Lawyer Advertising: Million Dollar Advocate

By the NHBA Ethics Committee
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I. Introduction

The Ethics Committee recently was asked to render an opinion on whether it is permissible under the New Hampshire Rules of Professional Conduct for an attorney to advertise that he or she is a "million dollar advocate" or is a member of the "Million Dollar Advocates Forum." Although the inquiring attorney is not considering the use of such phrases in advertising his services, and the Ethics Committee does not ordinarily render an opinion on such hypothetical inquiries, the Committee decided to address the issue in the form of a practical ethics article because it has not previously addressed the issue as to the propriety of certain advertising under the Professional Conduct Rules. This article discusses the constitutionality of restrictions on lawyer advertising and regulation of lawyer advertising in New Hampshire.

II. Constitutional Framework

For most of our Nation's history, purely commercial advertising was not considered to be protected by the First Amendment of the United States Constitution. *United States v. Edge Broadcasting*, 509 U.S. 418, 113 S. Ct. 2696, 125 L.Ed.2d 345, 354 (1993). In 1976, the United States Supreme Court held for the first time that truthful, non-misleading, commercial advertising by pharmacists is protected speech under the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976). The Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977), subsequently extended the First Amendment protection to lawyer advertising.

In *Bates*, the Court held that although attorney advertising may not be subjected to blanket suppression, advertising by lawyers could be subject to some regulation, including reasonable restrictions as to time, place, and manner. *Id*. at 384. The Court noted that false, deceptive, or misleading advertising is not entitled to First Amendment protection. *Id*. at 383. The Court also noted that advertising claims as to the quality of legal services offered by an attorney and in-person solicitation by an attorney are not susceptible of measurement or verification and therefore may warrant restriction because of their potential for misrepresentation. *Id*. at 383-84.

Several years after its ruling in *Bates*, the Supreme Court, in a case involving advertising by an electric utility, articulated a standard for regulating the content of commercial speech. In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 51 L.Ed.2d 341 (1980), the Court held that in order to restrict advertising, the restriction must meet a four-part test: (1) the expression to be regulated must propose a lawful activity and not be misleading; (2) a substantial governmental interest must be at stake; (3) the regulation must directly advance that substantial governmental interest; and (4) the regulation must be no more extensive than is necessary to serve that interest. *See also Edge Broadcasting*, 125 L.Ed.2d at 354 (setting forth *Central Hudson* factors).

After its rulings in *Bates* and *Central Hudson*, the Court continued to grant lawyer advertising broad protection by holding that it is free speech under the First Amendment. *See, e.g., Peel v. Attorney Registration & Disciplinary Common*, 496 U.S. 91, 110 S. Ct. 2281, 110 L.Ed.2d 83 (1990) (stating that although a state may "consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty," it may not completely ban statements of certification in attorney advertisements that are not actually or inherently misleading); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 108 S. Ct. 1916, 100 L.Ed.2d 475 (1988) (holding that states cannot categorically ban targeted direct mail solicitation of clients); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985) (holding that it is a violation of First Amendment guaranties to discipline an attorney for soliciting legal business through printed advertising which contains truthful and nondeceptive legal advice or for

using accurate and nondeceptive illustrations in advertising); *but see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978) (holding that a ban on in-person solicitation by attorneys does not violate the First Amendment because of the potential for fraud, undue influence, intimidation, and overreaching). However, in 1995, the United States Supreme Court made it clear that some state restrictions on lawyer advertising is permissible. *Florida Bar v. Went For It, Inc.*, __ U.S. __, 115 S. Ct. 2371, 132 L.Ed.2d 541 (1995).

In *Went For It*, a lawyer referral service known as Went For It, Inc. challenged a Florida Bar restriction that prohibited lawyers in personal injury matters from sending letters to accident victims or their families for 30 days after the accident or other triggering event and from accepting a referral from a lawyer referral service in violation of this limitation. *Went For It*, 115 S. Ct. at 2374. The Court held that although the restriction limited an attorney's ability to advertise, it did not violate the First Amendment. *Id*. at 2381. The Court reasoned, in part, that the Florida Bar had a substantial interest in protecting accident victims and their families from intrusive invasion of their privacy and in preventing the erosion of public confidence in the legal profession and that the regulation was narrowly tailored toward that end. *Id*.

