

# **LAWYER ADVERTISING**

**A Review of Recent Changes and Rulings**

Prepared and Presented By:

Sam A. Elbadawi, Esq.  
Sugarman Law Firm, LLP  
360 South Warren Street, 5<sup>th</sup> Fl.  
Syracuse, NY 13202  
(315) 474-2943

# 1. OVERVIEW:

It is well established that lawyer advertising is protected speech under the First Amendment. In Bates v. State Bar of Arizona, 433 US 350 (1977), the dispute involved an advertisement attorneys placed in a newspaper for their 'legal clinic', which listed fees for legal services including uncontested divorces, uncontested adoptions, personal bankruptcies, and name changes. There was no allegation that the advertisement made any impermissible claims as to the quality of the legal services offered and the attorneys did not dispute the fact that the advertisement was in violation of a disciplinary rule which prohibited lawyers from publicizing themselves in newspapers and similar materials.

The State Bar brought disciplinary proceedings against the attorneys which resulted in a recommendation that they be suspended from the practice of law for one week. The attorneys applied to the Arizona Supreme Court for review of the recommendation on the basis that the disciplinary rule in question impermissibly limited competition and infringed upon their First Amendment rights. The Arizona Supreme Court rejected both arguments but reduced the sanction to a censure on the basis that the advertisement in question was done in good faith to test the constitutionality of the disciplinary rule in question.

The Supreme Court stayed the censure order pending final determination by the Court. The sharply divided Supreme Court held that: (1) the Arizona Supreme Court's decision limiting attorney advertising was not subject to attack under the Sherman Anti-Trust Act and (2) the advertisement in question was not misleading and fell within the scope of First Amendment protection. The court carefully considered and rejected the State Bar's various arguments in support of the censure which were the following:

1. Adverse effect on professionalism;
2. Inherently misleading nature of attorney advertising;
3. Adverse effect on the administration of justice;
4. Undesirable economic effects of advertising;
5. Adverse effect of advertising on the quality of service; and
6. Difficulties of enforcement.

Although the Court rejected the State Bar's various arguments in support of the disciplinary rule in question, it specifically identified the following "*clearly permissible limitations on advertising not foreclosed by our holding*":

1. Advertising that is false, deceptive or misleading;
2. “*Reasonable restrictions*” on the time, place and manner of the advertisement;
3. Advertisements concerning illegal transactions;
4. “[T]he special problems of advertising on the electronic broadcast media will warrant special consideration.”

## **2. NEW YORK’S ADVERTISING RULES PRIOR TO 2006:**

New York’s attorney advertising rules are set forth at DR 2-101 (22 NYCRR §1200.6). Prior to the amendments, DR 2-101 stated in pertinent part as follows:

DR 2-101 Prohibited false, misleading or deceptive claims. Also authorized dissemination of educational background, bar admissions, bar association memberships, names of clients regularly represented (provided written consent is obtained), bank references, fees, descriptions of practice areas and foreign language fluency.

DR 2-101(d) Stated advertisements “*shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel.*”

About one year after the landmark Bates decision was handed down, the New York State Bar Association’s Committee on Professional Ethics (hereafter “the Committee”) published the first of numerous opinions clarifying the scope of the attorney advertising rules codified in DR 2-101. In Opinion #487 (1978), the Committee concluded that the Code “*clearly permits*” a lawyer to advertise information relevant to the process of lawyer selection generally or which reasonably bears upon his competence. Opinion #487 adopted limitations similar to those identified in Bates:

1. Statements that are false, deceptive or misleading;
2. Statements that cast reflection on the profession as a whole;
3. Statements that contain puffery, self-laudation claims regarding the quality of the lawyer’s legal services; and
4. Claims that can not be measured or verified.

Notably, Opinion #487 indicated that DR 2-101 (A), (B), and (D) “*broadly serve to define the absolute limits of permissible advertising and publicity.*”

- DR 2-101(f) Required retention of broadcast advertisements for at least one year after transmission. Print advertisements had to be filed with the appropriate disciplinary committee.
- DR 2-101(g) If a lawyer advertised fees or hourly rates of service, that lawyer was not allowed to charge more than the advertised fee unless the client agreed to such additional charges in writing and acknowledged that the services performed were not the type of legal services referred to in the advertisement.
- DR 2-101(h) Fee schedules in print advertisements were binding for at least 30 days or until publication of a succeeding issue.
- DR 2-101(i) Fee schedules in broadcast advertisements were binding for at least 30 days after they are broadcast.
- DR 2-101(k) *"All advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered."*

In Opinion #756 (2002), the Committee stated as follows: "[W]e believe the use of a website or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101(k)."

- DR 2-101(l) Advertisements discussing an attorney's contingent fee rates had to disclose how the percentage was computed and state that in the event there is no recovery, client remained responsible for litigation expenses.

