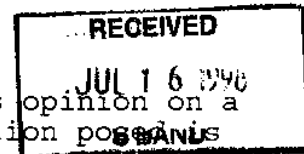


STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

COPY

Opinion No. 98 - 06
July 14, 1998



The Committee has received a request for its opinion on a question involving lawyer advertising. The question poses whether a certain telephone yellow pages advertisement conforms to the requirements of North Dakota Rule of Professional Conduct 7.1(a).

FACTS

The full page advertisement is for a law firm which has its office in a North Dakota city. The advertisement lists seven types of cases, gives licensure information, gives legal experience information, gives information about fees, and lists five different telephone numbers.

Four of the telephone numbers are listed under the names of four North Dakota cities, one of which is the city in which the firm's office is located.¹ Each of those four telephone numbers has a three digit prefix which is local to the city under which the telephone number is listed. In three of the four cities, the telephone numbers are "local market expansion" telephone lines. The "local market expansion" lines all ring into the firm's single office. At the bottom of the advertisement, there is a statement indicating that the firm's offices are located in only one of the four cities for which telephone numbers are listed; there are asterisks on both sides of that statement. In the line in which the four city names are listed, there are asterisks on both sides of the name of the city in which the office is located. The law firm intends to place the advertisement in telephone books for each of the four cities listed.

The requesting attorney asks whether the language stating that offices are located in only one of the four cities would "remove all doubt as to whether the ad conforms to the requirements" of Rule 7.1(a).

DISCUSSION

N.D.R. Prof. Conduct 7.1(a), which applies to communications made for advertising purposes, provides:

A lawyer shall not make a false or misleading communication about the lawyer, a person professionally

¹The other telephone number is a toll free (800) number.

associated with the lawyer, or their services. A communication is false or misleading if it:

(1) 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

(2) contains an assertion that cannot be substantiated.

North Dakota's Rule 7.1(a) is patterned after Model Rule 7.1(a), though the Model Rule contains some provisions that are not included in the North Dakota rule. Some states have established advertising review committees, whose sole function is to determine whether proposed lawyer advertising meets applicable rules. See, e.g., Texans Against Censorship, Inc. v. State Bar of Texas, 888 F.Supp. 1328 (E.D. Tex. 1995). Review committees of that nature generally have some authority to secure information to confirm statements made in proposed advertising. North Dakota does not have a committee that functions as a lawyer advertising review committee.

This Committee can provide only limited guidance to lawyers concerned about the content of their advertising. A recent opinion of this Committee describes limitations on opinions addressing advertising issues:

[I]n most instances the Ethics Committee is not in a position to determine whether a particular communication is truthful and not misleading. The Committee is not investigatory and cannot verify the veracity of the various statements that could be made in the context of lawyer advertising. It remains the obligation of the lawyer to ensure that a communication is truthful and not misleading. Thus, the Committee will not pre-approve a brochure or other similar documents. If the lawyer has a specific question regarding a specific portion of the brochure, the Committee will respond to such question to the extent that it has the necessary facts.

State Bar Ass'n of North Dakota Ethics Committee Opinion 97-11. (Nov. 11, 1997). In those limited instances where the Committee has considered specific advertisements or solicitations, it has never explicitly determined that an advertisement or solicitation met the requirements of Rule 7.1. Rather, the Committee has identified specific concerns about the content of the specific advertisements or solicitations.

This Committee cannot "remove all doubt" as to whether the firm's advertisement conforms to the applicable rule in all respects. For example, the Committee cannot determine whether the advertisement's statements regarding areas of practice,

licensure, or fees are false or misleading, because the Committee has no means of verifying the information contained in the advertisement. This opinion is limited to the question of whether, given the statement specifying that the firm has offices in only one of the four listed cities, listing the telephone numbers for the "local market expansion" lines in the other three cities is misleading.