This recent ruling by the Supreme Court in *Went For It, Inc*. may have opened the door to more restrictive regulation of lawyer advertising. Indeed, in states other than New Hampshire, lawyer advertising is closely regulated. *See, e.g., Moore v. Morales*, 63 F.3d 358 (5th Cir. 1995) (Texas statute requiring lawyers to wait 30 days after accident before using direct mail to solicit accident victims or their families is valid restriction on commercial speech); Nebraska Ethics Opinion 95-2 (Nebraska State Bar Assoc. Advisory Comm. 1995) (firm newsletters distributed to current and potential clients, calculated to generate new business, must conspicuously state, "This is an advertisement"); Comment 17, Part 7, Texas Disciplinary Rules of Professional Conduct (Texas State Bar Advertising Review Comm. 1996) (requires lawyers to file with committee hard copies of their Internet home pages' first screens if it is "primarily concerned with solicitation of prospective clients"); Tenn. Code Ann. § 23-3-110 (1996) (limitation on soliciting accident victims). Some states, including Alabama, Florida, Iowa, Louisiana, South Carolina, and Utah, require that a copy of any advertising communication be submitted to the appropriate attorney regulatory agency prior to or simultaneous with dissemination to the public. Several states, including Arizona, California, Iowa, and South Carolina, require that lawyer advertising contain certain disclaimers. With the exception of the restrictions on solicitation contained in Rule 7.3(c), New Hampshire currently has no such mandatory requirements.[1]

III. Regulation of False or Misleading Lawyer Advertising

Rule 7.1 of the New Hampshire Rules of Professional Conduct 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:
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> (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement, considered in light of all other circumstances, not materially misleading;
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> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The ABA Model Code Comment to Rule 7.1(b) states that the rule precludes advertisements that include statements referring to the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or client endorsements because statements regarding past performance "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." Advertising past successes have been held to be prohibited on grounds that such advertisements create an unjustified expectation of future success. *See* Maryland Ethics Opinion 88-48 (2/24/88) (lawyer may not refer in an advertisement to two jury verdicts or the fact that his clients won the verdicts, as the reference may

mislead the readers and create unjustified expectations about the results that the lawyer can achieve); District of Columbia Ethics Opinion 188 (11/17/87) (advertising is considered misleading or deceptive if it includes statements that are false or that are intended or likely to create an unjustified expectation; references to the lawyer's past performance and prediction of future success is prohibited); New York State Ethics Opinion 539 (2/8/82) (an advertisement setting forth the results previously obtained by the lawyer either in particular cases or on some statistical basis involve a high potential to mislead and are in the impression they intend to convey, unverifiable); Michigan Ethics Opinion CI-830 (1982) (sending a newsletter to present and past clients containing news clippings about out-of-state verdicts in personal injury cases is misleading unless accompanied by a disclaimer that similar results may not be possible in Michigan). In addition, advertisements that contain predictions of future success have been held to be prohibited. *See* Philadelphia Ethics Opinion 87-28 (1987) (lawyer may not include in billboard advertisements a sketch of "lady justice" with tipped scales and slogan that says "Tip the scales in your favor!" because it improperly implies that by hiring the lawyer, a client is guaranteed a favorable result).

Rule 7.1(c) of the New Hampshire Rules of Professional Conduct prohibits comparisons of the lawyer's services with those of other lawyers, unless such comparisons can be factually substantiated. The rule has been held to prohibit the use of subjective terms in lawyer advertising such as "experienced," "qualified," and the "leading" firm. *See Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1226 (S.D. Iowa 1981) ("verifiable, truthful use of restrained adjectives" is permissible, but "unrestrained, hucksterish adjectives . . . have a high potential to mislead" and are therefore prohibited); *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (3d Cir. 1985) (use of the term "competent" is similar to claiming that one is experienced or an expert and thus is prohibited as an unverifiable claim about the quality of the lawyer's services); Philadelphia Ethics Opinion 86-11 (2/13/86) (lawyer cannot use the terms "experienced," " reputable," or "efficient"); District of Columbia Ethics Opinion 142 (12/11/84) (firm may not state that it is the "leading firm" in a particular area of law because it cannot be verified and it implies that the firm provides higher quality legal services than any other firm).

III. Analysis

A statement that a lawyer is a "Million Dollar Advocate" or a member of the "Million Dollar Advocates Forum" may well be true. The lawyer may have obtained a million dollar verdict in a case and may have joined the Forum. Such a statement therefore may not be a violation of Rule 7.1(a), which prohibits lawyers from making material misrepresentations in their advertising.

The phrases would, however, implicate the other subsections of Rule 7.1. An advertisement that states that a lawyer is a "million dollar advocate" is misleading, and is likely to create unjustified expectations about the results that the lawyer can achieve, regardless of whether that lawyer had achieved one or more million dollar verdicts. The reference implies that million dollar verdicts are typical of all cases handled by the lawyer. Although it may not be obvious to members of the public, every lawyer knows that the results of a case depends not only on the counsel's ability, but on the merit of the case. There is no way to determine if the million dollar verdicts were exceptional, adequate, or poor results or whether the lawyer was instrumental in obtaining the results. Moreover, advertising as a member of the "Million Dollar Advocates Forum" implies that members of the Forum provide their clients with higher verdicts than other lawyers can provide them. The phrases therefore violate Rule 7.1(b) and 7.1(c).[2]

[1] Rule 7.3(c) provides that written solicitations by mail must be clearly labeled "advertising."

[2] The Committee has neither been asked nor has it considered whether any disclaimer would be sufficient to defeat the unjustified expectations that may be created by the phrases.