



OUTSIDE COUNSEL

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New Lawyer Ad Rules Restrict Client Testimonials, Names

Much has been written in connection with New York's proposed amendments to the Disciplinary Rules (DR) of the Lawyer's Code of Professional Responsibility. This article is not about the new rules generally but will address specific proposed restrictions on lawyer or law firm advertising of client testimonials and client names.

Constitutional Concerns

DR 2-101(d)(1) bans lawyers and law firms from advertising current client testimonials. This blanket prohibition is an unconstitutional abridgement of commercial free speech.

The U.S. Supreme Court has held that lawyer advertising is a form of commercial speech entitled to First Amendment protection. *Bates v. State Bar of Arizona*, 433 US 350 (1977). Commercial speech that is not false, deceptive or misleading can be restricted only if the state can show that the restriction directly advances a substantial state interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 US 557 (1980). Such restrictions must be the least-restrictive possible means of achieving a substantial governmental interest. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 US 626 (1985). The hypothetical, but remote, possibility that some potential client may be "misled" by reading a truthful endorsement from an existing client does not meet the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public. *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 US 91 (1990).

DR 2-101(d)(1) makes advertising current client



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testimonials a per se ethical violation. It does not appear to matter that the testimonial is truthful. No state interest is directly advanced by such a blanket prohibition. This rule denies people actively seeking to hire a lawyer the ability to obtain highly relevant information about whom to hire: i.e., the names of actual clients who are satisfied with the firm's services. Such testimonials conveyed verbally between business people are widely considered one of the best means of attorney practice development.

For example, David Maister urges that the true test of successful client service is the willingness of clients to give written testimonials and to "actively tell their friends about you." David H. Maister, "True Professionalism" 167-68 (2000). Ford Harding identifies client "sponsorship," such as referrals and testimonials, as the first technique for practice development. Ford

Harding, "Cross-Selling Success" 91-94 (2002). It is irrational to believe that putting such positive references into writing with attribution to a specific person or client and publishing them on a Web site renders them misleading. Banning current client testimonials will result in suppressing what might be the most useful information available to a prospective client.

The new rules continue to permit the listing of existing clients without testimonials. It can be argued that such information has much greater potential to mislead. A potential client has no way to contact anyone at the listed client, and no idea of what types of services are provided by the firm to the client. Listing clients suggests a level of endorsement by the listed client that may or may not be true. On the contrary, client testimonials allow the client to say precisely what they choose about the law firm and enable prospective clients to follow up with the giver of the testimonial, if they care to.

Advertising a false, deceptive or misleading client testimonial is obviously an ethical violation. But the fact that a truthful testimonial is from a current rather than former client does not automatically make it false, deceptive or misleading. No rationale is provided for why advertising current client testimonials is forbidden. First Amendment case law requires restrictions on nonmisleading commercial speech to be limited in scope. Rather than an outright ban, the new rules could have required disclosures or disclaimers similar to the requirements for advertising former client testimonials. However, such less restrictive means were not considered.

If the concern is that current client testimonials have a "potential" to mislead, under First Amendment case law, that potential does not satisfy the state's heavy burden of justifying an absolute ban on disseminating accurate information to the public. This prohibition only serves to restrict truthful and relevant

information from reaching the public. It assumes the public is not sophisticated enough to recognize the limitations of advertising and that the public is better left in the dark than entrusted with accurate information.

Interestingly, the kind of information DR 2-101(d)(1) restricts is exactly what DR 2-101(a) requires the content of lawyer advertising to be—predominantly informational, designed to increase public awareness of situations in which the need for legal services might arise, and presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm to provide such services. Clearly, the prohibition on advertising current client testimonials is totally contrary to the stated purpose of the new lawyer advertising rules.

The total ban on advertising current client testimonials abridges the commercial free speech rights of lawyers and law firms that want to advertise truthful, nonmisleading testimonials from their current clients.