Since the United States Supreme Court's recognition of lawyer advertising as protected commercial speech, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), lawyer advertising has been the subject of a number of court cases and ethics opinions. So long as lawyer advertising is not false, misleading, or deceptive, it cannot be completely prohibited. Id. Lawyer advertising that is "inherently misleading" or "actually misleading" can be prohibited. Professional advertising that is "potentially misleading" cannot be totally prohibited, but can be regulated through means less restrictive than a complete ban. Ibanez v. Florida Department of Business and Professional Regulation, 512 U.S. 136, 114 S.Ct. 2084 (1994); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990). North Dakota's rules are less restrictive than those of some other states.

There is a wide range of advertisements that have been found to be misleading in other states. See, e.g., Annotated Model Rules of Professional Conduct 485 (1996). In Colorado v. Carpenter, 893 P.2d 777 (Colo.1995), an advertisement was found to be misleading because it implied a referral service supplied more lawyers, in more fields, than were actually available through the service. An ethics opinion from the District of Columbia found that use of the letters "L.L.P." or "L.L.C." instead of "limited liability partnership" or "limited liability company" could be misleading to citizens due to unfamiliarity with those entities. D.C. Bar, Legal Ethics Comm., Op. 235 (1993). The Committee has identified no case law nor ethics opinions dealing with use of "local market expansion" lines.

In determining whether advertising is misleading, it is the opinion of this Committee that the standard to be applied is whether persons to whom it is directed would reasonably understand its plain meaning, considering the "statement as a whole." See, e.g., ABA Formal Opinion 84-351 (1984) (Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion.) See also, N.D.R. Prof. Conduct 7.1(a)(1) (Statement to be considered "as a whole".)

The "statement as a whole" includes the "local market

expansion" lines, together with the statement that the offices are located in only one of the four cities, together with the manner in which asterisks are used in the advertisement. The issue of whether use of the "local market expansion" numbers is misleading may turn on whether the asterisks are used in such a way that the statement at the bottom of the advertisement is considered a part of the "statement as a whole" made to readers in all four cities, or only as to those readers in the city whose name is asterisked. An alternative interpretation of the use of the asterisks is that they highlight the information about offices being located in only one city.

It is the opinion of a majority of the Committee that a person using the telephone yellow pages, reading the proposed advertisement as a whole, would reasonably understand that the law firm does not have offices in each of the four cities whose names are listed in the advertisement. However, the Committee recognizes that persons who do not read the last line of the advertisement might be misled to believe that the firm has an office in each of the four cities for which telephone numbers are listed. A minority of the Committee felt that the advertisement was misleading.

CONCLUSION

The advertisement presented to the Committee, considered as a whole, is not misleading as to the number of cities in which the law firm has offices.

This opinion is provided pursuant to N.D.R. Law. Discipline 1.2(B), which provides:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Alice R. Senechal, and was adopted by the Committee, with four members voting in favor of adoption and three members voting against adoption, on July 14, 1998.



Alice R. Senechal, Chair

June 12, 1998

VIA FACSIMILE TRANSMISSION

Ms. Sandi Tabor
Executive Director
STATE BAR ASSOCIATION
OF NORTH DAKOTA
P.O. Box 2136
Bismarck, ND 58502-2136

RE: Ethical Opinion on Attorney Advertising

Dear Ms. Tabor:

As I had recently explained to you, an ethical complaint has been filed against [REDACTED] by Inquiry Committee East on their own motion based upon an anonymous complaint directed to Ms. [REDACTED] of the State Bar Board. The complaint is based upon the allegation that our firm's use of local market expansion phone lines is misleading to potential clients in those market expansion cities insofar as they may be led to believe that we have offices located in those cities, which we do not.

I am writing to request that the Ethics Committee render an opinion regarding the afore-mentioned advertising. A copy of the advertising is enclosed for your review, which contains the following additional, corrective language at the bottom of the ad: "Offices located in [REDACTED] Only". This corrective language is being added to the ad in the hope that our ad can now be determined to be unquestionably proper. My question to the Ethics Committee is whether this corrective language to our existing advertising would remove all doubt as to whether the ad conforms to the requirements of North Dakota Rule of Professional Conduct 7.1(a).