

New York State Bar Association

Committee on Professional Ethics

Opinion 771 – 11/14/03

Topic: Website advertising, client testimonials and reports of past results.

Modifies: N.Y. State 614 (1990)
N.Y. State 539 (1982)

Digest: A website advertisement that uses client testimonials or reports of past results is prohibited under DR 2-101(A) if the advertisement creates unjustified expectations, contains insufficient information, or is otherwise false, deceptive or misleading. If the client testimonials or reports of past results are not false, deceptive or misleading, a lawyer need not post a disclaimer that past results do not guarantee similar outcomes in future cases. If the advertisement is false or deceptive, a disclaimer cannot cure the false or deceptive nature of the advertisement. If client testimonials or reports of past results are misleading, an appropriate disclaimer may be sufficient to correct the misleading nature of the advertisement if the disclaimer is prominently placed in the website such that a lawyer reasonably would expect that any prospective client who reads the advertisement will read the disclaimer.

Code: DR 2-101, 2-101(A), (B), (F), 2-102, 2-102(D); EC 2-10.

QUESTION

If a law firm's website includes client testimonials and claims of past results as part of its advertising, must the website include a disclaimer that past results do not

guarantee similar outcomes in future cases to satisfy the firm's obligations under DR 2-101(A)?

OPINION

The Lawyer's Code of Professional Responsibility (the "Code") permits advertising and other publicity by lawyers provided that it is not false, deceptive or misleading. DR 2-101(A).¹ See also DR 2-102 (ethical requirements regarding professional cards, announcements, letterhead, trade names, etc.); EC 2-10 (in lawyer advertising, "special care should be taken to avoid the use of any statement or claim which is false, misleading, deceptive or unfair"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint."); *In re Von Wiegen*, 63 N.Y.2d 163 (1984) (prohibition against direct mail advertising was an unconstitutional, content-based restriction because a less-restrictive alternative was available to prevent deception), *cert. denied sub nom. Comm. on Prof'l Standards v. Von Wiegen*, 472 U.S. 1007 (1985). In N.Y. State 709 (1998), this Committee concluded that Internet website advertising is permissible as long as it is not false, deceptive or misleading and otherwise complies with the advertising rules set forth in the Code. See also *Model Rules of Prof'l Conduct* R. 7.2 cmt. 3 (2004) ("electronic media, such as the Internet, can be an important source of information about legal services").²

The Code does not prohibit the use of client testimonials or reports of past results in advertisements. We observed previously that client testimonials have the potential to mislead an "unsophisticated potential client," but declined to adopt a *per se* rule prohibiting the use of client testimonials in advertising. N.Y. State 614 (1990). Instead, we held improper "those client endorsements describing prior results that are . . . statements of 'overblown assurances of client satisfaction,' statements that create unjustified expectations or 'false hopes' or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading." *Id.* Therefore, the use of client testimonials or reports of past results in website advertising will not violate DR 2-101(A) unless the testimonials or reports create unjustified expectations or contain insufficient information such that the advertisement is rendered false, deceptive or misleading.

¹ DR 2-101(A) provides that "A lawyer . . . shall not use or disseminate . . . any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading."

² N.Y. State 709 also identified several considerations relating to Internet advertising. For example, we noted that a lawyer should retain a copy of the website advertisement for at least a year after its last posting. N.Y. State 709 (1998) (citing DR 2-101[F]). We also noted that "[t]here is no ethical prohibition in the Code against advertising to solicit clients who reside outside the state of New York with respect to matters as to which the lawyer may competently and lawfully practice," but advised that website advertisements name the jurisdictions in which the lawyer is licensed to practice. *Id.*; see also DR 2-102 (D). New York lawyers should also be aware that lawyer advertising laws and rules in other jurisdictions may regulate the content of any website advertising in those jurisdictions.

