



Committee on Professional Ethics

Opinion 921 (4/26/12)

Topic: Attorney advertising

Digest: An advertisement that an attorney can “stop” a foreclosure proceeding is prohibited as false, misleading and deceptive. If the advertisement were modified to make it accurate, it would have to be accompanied by a disclaimer that prior results do not guarantee a similar outcome.

Rule: 7.1

QUESTION

1. May an attorney market his services to persons facing foreclosure of their homes with an advertisement that states, “We will stop your foreclosure”?

OPINION

2. Rule 7.1(a) of the New York Rules of Professional Conduct provides: “A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that ... contains statements or claims that are false, deceptive, or misleading....”

3. Comment 3 to Rule 7.1 provides in pertinent part:

“Truthful statements that are misleading are 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, or about the results a lawyer can achieve, for which there is no reasonable factual foundation.”

4. Here, the inquiring attorney justifies the representation that he can “stop” a foreclosure with reference to the Fair Debt Collection Practices Act. He maintains that, under the Act, he can make a motion that will “stop” the proceeding until the debt collector verifies the debt. “Then,” continues the inquirer, “other motions can be filed in order to create leverage for the client to negotiate a successful loan modification.”¹

¹ This inquiry does not ask, and we do not opine, about the permissibility of any underlying litigation tactics. The inquiry concerns only the related advertising.

5. In N.Y. State 487 (1978), we addressed an advertisement in which a lawyer stated he had “[a specified number of] years’ experience representing licensees, applicants, ABC Boards, SLA, Federal Alcohol Bureau, Judicial Review.” We noted that “while it should be obvious to other members of the Bar that the lawyer in question means to say that he has represented licensees and applicants before the enumerated agencies, an unsophisticated reader of the proposed advertisement could reasonably assume that the lawyer had represented the agencies themselves.” Accordingly, we counseled a modification of the advertisement to “cure this ambiguity,” observing that “[t]he need for careful draftsmanship cannot be over emphasized. Even the slightest ambiguity may tend to mislead the uninformed.”

6. In our view, the current inquiry presents an analogous situation. Perhaps an attorney experienced in this area of law might understand the inquiring lawyer to mean merely that he can delay the progress of a foreclosure action so as to allow time for other efforts. But a layperson, especially one who is unsophisticated or inexperienced in such matters, would likely interpret the statement quite differently. The layperson, rather than understanding that the advertisement refers merely to delaying the progress of the foreclosure action in order to achieve a negotiated settlement, may well believe that “stop” means “stop,” and that the foreclosure proceeding, through the efforts of retained counsel, will simply cease and terminate.

7. This reasonable inference from the proposed advertisement – that the foreclosure proceeding will cease and terminate – is likely to give rise to the type of “false hope” that we have previously associated with false, deceptive and misleading advertisements. *See* N.Y. State 614 (1990) (applying former DR 2-101(A), the predecessor to Rule 7.1(a)(1), which contained similar prohibitory language) (“we hold improper those client endorsements describing prior results that are potentially misleading in the various ways described herein, e.g., 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”).

8. Thus, to be permissible, the proposed advertisement would have to be re-worded so that it would no longer be ambiguous and misleading. It would have to provide enough information about the proposed legal services and their role in foreclosure litigation so that the advertisement would not create the kind of false hopes discussed above. Finally, to the extent that the advertisement would be “reasonably likely to create an expectation about results the lawyer can achieve,” it would have to be “accompanied by the following disclaimer: ‘Prior results do not guarantee a similar outcome.’” Rule 7.1(d)(1) & (e)(3); N.Y. State 848 (2010) (holding that required disclosure must be made in exactly the language set forth in the Rule).

CONCLUSION

9. A statement made in any attorney advertisement, without more, that the attorney can “stop” a foreclosure proceeding is prohibited under Rule 7.1(a)(1) as false, misleading and deceptive. Even if the advertisement were modified so as not to give false hope that the attorney could guarantee a termination of the foreclosure proceeding, an accompanying Rule 7.1(e)(3) disclaimer would be required.

(22-12)