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LAWYER ADVERTISING GUIDELINES

Adopted October 17, 1987.

Addendum issued 1995.

Fact Situation

An example of the kind of fact situation giving rise to this Opinion can be summarized as follows:

A law firm consisting of two lawyers published advertisements in local newspapers which referred to the firm's skill in preparation of clients' personal injury cases "for trial," to its medical knowledge that would "make complicated medical facts clear for the jury," and to its licensed investigators who discovered facts "essential for victory in the courtroom." From the time the firm was formed until the advertisements appeared, no lawyer at the firm had tried a personal injury case to a conclusion. One lawyer had never tried such a case at all, while the experience of the other in that area consisted of from three or four trials more than ten years before. The firm settled 95 percent of its clients' claims without filing a complaint and referred virtually all actions it did commence to other lawyers for trial.

These facts are largely identical to those in the case of *Matter of Zang*, 741 P. 2d 267 (Ariz. 1987). This ethics opinion is not limited to those facts, however.

Syllabus

Lawyer advertising engenders responsibilities to the public as well as professional opportunities. Lawyers who advertise must have or develop the competency to handle the representations for which they advertise. Lawyers should not claim to be "experienced" in matters which typically involve litigation in the absence of substantial trial experience. A lawyer may associate with another lawyer to handle a representation obtained through advertising, but must disclose to the public such associations if there is a likelihood the lawyer will associate with more experienced lawyers at the time the advertisement is placed. Referral or forwarding fees are forbidden. Clients obtained through advertising must be given the same attention and zealous advocacy required for any other client. Lawyers cannot hold themselves out as certified specialists except to the extent permitted by the Colorado Supreme Court, although they may advertise their areas of preference.

Opinion

Background

Lawyer advertising was first given constitutional protection by the United States Supreme Court in *Bates v. Arizona State Bar Association*, 433 U.S. 350 (1977). The right of lawyers to advertise has been more recently refined by the Supreme Court in *In re R. M. J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In Colorado, the scope of permissible advertising was most recently expanded by amendments to Canon 2 of the Code of Professional Responsibility, effective April 1, 1985.

The cases recognizing and upholding the rights of lawyers to advertise their services are in part a recognition of their commercial free speech right. See *Zauderer, supra*, 471 U.S. at 638, and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980). Just as important, lawyer advertising is consistent with the ethical obligation of Canon 2 of the Code: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." It is at least as much concern for the public as it is protection of lawyers' rights that makes advertising a permissible activity by the legal profession. See also, *Central Hudson, supra*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

Responsibilities to the Public

While lawyer advertising creates professional opportunities for the Bar, it also engenders responsibilities to the public. Concern has been raised within the profession regarding the scope of ethical advertising and the ethics of certain professional conduct resulting from obtaining clients through advertising. The following guidelines govern the professional responsibilities of lawyers who advertise.

1. A key provision of lawyer advertising is set forth in DR 2-101(A), which states:

A lawyer shall not, on behalf of himself, his partner, associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of advertising, solicitation or publicity containing a false, fraudulent, misleading, deceptive, or unfair statement or claim.

The scope of what is meant by “a false, fraudulent, misleading, deceptive, or unfair statement or claim” is explained in DR 2-101(B). Such statements can be improper by omission on account of a failure to “contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive.” DR 2-101(B)(6). *See also, Zauderer, supra*, 471 U.S. at 650-53. Lawyers who advertise must be prepared to disclose in their advertisements information the absence of which would cause a reasonable layperson to be misled or deceived. “[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture. . . .” *Bates, supra*, 433 U.S. at 375.

2. A lawyer should be competent or promptly become competent in any area of law in which the lawyer seeks clients through advertising. Competence is achieved through experience, but also “through study and investigation.” EC 6-3. New or inexperienced lawyers are not precluded from advertising so long as the requirements of the Disciplinary Rules under Canons 2 and 6 are followed.

