

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2004-F-149**

Guidance is provided regarding what general types of claims or representations as included within attorney advertising are false or misleading in violation of Tennessee Rule of Professional Conduct 7.1.

Considerable confusion currently exists among members of the bar of this state regarding what types of claims or representations may be appropriately included within lawyer advertising without violating the prohibitions against false or misleading advertising as contained in Tennessee Rule of Professional Conduct (RPC) 7.1. This Opinion is to help clarify this issue and to interpret RPC 7.1 for the benefit of the bar in Tennessee.

RPC 7.1, Communications Concerning a Lawyer's Services, provides as follows:

A lawyer shall not make a false or misleading communication about the lawyer, the lawyer's services, the lawyer's charges for fees or costs, or the law as relates to the services the lawyer will provide. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading; or
- (b) 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; or
- (c) compares the lawyer's services or fees with other lawyers' services or fees, unless the comparison can be factually substantiated.

Comment to RPC 7.1 provides, in pertinent part, as follows:

...The prohibition in paragraph (b) of statements that may create an "unjustified expectation" would ordinarily preclude advertising about results obtained on behalf of a client, such as the amount of a damage award or a lawyer's record in obtaining favorable verdicts and advertisements containing client endorsements.

Rule 7.2(c) provides as follows:

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

- (1) the reasonable costs of advertisements or other communications permitted by this Rule, Rule 7.3, or Rule 7.5;
- (2) the usual charges of a registered intermediary organization as permitted by Rule 7.6;
- (3) a sponsorship fee or a contribution to a charitable or other non-profit organization in return for which the lawyer will be given publicity as a lawyer;
- (4) a law practice in accordance with Rule 1.17.

In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, (1980), the U. S. Supreme Court held that a four-part test of intermediate scrutiny must be employed to determine whether commercial speech is protected by the First Amendment. Commercial speech is accorded qualified First Amendment protection only if it is not false or misleading. With respect to commercial speech which is not actually or inherently false or misleading, a state may reasonably regulate potentially misleading commercial speech where the harms which the state seeks to alleviate are real, and where the proposed regulation "directly and materially advances the state's interest in preventing the specific type of deception at hand." Douglas v. State, 921 S.W.2d 180, 184 (Tenn. 1996), quoting Edenfield v. Fane, 507 U.S. 761, 770-771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993). "The state may completely ban commercialized expression that is either actually or inherently misleading without further justification." Id. In Douglas, the Supreme Court of Tennessee found constitutional the Dental Board's requirement that general dentists who chose to advertise in specialty branches indicate that the services were being performed by general dentists. With respect to lawyer advertising, the Supreme Court of Tennessee concluded that the specialty certification disclaimer requirements of DR 2-101(C) of the former Code of Professional Responsibility for attorneys passed constitutional muster. Walker v. Board of Professional Responsibility, 38 S.W.3d 540 (Tenn. 2001). Although RPC 7.4 changed the specialty certification disclaimer requirements of DR 2-101(C), those requirements were not found to be unconstitutional.

The U. S. Supreme Court has uniformly held that, "false, deceptive or misleading commercial speech may be banned." Ibanez v. Florida Dept. of Bus. & Prof'l. Regulation, 512 U.S. 136, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994). The U. S. Supreme Court held that "...[t]he government may freely regulate commercial speech that concerns unlawful activity or is misleading". Florida Bar v. Went for It, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Likewise, inherently misleading statements may be banned. In Re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed. 64 (1982). In Bates v. State Bar of Arizona, 433 U.S. 350, 383-84, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court observed that:

...advertising claims as to quality of services...are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction...

The lack of objectively verifiable data in support of the claims which are the subject of this Opinion warrant restrictions as the U. S. Supreme Court has observed.

Accordingly, the claims or representations contained in lawyer advertising which are the subject of this Opinion are accorded only qualified First Amendment protection. Communications violative of RPC 7.1(a), (b), and (c)--those communications which contain material misrepresentations of fact or law, those which are likely to create an unjustified expectation about

results the lawyer can achieve, or those which compare a lawyer's services or fees with other lawyers' services or fees in a fashion which cannot be factually substantiated--are potentially false or misleading and, accordingly, are prohibited where the additional disclosures as provided below are not included.

Consistent with the above Rules, Comment, and the cited case law, lawyers' advertisements in Tennessee shall not refer to prior successes or results obtained on behalf of clients, such as the amount of damage awards, settlements, the nature of jury verdicts, or other outcomes unless the advertisements refer to the specific factual and legal circumstances underlying the claimed prior success or prior result.

