

OHIO BOARD OF PROFESSIONAL CONDUCT

OPINION 2016-8

Issued October 7, 2016

Withdraws Opinions 89-24, 2000-6

Client Testimonials in Lawyer Advertising and Online Services

Syllabus of Opinion:

1. A lawyer may include a client testimonial in advertising so long as it does not constitute a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services or create unjustified expectations for prospective clients. Testimonials generally referring to favorable outcomes for clients must contain an appropriate disclaimer to avoid unjustified expectations.
2. Client testimonials in an advertisement that state the amount of a settlement or verdict are inherently misleading even if a disclaimer is used.
3. A lawyer is responsible for monitoring testimonials and reviews made by clients on websites if the lawyer controls the content of the website. Online testimonials or reviews from clients about the lawyer or the lawyer's services that contain false, misleading, or nonverifiable communications must be removed by the lawyer when the lawyer has control over the online content.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

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OPINION 2016-08

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Withdraws Opinions 89-24, 2000-6

Client Testimonials in Lawyer Advertising and Online Services

SYLLABUS: A lawyer may include a client testimonial in advertising so long as it does not constitute a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services or create unjustified expectations for prospective clients. Testimonials generally referring to favorable outcomes for clients must contain an appropriate disclaimer to avoid unjustified expectations.

Client testimonials in an advertisement that state the amount of a settlement or verdict are inherently misleading even if a disclaimer is used.

A lawyer is responsible for monitoring testimonials and reviews made by clients on websites if the lawyer controls the content of the website. Online testimonials or reviews from clients about the lawyer or the lawyer's services that contain false, misleading, or nonverifiable communications must be removed by the lawyer when the lawyer has control over the online content.

QUESTION PRESENTED: Whether a lawyer may utilize client testimonials in advertisements that promote the lawyer or the lawyer's services.

APPLICABLE RULES: Prof.Cond.R. 1.6, 1.9, 7.1, 7.2.

OPINION: Client testimonials are commonly used by lawyers in advertisements to convey information about the lawyer or the lawyer's services in an effort to attract new clients. Lawyers have a First Amendment right to communicate truthful information about their services that is not false or misleading. *Bates v. State Bar*, 433 U.S. 350 (1977). Communications made by lawyers, including advertisements containing client testimonials, cannot be false, misleading, or nonverifiable. Prof.Cond.R. 7.1, 7.2. A communication about the lawyer or the lawyer's services is considered "false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially misleading." Prof.Cond. R. 7.1. A communication is also misleading when there is a substantial likelihood that a reasonable person would form a conclusion about the lawyer or the lawyer's services without a reasonable factual foundation. Prof.Cond.R. 7.1, cmt. [2].

When a lawyer decides to use a client testimonial in an advertisement there are several considerations to ensure the communication will not be construed as false, misleading, or nonverifiable. A testimonial should consist of truthful remarks from an actual client, not those prepared by the lawyer or others. Client testimonials such as "I was pleased with the representation I received," and "The lawyer listened to my concerns," are examples of permissible client testimonials under Prof.Cond.R. 7.1 because they do not create unjustified expectations. However, testimonials containing statements that characterize the lawyer's skills, reputation, or record are nonverifiable and are not permitted by the rule. For example, "My lawyer never settles a case he knows he can win," and "My lawyer is the best criminal defense lawyer in Columbus," are types of communications that generally cannot be verified and therefore are not permitted under the rule.

More importantly, a client testimonial in an advertisement can be misleading when it leads a reasonable person to form an unjustified expectation that the same results can be obtained for other clients in similar matters. Prof.Cond.R. 7.1, cmt. [3]. Client testimonials containing dollar amounts of settlements or verdicts are particularly susceptible of generating unjustified expectations, even though the statements can sometimes be verified and accompanied by a disclaimer. For example, a testimonial stating "I was pleased my lawyer settled my case for over \$50,000" only communicates the client's subjective value of the former client's case and does not take into account the nature or relative strength of the case, its true value, or the individual skills of the lawyer.

