

The Standing Committee on Lawyer Advertising and Solicitation reviewed all of its previous opinions, and issued a compendium opinion March 20, 2001, summarizing many of the existing advertising opinions and incorporating previously issued legal ethics opinions on the subject of lawyer advertising. In November 2001, the Virginia Supreme Court amended Rules 7.1 and 7.2 of the Rules of Professional Conduct. Additionally, the Virginia Supreme Court approved LAO A-0114 on August 26, 2005. The Standing Committee on Lawyer Advertising and Solicitation is now issuing this updated opinion which incorporates the new rule amendments and new opinions.

Some of the issues addressed in this opinion include: use of actors; use of the phrase “no recovery, no fee;” laudatory statements by third parties; use by a law firm of a fictitious name; use of specific or cumulative case results; participation in a lawyer referral service; communications involving listing of inclusion in publications such as *The Best Lawyers in America*; and the use of the terms “Specialist” or “Specializing In.” The prohibition in Rule 7.1 concerning advertising which is false, fraudulent, deceptive or misleading applies to all public communications and includes communications over the Internet. The Standing Committee on Lawyer Advertising and Solicitation also observes that a lawyer’s communications over the Internet are “disseminated to the public by use of electronic media” for which the lawyer has given value, and therefore are subject to the requirements of Rule 7.1 and 7.2.

In order to provide all members of the Bar with better access to the advertising opinions, this compendium opinion, issued by the Standing Committee on Lawyer Advertising and Solicitation, will be published as a Legal Ethics Opinion. See, Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10; Virginia State Bar Bylaws, Article VII, Section 5.

***Opinion:***

The appropriate and controlling rules relevant to the questions raised are Rule 7.1 and 7.2, which state in part:

**RULE 7.1 Communications Concerning A Lawyer's Services**

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:

- (1) contains false or misleading information; or
- (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or
- (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
- (4) 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.

(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

## RULE 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:

(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or

(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization; or

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

(b) A recording of the actual electronic media advertisement shall be approved by the lawyer prior to its broadcast and retained by the lawyer for a period of one year following the last broadcast date, along with a record of when and where it was used, which recording and date shall be provided to the Standing Committee on Lawyer Advertising and Solicitation upon its request.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) A written or e-mail communication that bears the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective non-lawyer client who is not:

- (1) a close friend, relative, current client, former client; or
- (2) one who has initiated contact with the attorney; or
- (3) one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter;

shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL."

The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, "ADVERTISING MATERIAL."

Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.

(e) Advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content or, in the alternative, a law firm may file with the Virginia State Bar a current written statement identifying the responsible attorney for the law firm's advertising and its office address, and the firm shall promptly notify the Virginia State Bar in writing of any change in status.

In the determination of whether a communication or advertisement violates this rule, the communication or advertisement shall be considered in its entirety including any qualifying statements or disclaimers contained therein.

#### **A. Use of Actors in Lawyer Advertising**

Rule 7.2(a) articulates several examples of communications which are prohibited, including an advertisement which contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization. Rule 7.2(a)(2). The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The Committee viewed numerous advertisements in which, either by direct statement or by implication, it appears that a person is an attorney associated with the advertised law firm, even though that person is not, in fact, an employee or member of the law firm. In particular, when actors are speaking they frequently include first person references to themselves as lawyers or as members of the law firm being advertised. The Committee is

of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading or deceptive.

Therefore, the Committee concludes that advertisements which use actors who portray attorneys or employees of a law firm are misleading and deceptive, absent a clear disclosure that the actor is not a member or employee of the firm or that the depiction is a dramatization. See also LAO-0101.

LEO 1119 is overruled to the extent that it is inconsistent with this opinion.

#### **B. Use of “No Recovery, No Fee”**

The Committee considered whether the language “no recovery, no fee” or language of similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was misleading or deceptive pursuant to Rule 7.1(a), under circumstances in which the advertising or public communication did not also include an explanation that the client was obligated to pay litigation expenses and court costs, regardless of whether any recovery was obtained.