Further, lawyers' advertisements containing testimonials or endorsements by a current or former client must comply with RPC 7.1, particularly with regard to avoiding creating an unjustified expectation about the results the lawyer may obtain and/or comparing the lawyer's services and fees. Lawyers' advertisements shall not contain any testimonial or endorsement of Tennessee lawyers by simulated current or former clients unless notice is provided in a prominent fashion that such clients are simulations. Such advertisements by simulated clients are false or misleading in the absence of such notice. Lawyers' advertising containing any testimonials or endorsements by individuals, including current or former clients, actors, public figures, or celebrities who are compensated in any manner for their participation in the advertisement are prohibited. RPC 7.2(c).

Further, lawyers' advertisements shall not contain subjective, particularly self-imposed, characterizations or descriptions of the lawyer, the quality of legal services offered by the lawyer, the level of fees charged, or any comparison of one lawyer's or law firm's quality with the quality of other lawyers' services which cannot be factually substantiated. Thus, in the absence of factual substantiation, a lawyer shall not advertise that he or she (or his or her law firm) is "No. 1", "the best", "one of the best", "better", "top", "excellent", "qualified", "highly qualified", "experienced", "most experienced", "reputable", "efficient", "preferred", or that the lawyer's or law firm's fees are the lowest. Such terms may be likely to create unjustified expectations about results to be obtained by the lawyer. These characterizations (and many others too numerous to list) are necessarily relative and ambiguous terms comparing lawyer services and inherently misleading in the absence of factual substantiation. See, *Spencer v. The Honorable Justices of The Supreme Court of Pennsylvania*, 579 F.Supp. 880, 885-888 (E.D. Pa. 1984) (reiterating the principle that there is no constitutional protection for false, misleading, or deceptive advertising and finding that lawyer's use of terms such as "experienced", "expert", "highly qualified", or "competent" are difficult for a layman to confirm, measure, or verify; court held that the state's prohibition of the use of terms which subjectively evaluate a lawyer's credentials or the quality of his or her services directly advances the state's substantial interest in protecting consumers from misleading claims, and is not more extensive than necessary to serve that interest); and *Medina County Bar Association v. Grieselhuber*, 678 N.E.2d 535 (Ohio 1997) (Ohio Supreme Court upheld sanction of lawyer who used the words "We Do It Well" in advertisement as claim which was not verifiable in violation of Ohio's DR 2-101(A)(4)). RPC 7.4(b)(d)<sup>1</sup> permit the use of "specialist", "specializes", and "certified" as provided

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<sup>1</sup>Subject to the requirements of Rules 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes, or is certified or recognized as a specialist in a particular field of law.

in the rule as long as a lawyer's use of such terms is objectively in accordance with the rule. The use of subjective characterizations or descriptions conferred by organizations may be permissible if the organization has made inquiry into the lawyer's fitness and does not issue or confer such characterizations or descriptions indiscriminately or for a price. Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 102, 110 S.Ct. 2281, 2288, 110 L.Ed.2d 83 (1990); Mason v. Florida Bar, 208 F.3d 952, 957 fnt.3 (11th Cir. 2000).

Consistent with Chapter 7 of the Rules of Professional Conduct, this Ethics Opinion applies only to communications by lawyers which propose commercial transactions and has no application to a lawyer's non-commercial speech. Moreover, this Opinion only addresses appropriate conduct by lawyers under the Tennessee Rules of Professional Conduct and does not address compliance with any other rules or law applicable to advertisements, such as the Tennessee Consumer Protection Act.

Lawyers are encouraged to submit to the Board copies of their proposed advertising substantially in advance of their contemplated dissemination of same to obtain an advisory opinion concerning whether the proposed advertisements comply with the provisions of the Rules of Professional Conduct and with this Opinion.

This 17<sup>th</sup> day of September, 2004.

BOARD OF PROFESSIONAL RESPONSIBILITY, En Banc

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(d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Commission on Continuing Legal Education and Specialization may state that the lawyer "is certified as a specialist in [field of law] by the Tennessee Commission on C.L.E. and Specialization." A lawyer so certified may also state that the lawyer is certified as a specialist in that field of law by an organization recognized or accredited by the Tennessee Commission on Continuing Legal Education and Specialization as complying with its requirements, provided the statement is made in the following format: "[Lawyer] is certified as a specialist in [field of law] by [organization]."