Scope of New Rules

The new rules do not differentiate between client testimonials in the corporate and noncorporate contexts. In the corporate context, client testimonials included on law firm Web sites are directed at potential business clients, not the public. These testimonials are genuine expressions of client satisfaction where lawyers or law firms achieve important results that facilitate their clients' business objectives. In contrast, client testimonials in the noncorporate context, primarily target the public. These testimonials, with some exceptions, are overblown assurances of client satisfaction that create false hopes or unjustified expectations about obtaining multi-million-dollar jury awards and favorable settlements. Unlike the unwary consumer who might be misled by such client testimonials in the noncorporate context, business clients tend to be sophisticated, experienced and protected by in-house counsel. Therefore, the risk that potential business clients will be misled by client testimonials included on firm Web sites, is minimized.

Effect of New Rules

The new rules on advertising client names and client testimonials are too restrictive for law firms that provide commercial legal services to business clients. By creating the categories "current clients," "former clients," and "regularly represented clients," the new

rules limit lawyer advertising by forcing business clients into rigid boxes they do not fit in.

• *Current Clients*

As discussed above, advertising current client testimonials is forbidden under the new rules. Ironically, "current" not "former" client testimonials are what practicing lawyers prefer to include on their firm Web sites.

This ban on current client testimonials would penalize law firms that represent business clients on multiple matters. For example, if a law firm is successful in closing a complex cross-border transaction for its corporate client and has pending matters for the same client, the new rules would prevent the law firm from advertising on its Web site a client testimonial about the successfully concluded matter due to its existing representations.

The potential effect of the new rules on parent entities, subsidiaries and affiliates of corporate clients is not clear. For example, if a law firm currently represents ABC Corp. but previously represented its affiliate, XYZ Inc., the new rules provide no guidance on whether XYZ's testimonial may be advertised on the firm's Web site on the basis that it is a separate legal entity or whether XYZ's affiliation to ABC would bar such advertisement.

• *Former Clients*

Advertising former client testimonials is permitted under the new rules, provided the content is predominantly informational and relevant to the selection of appropriate counsel, not false, deceptive or misleading, does not violate a disciplinary rule, objectively verified by the lawyer or law firm, and is accompanied by the following disclaimer: "Prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained." (DR 2-101(e)(3); DR 2-101(f); DR 2-101(a) and (b)).

It is not always easy to determine when a "current client" becomes a "former client." For example, a settled case for a one-time litigation client represented a decade ago is clearly a former client. However, a business entity for which a law firm provides continuous representation in transactional or litigation matters may never become a "former client." The new rules will preclude law firms from including on their Web sites testimonials from business clients if "current client" testimonials are banned and if business clients never become "former clients." This appears to be an unintended result of a rule that is too broad.

• *Regularly Represented Clients*

Advertising names of regularly represented

clients with their prior written consent continues to be permitted under the new rules, provided the same content requirements for advertising former client testimonials are met, except for objective verification by the lawyer or law firm and the disclaimer referred to above (DR 2-101(c)(2); DR 2-101(a) and (b)).

The term "regularly represented clients" is too vague. It is not clear what the length or frequency of client representations should be in order for clients to be considered "regularly represented clients." It is also unclear whether "current clients" are included under the category of "regularly represented clients."

Consider, for example, a law firm that currently represents a new bank client in connection with a loan transaction. The law firm would be banned from advertising on its Web site the bank client's testimonial while it is a "current client." If the bank sends no further work to the law firm, the bank's testimonial may be advertised because it has become a "former client." However, because the bank never became a "regularly represented client," its name cannot be advertised. This illustrates the unworkable scenarios that are likely to result from a set of rules that are not consistent with each other.

Law firm Web site advertisement of names and testimonials of business clients that consent should be permitted, regardless of whether they are "current clients," "former clients" or "regularly represented clients." Such advertisement is not false, deceptive or misleading.

Conclusion

The new lawyer advertising rules are too far-reaching. They impose artificial boundaries to curtail lawyer advertising instead of creating practical guidelines to limit unethical advertising. The rules should be narrowed to regulate the kinds of potentially misleading advertising they were intended to address. As proposed, the new rules are a potential minefield for lawyers and law firms that have no intention of violating New York's ethics rules yet have no practical means of complying with them.

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