The Committee determined that use of the explicit phrase “no recovery, no fee” in the solicitation of contingent fee cases is misleading or deceptive without any additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the terms “fee” and “costs.” See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-3 (1985)(finding that “[t]he State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs is reasonable enough to support a requirement that information regarding the client’s liability for costs be disclosed”). The statement “no recovery, no fee” is misleading in light of the fact that a client is or may be liable for costs even if there is no recovery. See Rule 1.8(e). The statement is improper unless a suitable disclaimer is added.

Also, the Committee considered the propriety of such phrases as “we guarantee to win, or you don’t pay,” “we are paid only if you collect,” “no charge unless we win,” or other language not making explicit reference to a legal “fee.” Language of this type that does not make explicit reference to a “fee” is misleading and deceptive in violation of Rule 7.1(a) since the language includes the implication that the client will not be required to pay either expenses or attorney’s fees if there is no recovery, but does not disclose the circumstances in which the client will be obligated to reimburse the attorney for any litigation expenses and court costs advanced, regardless of outcome. See also Rule 1.8(e). See also LAO-0102.

LEO 1029 is overruled to the extent that it is inconsistent with this opinion.

#### **C. Use of Fictitious Names**

The question arises whether and under what circumstances attorneys may advertise using a corporate, trade, or fictitious name which is not the name or names of the firm, the attorney, or the attorneys in the firm. For example, in reviewing the telephone directory yellow page advertisements, the Committee has observed instances where attorneys have used the letter “A,” “AA” or “AAA” as the first word in a name listing with the apparent intent to be in the front or near the front of the “Attorneys” or “Lawyers” section of the yellow pages.

It is misleading and deceptive under Rule 7.1(a)(1) and 7.5(d) for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. Use of a name which is not the name used in the practice is misleading and deceptive as to the identity, responsibility, and status of those using such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign. Furthermore, the usage of such name shall be in compliance with Rule 7.5 and shall comply with applicable laws, including Sections 13.1-542 et seq. or Sections 59.1-69 et seq. of the Code of Virginia.

See also LAO-0103 and LEOs 589, 935, 937, 1242, 1342, 1356, 1369.

#### **D. Advising That An Attorney Must Be Consulted**

The question arises whether it is permissible for an advertisement to state that an individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual “will have to consult an attorney,” the proposed advertisement would be in violation of Rule 7.1. See also LAO-0104.

#### **E. Participation in Lawyer Referral Services**

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false, fraudulent, deceptive or misleading. See Rule 7.3(a). The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are deceptive. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral service would create automatic rules violations by the participating attorneys. The Committee has opined that the following practices are deceptive and misleading:

1. Advertising participation in a Lawyer Referral Service which is not a true, qualifying Lawyer Referral Service as defined by prior opinions of the Standing Committee on Legal Ethics; see LEOs 926 and 1348;
2. Implying in advertising that a lawyer is selected for participation in a Lawyer Referral Service based on quality of services or some other process of independent endorsement when in fact no bona fide quality judgment has been objectively made;
3. Stating or implying that the Lawyer Referral Service contains all of the lawyers or law firms eligible to participate in the Service by the objective criteria of the Service when in fact the Service is closed to some lawyers or law firms who meet the objective criteria;
4. Stating or implying that there are a substantial number of attorneys or firms participating in the Service when in fact all calls in a geographic area will be directed to one or two attorneys or firms; see LEO 1543;
5. Using the name of a Lawyer Referral Service or joint marketing arrangement in a way which misleads the public as to the true identity of the advertiser.

See also LAO-0105 and LEOs 910, 926, 1014, 1175, 1348, 1543.

## **F. Advertising Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements**

The Committee considered the question of whether it is misleading to the public for an attorney to advertise results obtained in a specific case or to advertise cumulative results obtained in more than one specific case, e.g., “We’ve collected millions for thousands,” or “We’ve collected \$30 million in 1996.”

