

New York State Bar Association

Committee on Professional Ethics

Opinion 792 – 2/14/06

Topic: Lawyer advertising; testimonial by celebrity client.

Digest: Lawyer may advertise on TV or radio using a testimonial by a celebrity client so long as the testimonial is not false, deceptive or misleading and otherwise satisfies the record-keeping requirements for any radio and TV advertising. However, the lawyer may not compensate or give anything of value to the celebrity client for the testimonial, including compensation for the celebrity's time and services in making it.

Code: DR 2-101(A); 2-101(B); 2-101(F); 2-101(K); DR 2-103(B).

QUESTIONS

1. May a lawyer or law firm advertise on radio or TV by using a celebrity client to express the client's satisfaction with the law firm's services and the results obtained?
2. If so, may the celebrity client be identified by name?
3. May the lawyer or law firm pay the celebrity client for the client's time and services rendered in making the testimonial?

OPINION

4. The Lawyer's Code of Professional Responsibility (the "Code") generally permits advertising and other publicity by lawyers provided that it is not "false, deceptive, or misleading." DR 2-101(A). Thus, testimonials by celebrity clients -- advertisements using a celebrity client to express satisfaction with the law firm's services and the results obtained -- are not permissible if they are false, deceptive, or misleading.

5. In N.Y. State 614 (1990), this Committee concluded that the Code does not impose a ban on all radio or television advertising that uses client testimonials. In that opinion, however, we concluded that it would be improper to use client testimonials 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.” We further opined that, in order to prevent misleading the broadcast audience, “some disclaimer should be joined with client endorsements describing prior results to the effect that the endorsement does not guarantee or predict a similar outcome with respect to any future matter on which the lawyer may be retained.”
6. N.Y. State 614 was based in part on DR 2-101(B), which at the time prohibited advertisements that contain “puffery, self-laudatory claims regarding the quality of the lawyers’ legal services, and claims that cannot be measured or verified.” DR 2-101(B) was repealed by the 1999 amendments to the Code. Thereafter, in N.Y. State 771 (2003), which addressed client testimonials on the Internet, this Committee reached conclusions very similar to those we had reached in N.Y. State 614. We concluded that where such client testimonials otherwise would be misleading (but not false or deceptive), a disclaimer like that described in N.Y. State 614 “may be sufficient to bring the advertisement into compliance with DR 2-101(A),” and we further stated that “compliance with DR 2-101(A) may require additional cautionary language if the testimonial . . . is misleading for reasons beyond the mere report of a positive outcome.” N.Y. State 771.
7. We have also previously concluded that client testimonials are not invariably misleading, N.Y. State 771; N.Y. State 614, and we see no reason to conclude otherwise just because the client is a celebrity. Thus, in using a celebrity client testimonial, a lawyer or law firm should ensure that the testimonial is not false, deceptive or misleading in nature. If a true, non-deceptive celebrity client testimonial is misleading, the law firm should determine whether a disclaimer accompanying that client testimonial could be fashioned that would dispel the otherwise misleading quality of the testimonial.
8. We see no reason why the mere identification of the celebrity client by name would be problematic. Indeed, we assume that the identity of the celebrity will be known to at least some of the intended audience merely by virtue of the celebrity’s voice or appearance.
9. On the other hand, we conclude that it would violate the Code to pay the celebrity client for a testimonial. DR 2-103(B) states that “[a] lawyer shall not compensate or give anything of value to a person . . . to recommend . . . employment by a client, or as a reward for having made a recommendation resulting in employment by a client, ” with exceptions not relevant here. We consider the celebrity client’s testimonial a recommendation of employment and, therefore, payment of the celebrity client by the lawyer or law firm would violate DR 2-103(B). *Compare*

N.Y. State 661 n.2 (1994) (DR 2-103(B) prohibits payment of a client to obtain the client's authorization to dramatize his or her testimonial).

10. In reaching this conclusion, we reject the argument that payment to the celebrity client is merely payment of the cost of the advertisement and, therefore, it should be permissible to make such a payment for the celebrity's time and services in making the advertisement. In N.Y. State 661 we implied that it is permissible to pay non-client actors who participate in lawyer advertisements for their time and services. But when the celebrity is the person actually making the recommendation, he or she is more than an actor with respect to the testimonial; the celebrity is the client making the recommendation. In those circumstances, we believe that there is too great a likelihood that such payment would be a purchase of the celebrity client's willingness to endorse the lawyer and would create the evil at which DR 2-103(B) is directed -- a nonlawyer's having "an incentive to refer to lawyers who will pay the highest referral fee, rather than to lawyers who can provide the most effective services." Restatement Third, The Law Governing Lawyers §10, cmt. d (2000).
11. Finally, we note that the Code imposes certain record-keeping and other requirements upon lawyers who engage in any radio and television advertising. See DR 2-101(F); DR 2-101(K)

CONCLUSION

12. A lawyer or law firm may advertise on radio or TV using client testimonials so long as (i) they are not false, deceptive, or misleading and (ii) they satisfy the record-keeping and other Code requirements relating to radio or TV advertising. The celebrity client may be identified by name in such testimonials. But, the lawyer or law firm may not compensate or give anything of value to the celebrity client for the testimonial, including any compensation to the celebrity client for the client's time or services in making the testimonial.

(29-05)