portrayal of a judge or fictitious law firm, and that rule was held unconstitutional. See *Alexander v. Cahill*, supra.

13. As an initial matter, we note that there is a difference between a "dramatization" and a fictional performance or sketch. To "dramatize" means to "adapt (a story, event, etc.) for performance on the stage, in a movie, etc." WEBSTER'S NEW WORLD DICTIONARY, SECOND COLLEGE EDITION (1986). Hence, calling something a

"dramatization" may imply that the event actually occurred, such as "dramatizations" of historical events in television programs. This would be accurate language to use if a lawyer were accurately re-enacting the oral argument he delivered before the court. However, it would be misleading to use the word "dramatization" to label an entirely fictional presentation.

14. Certain fictional sketches have attracted the attention of regulators. One is what Hazard calls "the notorious 'Strategy Session' used by several plaintiffs' law firms" and describes thusly:

In the spot actors portray insurance company adjusters or lawyers discussing a newly filed automobile injury claim, and at first consider employing delay tactics to see if the plaintiff will 'crack.' When they learn (to their apparent chagrin) that the plaintiff is represented by the advertising law firm, however, they immediately determine to settle the case. In each version of the advertisement, actor Robert Vaughn then faces the audience and suggests that persons with serious injury claims should engage that firm. Hazard §55.4 at p. 55-22 n. 3.

The Indiana Supreme Court reprimanded two lawyers for televising this advertisement in *In re: Keller*, 792 N.E.2d 865 (Ind. 2003). The Indiana rules prohibited advertising which contained an opinion as to the quality of legal services (a prohibition that is, in our view, overly broad). However, the court reasoned that sanctions were appropriate because the ads "create an impression that the claims they handle are settled, not because of the specific facts or legal circumstances of the claims, but merely by the mention of the name of the respondents' firm. . . ." 792 N.E. 2d at 868. Similarly, a U.S. District Court held that this advertisement was not protected speech but constituted a material misrepresentation of fact regarding the insurance industry and was likely to create an unjustified expectation that the lawyers advertised can obtain settlements based solely on their reputation and the insurance industry's fear of them and irrespective of the facts of the case. *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 440 (M.D.N.C. 2001). In that case insurance industry experts testified about the various factors taken into consideration in deciding whether to settle a claim, and that reputation of the attorney was a small part of the equation. Hazard's commentary suggests that this outcome is correct. See Hazard §55.4 at p. 55-22 n. 3.

15. Nevertheless, this does not suggest that fictional portrayals are always misleading or likely to create unjustified expectations. An acceptable fictional vignette should be labeled as "fictional" or should be clearly identifiable as fictional, as with lawyers portrayed as giants towering over the town, counseling a space alien about an insurance matter, and "running as fast as blurs to reach a

client in distress." See *Alexander v. Cahill*, supra. A fictional vignette can convey such a message about a lawyer or law firm so long as the message itself is not misleading or likely to create unjustified expectations. A clearly identified fictional sketch in which a fictional party or opposing counsel shows frustration to learn that the opposing party has retained Firm X would be acceptable. The only limits are that these vignettes should be identified as fictional and ultimately must not lead a reasonable person to form an unjustified expectation. Obviously which fictional portrayals will be appropriate and which deemed misleading may depend, to some extent, on the facts about the lawyer and the contents of the vignette.

Conclusion: Advertising may not be "false or misleading." Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation regarding the lawyer or the services to be rendered. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

Footnotes:

1. *In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules of Advertising*, 647 P.2d 991, 993 (Utah 1982) (state has substantial and compelling interest in protecting the public from false or misleading advertising by lawyers).

2. Ethics 2000 Commission, Report on the Model Rules of Professional Conduct, Reporter's Explanation of Changes, available at: http://www.abanet.org/cpr/e2k/e2k-report_home.html.