Furthermore, the stated amount of an award does not take into account a variety of important factors that affect award amounts (*e.g.*, availability of insurance coverage, severity of an injury, the total amount of damages, and issues raised at trial for purposes of appeal, etc.), and leaves out important information about the facts and circumstances of the case. In the Board's opinion, the use of client testimonials to communicate settlement or verdict amounts, without more information, is materially misleading under Prof.Cond.R. 7.1. Consequently, a disclaimer cannot temper the unjustified expectations that are inevitably invoked when settlement or verdict amounts are communicated through a client testimonial. *See also* N.C. Adv. Op. 2012-1.

On the other hand, when an advertisement contains a client testimonial describing *general* favorable results of the representation, an appropriate disclaimer *may* prevent a misleading communication by the lawyer, *e.g.*, "After my DUI charge, I was able to keep my driver's license" or "I was able to return to work after my workplace injury." Prof.Cond.R. 7.1, cmt [3]. A disclaimer may include:

- Prior results do not guarantee a similar outcome in your case; or
- Individual results may vary based on the facts, injuries, jurisdiction, venue, witnesses, parties, and other factors. The results and client testimonials provided are not necessarily representative of the results obtained by all clients or their satisfaction with the firm's services.

A disclaimer in a print or video medium should be clear, conspicuous, and not minimized or obscured. A written disclaimer should be placed in the same size font as the written testimonial. Disclaimers provided in an audio format should be placed at the beginning or end of the advertisement in a volume and speed that can be easily understood by the listener. *See, e.g.* N.C. Adv. Op. 2012-1.

When using a client testimonial in an advertisement, a lawyer should always be mindful of the limitations imposed by Prof.Cond.R. 1.6 and 1.9, requiring the lawyer to not reveal information relating to the representation of a client, unless the client gives informed consent in writing. Both rules prohibit the release of any statement made by the client, former client, or of the client's identity without the client's consent. A lawyer should obtain the written and informed consent of the client to use his or her testimonial, whether or not the actual client is identified by name, partial name, or likeness. In

addition, the lawyer should inform the client of the timeframe in which the advertisement will run, and allow the client to withdraw his or her consent at any time.

Finally, a lawyer may not give anything of value to a current or former client for recommending the lawyer's services through a testimonial. Prof.Cond.R. 7.2(b). If the advertisement contains a photograph or video depicting a client, and the client is a portrayed by an actor, the advertisement should contain an appropriate disclaimer.

Online client testimonials and endorsements

A lawyer may place information about his or her services on a website or online legal directory. This information is a form of advertisement that a lawyer must ensure complies with Prof.Cond.R. 7.1 and 7.2. A variety of websites, online legal directories, and social media permit clients and others to endorse or post a review about a lawyer. A client typically provides a review on his or her own volition and waives the attorney-client privilege as to any information revealed in the review or comment. A lawyer with an online presence, who is able to control the content of his or her online profile, should periodically monitor the content of the profile to ensure the communications about the lawyer or the lawyer's services comply with Prof.Cond.R. 7.1. False, misleading, or nonverified testimonials in the form of client comments or endorsements should be removed by the lawyer when he or she has control over the content of the profile. *See* Penn. Adv. Op 2014-300 (2014). In those instances when the lawyer is unable to control the content of a website, caution should be exercised when responding to any reviews or comments, negative or otherwise, left by clients. When responding, the lawyer should never reveal information related to the representation of the client. Furthermore, none of the exceptions to Prof.Cond.R. 1.6(b) permit the disclosure of client information in response to a negative review. *See* Tex. Adv. Op. 662 (August, 2016).

CONCLUSION: Client testimonials that are not false, misleading, or nonverifiable may be included in lawyer advertising. A lawyer should endeavor to ensure that the testimonial is verifiable and carries an appropriate and conspicuous disclaimer when *general* results of the representation are communicated. However, advertisements that use client testimonials in order to communicate the dollar amount of settlements or verdict awards are inherently misleading even if a disclaimer is utilized. A former or current client cannot be paid for his or her testimonial, and must give consent to the use of his or her statement, name, or likeness in the advertisement. If a lawyer has the ability

to control the content of an online website, the placement of client comments, endorsements, or testimonials featuring the lawyer constitutes advertising that must be periodically monitored by the lawyer to determine compliance with Prof.Cond.R. 7.1 and 7.2.