The Committee determined that it is misleading to the public for an attorney to advertise specific case results, whether individually or cumulatively, for two reasons:

1. The results obtained in specific cases depend on a variety of factors, and any advertisement of the results obtained in a specific case or cases that does not include all factors is inherently misleading. This is true, in part, because it is generally impossible to know all factors that have influenced a specific result or an accumulation of specific results.
2. Each legal matter consists of circumstances that are peculiar or unique to the specific case, and the result obtained under one set of circumstances does not provide useful information to the public as a predictor of the result likely to be obtained in a case that necessarily involves different circumstances.

An example will illustrate why information describing a specific case result or a blanket statement of cumulative results may be entirely accurate, but nonetheless misleading. An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would plainly be deceived if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly deceptive if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial. More importantly, since no member of the public is likely to have a case in which the circumstances precisely duplicate the advertised verdict, the report of a specific case result not only fails to provide helpful information to the consumer, but is likely to mislead the consumer as to the result that will be obtained in their case.

This reasoning is what led to the adoption of Rule 7.2(a)(3) in November, 2002. This rule now specifically prescribes the manner in which lawyer advertising can incorporate specific or cumulative case results, or any references thereto. The rule specifically identifies the use of a disclaimer and what the disclaimer must include, as well as the specifics of the type size of the text involved. The rule also clearly states that the disclaimer “shall precede the communication of the case results.” The Committee agrees that many times this means the disclaimer must appear on a law firm’s homepage of their website in order to meet these requirements. Rule 7.2(a)(3) states the following:

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

The Committee has repeatedly opined that the use of claims such as “the best lawyers,” “the biggest earnings,” and “the most experienced” are self-laudatory and amount to comparative statements that cannot be factually substantiated, in violation of Rule 7.1 (a)(3). (See also Comment 5 to Rule 7.1)

The Legal Ethics Committee first issued a legal ethics opinion on this topic in 1989 in LEO 1297. This Committee continues to adhere to the belief that such statements that use extravagant or self-laudatory words are designed to and in fact mislead laypersons to whom they are directed and, as such, undermine public confidence in our legal system. Comment 3 to Rule 7.2 specifically states that “[a]dvertising through which a lawyer seeks business by use of extravagant or self-laudatory statements or appeals to fears and emotions could mislead laypersons.”

See also LEOs 1229, 1443.

LEOs 1297, 1321 are overruled to the extent that they are inconsistent with this opinion.

## **G. Statements by Third Parties**

The Committee addressed whether a lawyer can circumvent the prohibition against comparative statements with the use of client testimonials. For example, a lawyer’s television advertisement shows a former client making statements about the client’s satisfaction and about the quality of the lawyer’s services, using statements to the effect that the lawyer is “the best” and will get you “quick results.”

Rule 7.1(a)(3) prohibits statements comparing attorneys’ services, unless the comparison can be factually substantiated. The Committee has previously opined that a lawyer’s advertising of specific case results is misleading, without the appropriate disclaimer. See Rule 7.2(a)(3). Thus, an attorney has clear guidance as to the impropriety of making certain statements in his advertising. Rule 8.4(a) states that an attorney shall not violate a disciplinary rule through the actions of another. Moreover, the language of the restriction in Rule 7.1 makes no qualification as to the maker of the regulated statements. To the contrary, the rule’s requirements are directed at any statements contained in the communication. Thus, there is no support in Virginia’s Rules of Professional Conduct for affording greater leeway to advertising statements made by clients than to those made by attorneys. The standard is the same in both instances. Applying that standard to this hypothetical, the client’s statements make a comparison (“the best”) that cannot be factually substantiated and offer a guarantee of results (“quick”). If such improper statements are contained in the lawyer’s advertisement, the lawyer would be in violation of Rule 7.1.