3. Lawyers who are new or inexperienced in a particular area of law should not state in their advertisements that they are experienced in that area. Similarly, lawyers without substantial trial experience who advertise for clients in an area of law which typically involves litigation (*e.g.*, personal injury cases, workers’ compensation, products liability and professional malpractice) are misleading the public if they hold themselves out as “experienced” in that area of law. *See, Matter of Zang, supra*. Subject to the other guidelines herein set forth, lawyers may advertise and accept resulting clients without having prior experience in a particular area of law so long as they achieve the qualifications required to render the service competently. *See, EC 6-3 and 6-4*.

4. Lawyers who are new or inexperienced in a particular area of law can acquire the necessary competency required of the Code by “associating with . . . a lawyer who is competent to handle” the matter. DR 6-101(A)(1). Thus, a lawyer who obtains a representation through advertising and, subsequent to the time of acceptance, recognizes that such representation is beyond the lawyer’s competence to handle it, may associate with another lawyer who is competent to handle it. *See also* paragraph 6 below.

5. However, if at the time the advertisement is placed there is a likelihood that the lawyer will later associate with more experienced lawyers to handle the resulting cases, that fact should be disclosed to the public. For example, lawyers should not without adequate disclosure advertise with the expectation that they will undertake litigation matters in order to obtain settlements for most or all cases received through the advertisements, intending to refer those that go to trial to other lawyers. A lawyer who advertises in an area of law which normally involves litigation is expected to be able to handle the matter competently through trial. *Matter of Zang, supra*.

6. Lawyers who advertise and who, for any reason, refer clients to another lawyer cannot obtain a referral or forwarding fee. The requirements of DR 2-107, “Division of Fees Among Lawyers,” must be scrupulously observed by the referring and the receiving lawyers. Those requirements include informed consent by the client, overall reasonableness of the fee and a fee division “in proportion to the services performed and responsibility assumed by each” lawyer. DR 2-107. The referral or forwarding of a case by a lawyer to another lawyer is not the rendition of “services” or the undertaking of “responsibility” within the meaning of DR 2-107(A)(2) for which fee division is permitted. *See ABA Formal Opinion 204 (1940); ABA Informal Opinion 1392 (1977)*. A division of fees should be apportioned in accordance with the relative value of services performed and responsibilities assumed by each lawyer. *McNeary v. American*

Cyanamid Co., 105 Wash.2d 136, 712 P.2d 845, 848 (1986); Annot., 28 A.L.R. 4th 665 (1985). Nominal services and responsibilities do not justify more than a nominal fee.

7. Canon 7 mandates that “A lawyer should represent a client zealously within the bounds of the law.” See also DR 7-101; EC 7-1. Lawyers who advertise may sometimes obtain a high volume of cases. However, lawyers must treat each case individually and seek the maximum result for the client consistent with the client’s wishes. It is improper for a lawyer to settle cases obtained through advertising on terms which are less favorable to the client than if the client was not obtained through advertising. It is also improper for a lawyer to accept more cases as a result of the advertising than he or she can diligently and competently handle.

8. Lawyers should not hold themselves out as certified specialists or specialists in a particular field of law or law practice, except to the extent permitted by the Colorado Supreme Court. DR 2-105(A)(4).

9. Lawyers may, however, indicate, if appropriate, that a certain area of the law is one to which they limit their practice, in which they concentrate, in which they have extensive experience or which they emphasize. Lawyers may also indicate that they prefer or accept cases in a certain area of law, subject to the above guidelines. See *In re R. M. J.*, *supra*, 455 U.S. at 203; *Parker v. Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504, 510-11(6th Cir. 1987).

1995 Addendum

Note: The previous addendum to Formal Opinion 76 issued on July 24, 1993 is withdrawn.

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (regarding false or misleading communication about the lawyer or lawyer’s services); Rule 7.2 (regarding advertising in general); Rule 7.4(a), (d) and (e) (relating to communication of field of practice); Rule 1.1 (relating to competence); Rule 1.3 (relating to diligence); and Rule 1.5(d) (relating to division of fees). Consideration should also be given to Opinion 83.