In Matter of von Wiegen, 63 NY2d 163 (1984) cert. denied 472 US 1007 (1985), New York's Court of Appeals reiterated the general principal outlined in Bates that lawyer advertising represents constitutionally protected commercial expression.

### **3. NEW YORK'S SOLICITATION RULES PRIOR TO 2006:**

New York's attorney solicitation rules are set forth at DR 2-103 (22 NYCRR §1200.8). Prior to the amendments, DR 2-103 stated in pertinent part as follows:

- DR 2-103(a) Lawyers were not allowed to:
- (1) solicit employment from a prospective client by in person or telephone contact;

- (2) communicate with a prospective client who made his desire not to be solicited known to the attorney;
- (3) utilize methods that involve coercion, duress or harassment;
- (4) communicate with prospective clients whose age, physical, mental or emotional state is impaired; and
- (5) solicit employment from a prospective client if the lawyer intended but does not disclose the fact that the legal services necessary to handle the prospective client's matter will be performed primarily by another lawyer who is not affiliated with the soliciting attorney.

In Opinion #715 (1999), the Committee addressed the questions (1) whether a solo practitioner may solicit and handle legal work from multiple law firms on a temporary basis and (2) whether the client of the referring firm must be informed that the work in question was referred to an unaffiliated lawyer for handling. The Committee answered the first question in the affirmative. With respect to the second question, the Committee concluded that the obligation to disclose depended upon whether the referring attorney directly supervises the contract attorney. Where no direct supervision takes place or is expected to take place, disclosure of the referral to the client is required.

**DR 2-103(b)** Lawyers were not allowed to compensate or give anything of value to a person or organization to recommend or obtain employment by a client unless:

- (1) it was a referral to a non-legal professional service firm pursuant to a contractual relationship that did not include the sharing of legal fees or payment of tangible consideration;
- (2) the lawyer paid permissible, usual and reasonable referral fees charged by another attorney as set forth in the Disciplinary Rules.

In Opinion #731 (2000), the Committee concluded that a lawyer may not compensate employees for soliciting parties to a real estate transaction to engage the services of a title insurance agency in which the lawyer had an ownership interest.

In Opinion #733 (2000), the Committee concluded that non-lawyers may be compensated based on a profit sharing arrangement but may not receive direct remuneration tied to the success of their efforts to solicit business for the lawyer or law firm that employs them.

DR 2-103(d) Permitted lawyers to be recommended for employment or to be affiliated with the following offices or organizations provided they did not interfere with the exercise of the attorney's independent professional judgment:

- (1) legal aid office;
- (2) organizations operated by a duly accredited law school;
- (3) organizations operated by a non-profit organization;
- (4) organizations operated by a governmental agency;
- (5) organizations operated by a bar association;
- (6) a military legal assistance office;
- (7) a lawyer referral service operated by a bar association or authorized by a law or court rule; and

In Opinion #651 (1993), the Committee was asked to determine (1) whether a bar association operating a lawyer referral service may require lawyers who receive referrals to pay, in addition to or in lieu of a fixed administration fee, a percentage of any fees in excess of \$500 earned from the referral and (2) whether an attorney may ethically pass such a fee along to the client. The Committee answered the first and, remarkably, the second question in the affirmative.

In Opinion #678 (1996), the Committee concluded that a lawyer may not accept referrals from a divorce mediation referral service that is not sponsored, affiliated with or approved by a bar association. "*Generally speaking, [DR 2-103©)] forbids lawyers from arranging for third parties to recommend their services in a seemingly disinterested manner.*" Notably, the Committee expressly stated that, in their opinion, attorneys who serve as mediators are engaged in the practice of law.

- (8) an organization which furnished or paid for legal services to its members provided:
  - a) the lawyer has not initiated the organization for the primary purpose of financial gain;
  - b) the organization is not operated for the purpose of procuring legal work for the lawyer;
  - c) the member, not the organization, is recognized as the client of the lawyer;
  - d) the organization provides members with remedies for any claims that the representation by counsel the organization furnished is improper or unethical;
  - e) the lawyer does not know or suspect that the organization is in violation of the law; and

- f) the organization files its legal service plan containing schedules of benefits, subscription charges, agreements with counsel and related financial information on at least an annual basis with the appropriate disciplinary authority.

In Opinion #694 (1997), the Committee concluded that an attorney may not participate in a program operated by a real estate broker in which prospective home purchasers are offered reduced closing costs by permitting an attorney selected by the broker to represent both the lender and the purchaser.