In addition, the Code does not require that client testimonials or reports of past results in advertisements of legal services be accompanied by a disclaimer of any kind, including one that informs the reader that past results do not guarantee similar outcomes in future cases. In N.Y. State 614, however, this Committee opined that to avoid the unjustified expectations that may be created by such advertising, the advertisement should contain a disclaimer that a client endorsement or other report of prior results does not guarantee or predict a similar outcome with respect to any future matter. To support this conclusion, we referred to N.Y. State 539, in which we held that the intended impression conveyed by reports of past results is “so unverifiable” as to violate former DR 2-101(B), which prohibited advertising claims that “cannot be measured or verified.” See N.Y. State 539 (1982). DR 2-101(B) has been repealed. Accordingly, to determine whether a disclaimer is necessary in any advertisement that includes client testimonials or reports of past results, the lawyer must determine whether, without a disclaimer, the testimonials or past results render the advertisement false, deceptive or misleading in violation of DR 2-101(A).

A lawyer must review any proposed advertising that will include client testimonials or reports of past performance and decide, in each instance, whether the testimonial or report is likely to mislead the reader. We believe that in some cases, client testimonials and reports of past results in website advertising by their very nature may mislead prospective clients. For example, advertisements that do not distinguish among the facts and law specific to each case have the potential to mislead the public. EC 2-10 provides the following guidance:

Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. Special care should be taken to avoid the use of any statement or claim which is false, misleading, deceptive or unfair, or which is violative of any statute or rule of court, in disclosing information, by advertisements or otherwise, relating to [the lawyer or law firm].

Indeed, it is possible that the mere volume of information presented in website advertising – which may consist of several pages of information and links to other websites – will increase the chance that the reader will form an unjustified expectation regarding the legal services being advertised.³

If the client testimonials or reports of past results in a website advertisement are misleading in the ways described above (but not false or deceptive), cautionary language warning that prior results do not guarantee or predict a similar outcome in

³ See also *Model Rules of Prof'l Conduct* R. 7.1 cmt. 3 (2004) (“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.”)

future matters may be sufficient to bring the advertisement into compliance with DR 2-101(A).⁴ Moreover, compliance with DR 2-101(A) may require additional cautionary language if the testimonial or report is misleading for reasons beyond the mere report of a positive outcome. The disclaimer must be placed in a reasonably prominent location in the website so that the reader is likely to read the disclaimer in connection with his or her review of the testimonial or report of past results. To assess the sufficiency of the placement of a disclaimer, the lawyer should consider the size of the text and the proximity of the disclaimer to the client testimonial or report of past results. If the disclaimer is in a link, the lawyer should also consider the size and placement of the text signaling the reader to access the link and whether this signal sufficiently informs the reader that reviewing the linked disclaimer is material to any assessment of the information conveyed in the advertisement.

We recognize that website advertising is a dynamic and evolving medium, and that there will be an ever-increasing number of ways to post or position a disclaimer. If a lawyer chooses to post one or more disclaimers to cure otherwise misleading client testimonials or reports of past results, the lawyer should be mindful of changes in technology to ensure that the disclaimer remains posted in a manner that increases the likelihood that it is read in conjunction with the otherwise misleading information.

It goes without saying that if an advertisement is false or deceptive -- as opposed to misleading because of the unjustified expectations created -- no disclaimer, regardless of its content, will cure the ethical violation. Such an advertisement may not be used without violating DR 2-101(A).

CONCLUSION

A website advertisement that uses client testimonials or reports of past results is prohibited under DR 2-101(A) if the use of the testimonials or report of past results creates unjustified expectations or is otherwise false, deceptive or misleading. The extent to which any use of testimonials or reports of past results is misleading, if at all, must be assessed on a case-by-case basis. If client testimonials and reports of past results in a website advertisement are misleading, a disclaimer may cure the otherwise misleading information conveyed if the disclaimer is sufficiently tailored to address the information that is misleading, and if the disclaimer's placement in the website is such that it is reasonable for the lawyer to expect that anyone who reads the testimonials and reports of past results will read the disclaimer. If an advertisement is false or deceptive, as opposed to being misleading because of the unjustified expectations conveyed, no disclaimer can cure it. To the extent that the conclusions reached in N.Y. State 614 (1990) and N.Y. State 539 (1982) were premised on DR 2-101(B), those opinions are modified consistent with the discussion herein.

⁴ See *Model Rules of Prof'l Conduct* R. 7.1 cmt. 3 (2004) ("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.").