In further clarification, even statements of opinion by clients that contain comparative statements are not appropriate. This Committee adopts the mixed approach, used in Pennsylvania, while prohibiting testimonials regarding results and/or comparisons, it does allow “soft endorsements.” Philadelphia Ethics Opinion 91-17; Pennsylvania Bar Association Ethics Opinion 88-142. Examples of “soft endorsements” include statements such as the lawyer always returned phone calls and the attorney always appeared concerned. Id.

In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This Committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent disciplinary rule and the spirit behind it.

See also LAO-0113.

#### **H. Communications Involving Listing of Inclusion in *The Best Lawyers in America***

The Committee addressed this issue and stated that a lawyer may advertise the fact he/she is listed in a publication such as *The Best Lawyers in America*, or a similar publication and include additional statements, claims or characterizations based upon the lawyer’s inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1. If, for some reason, the lawyer is delisted by a publication, the statement in the advertisement must accurately state the year(s) or edition(s) in which the lawyer was listed.

Further, the lawyer may not ethically communicate to the public credentials that are not legitimate, such as, one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is misleading to the public and therefore prohibited.

Similarly, statements that explain, and do not exaggerate the meaning or significance of professional credentials, in laymen’s terms are permissible. For example, if the lawyer is communicating his/her “A.V.” rating by Martindale-Hubbell, the lawyer may properly include a description that states that “A.V.” represents “the highest rating” that particular service assigns. Also, if the lawyer is recognized and listed in the book *The Best Lawyers in America*, that lawyer may properly note he/she is among those lawyers “whom other lawyers have called the best.” The lawyer should be mindful to exercise discretion when communicating this information, that it be objective and not misleading. For example, although the lawyer may properly characterize inclusion in the book *The Best Lawyers in America*, he/she cannot properly characterize that inclusion into statements such as “since I am included in the book, that means I am the best lawyer in America,” nor can the lawyer impute any such endorsement to others in the law firm not so recognized.

The Committee’s decision includes objective and factual statements and claims of such inclusions and warns that descriptive characterizations and other qualitative statements must meet the requirements of Rule 7.1.

See also LAO-0114.

#### **I. Use of “Specialist” or “Specializing In”**

Rule 7.4 permits a lawyer to hold him/herself out as limiting or concentrating the lawyer's practice in a particular area or field of law as long as that is a true and accurate statement in accordance with Rule 7.1 and 7.2.

Comment [1] to Rule 7.4 gives guidance that a lawyer can generally state that he/she is a "specialist," practices a "specialty," or "specializes in" particular fields, but the communication is subject to the "false and misleading" standard as applied in Rule 7.1 and 7.2. However, unless the lawyer is engaged in patent, admiralty or a certification recognized by the Virginia Supreme Court, the lawyer should only use the term "certified specialist" in accordance with Rule 7.4.

The Committee cautions that if the lawyer uses terms such as "specialist" or "specializing in," he/she should be mindful of Rule 7.4's requirement that only certain specialties have been certified and recognized by the Virginia Supreme Court; otherwise the lawyer can only communicate the fact he/she is certified as a specialist with an appropriate disclaimer that there is no procedure in Virginia for approving certifying organizations.

See also LAO-0111 and LEOs 1475, 1425, 1385, 1292, 1231, and 923.

#### **J. Use of "Expert" and "Expertise"**

Rule 7.1 prohibits a lawyer from using or participating in the use of any form of public communication which contains a false, fraudulent, misleading, or deceptive statement or claim. Rule 7.1(a)(3) further prohibits a lawyer from comparing the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. The Committee opines that a lawyer's use of the words "expert" or "expertise" in public communications amounts to a comparative statement and is therefore prohibited, unless the claim can be factually substantiated.

See also Legal Ethics Opinions 1292, 1406 and 1425.

Committee Opinion  
March 20, 2001

Committee Revised Opinion  
April 4, 2006

Committee Revised Opinion  
December 18, 2008