In Opinion #741 (2001), the Committee was asked to determine whether an attorney may ethically participate in a dues based business referral network that requires members to refer clients to and accept referrals from other network members. In brief, the Committee determined that such arrangements violate DR 2-103(b). The Committee re-visited the issue in 2006 (Opinion #791) stating in pertinent part as follows:

*Upon reconsideration, we adhere to our opinion in NY State 741 (2001), which concluded that a lawyer may not participate in a business networking organization that requires the lawyer to refer clients to other members in exchange for their referral of legal business, whether or not the organization charges the lawyer any fees. We add here that a lawyer also may not participate in a business networking organization that charges membership dues and/or other fees and requires non lawyer members to refer potential clients to members of the organization who are lawyers.*

One year after Opinion #487 was published, the Second Department had an opportunity to review a determination by a referee appointed by the Joint Bar Association Grievance Committee for the Tenth Judicial District. In Matter of Koffler, 70 AD2d 252 (2d Dept., 1979), the respondent attorneys placed an advertisement in Newsday, a newspaper with a large circulation in Nassau and Queens Counties listing their fees for real estate closings. The attorneys subsequently mailed copies of their advertisement to homeowners and real estate brokers along with a letter inviting them to utilize their services. Disciplinary proceedings were brought against the attorneys for violation DR 2-103(a).

The referee appointed to investigate the matter concluded that the attorneys violated DR 2-103(a) and moved before the Appellate Division for an Order confirming his findings. The Appellate Division confirmed the findings, held the letters constituted impermissible solicitations (as opposed to advertisements subject to protection under

the First Amendment), and held that the limitations proscribed in DR 2-103 were constitutional. Although the court declined to address the question whether all mailings were prohibited and did not discipline the respondents, the court warned future practitioners by stating the following: “*The members of the bar having been put on notice by this opinion of the strictures here laid down, any future violation will necessitate the taking of appropriate disciplinary measures.*” The Court of Appeals reversed the Second Department and held in pertinent part as follows:

*Direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed. The Appellate Division’s contrary holding, predicated upon an artificial distinction between solicitation and advertising, should therefore, be reversed[.]*

Koffler v. Joint Bar Ass’n., 51 NY2d 140, 143 (1980).

#### **4. NOTABLE CHANGES TO ADVERTISING<sup>1</sup> RULES (Post Alexander v. Cahill):**

DR 2-101(a) Still prohibits advertisements that contain false, deceptive misleading claims but now also prohibits advertisements that violate a disciplinary rule.

DR 2-101(b) Now permits dissemination of educational background, bar admissions, names of clients regularly represented (provided written consent is obtained), bar association memberships, bank references, fees, descriptions of practice areas and foreign language fluency.

DR 2-101(c)<sup>2</sup> Now prohibits:

---

<sup>1</sup> 22 NYCRR §1200.1(k) now defines the term “Advertisement” as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.”

<sup>2</sup> In Alexander v. Cahill, 2007 WL 2120024 (NDNY 2007), the Court scrutinized the amendments codified as DR 2-101(c)(1), (3), (5) and (7), granted the portion of the plaintiffs’ Summary Judgment Motion relating thereto, and ruled that they were unconstitutional and therefore **not** enforceable (the portion of Senior Judge Scullin’s Memorandum-Decision and Order which discusses DR 2-101(c)(1), (3), (5)

- (2) paid endorsements or testimonials without disclosing the fact that the person is being compensated;
- (4) use of actors to portray lawyers, members of a law firm, clients or depictions of fictionalized events or scenes without disclosure;
- (6) advertisements that resemble legal documents.

DR 2-101(d) Now permits, subject to compliance with DR 2-101(e), the following:

- (1) *“statements that are reasonably likely to create an expectation about results the lawyer can achieve”*;
- (2) *“statements that compare that lawyer’s services with the services of other lawyers”*.

DR 2-101(e) Now permits dissemination of the statements described in DR 2-101(d) provided the statement:

- (1) does not violate DR 2-101(a) which prohibits false, misleading and deceptive advertising;
- (2) can be factually supported by the lawyer; and
- (3) is accompanied by the following disclaimer *“Prior results do not guarantee a similar outcome”*.

DR 2-101(f) Now requires print advertisements, mailings, and website listings to be labeled “ATTORNEY ADVERTISING” on the first or home page. E-Mail advertisements require the phrase “ATTORNEY ADVERTISING” to be listed in the subject line.

DR 2-101(g)<sup>3</sup> Now prohibits:

---

and (7) is summarized in section 6 below).

<sup>3</sup> In Alexander v. Cahill, *id*, the Court scrutinized this amendment, granted the portion of Plaintiffs’ Summary Judgment Motion relating thereto, and ruled that DR 2-101(g)(1) was unconstitutional and therefore **not** enforceable (the portion of Senior Judge Scullin’s Memorandum-Decision and Order which discusses DR 2-101(g)(1) is summarized in section 6 below).

