

## NEW HAMPSHIRE BAR ASSOCIATION

### Limitations on “Million Dollar Advocate” and “Million Dollar Advocates Forum” Advertising

#### Ethics Committee Advisory Opinion #2011-12/03

#### **ABSTRACT:**

Advertising that a lawyer is a “million dollar advocate” or is a member of the “Million Dollar Advocates Forum” is permissible *only if* the advertisement includes an appropriate disclaimer.

#### **ANNOTATIONS:**

A lawyer may not make a false or misleading communication about the lawyer or the lawyer’s services.

A communication is misleading if it is likely to create an unjustified expectation about results the lawyer can achieve.

### OPINION

#### **ISSUE PRESENTED:**

May a lawyer advertise that she or he is a “Million Dollar Advocate” or a member of the “Million Dollar Advocates Forum”?

*Factual Background:* The Million-Dollar Advocates Forum was established in 1993 and is limited to only those lawyers who obtained a million dollar or multi-million dollar verdict or settlement. A New Hampshire lawyer asked whether he could post on his website that he is a million dollar advocate.

#### **ANALYSIS:**

In November 1997, the Ethics Committee issued a practical ethics article that concluded it was impermissible for a New Hampshire lawyer to advertise that he or she is a “million-dollar advocate” or a member of the “Million-Dollar Advocates Forum.” In reaching that conclusion, the Committee applied the “four-step analysis” set forth in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), a test that the Supreme Court applies to commercial speech.

The *Central Hudson* test assumes, as a starting point, that the speech at issue concern a “lawful activity” and is not “more likely to deceive the public than inform it.” 447 U.S. at 563. Second, the government “must assert a substantial interest to be achieved by restrictions on commercial speech.” *Id.* at 564. Third, the restriction “must directly advance the state interest involved.” *Id.* Finally, the restriction may not “completely suppress information when narrower restrictions on expression would serve the interest as well.” *Id.* at 565.

The 1997 Committee then turned to New Hampshire Rule of Professional Conduct Rule 7.1 which provided:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. 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 in light of all of the circumstances, not materially misleading;
- 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 with other lawyers' services, unless the comparison can be factually substantiated.

The Committee noted that "ABA Model Code Comment to Rule 7.1(b) stated that the rule precludes advertisements that include statements referring to the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or client endorsements because statements regarding past performance 'may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.'"

Continuing, the Committee pointed out that Rule 7.1(c) "prohibits comparisons of the lawyer's services with those of other lawyers, unless such comparisons can be factually substantiated. This rule has been held to prohibit the use of the subjective terms in lawyer advertising such as 'experienced,' 'qualified,' or the 'leading' firm."

The Committee concluded that a statement that a lawyer is a "million dollar advocate" or a member of the "Million Dollar Advocates Forum," even if true, implicated Rules 7.1(b) and 7.1(c) because it "is misleading, and is likely to create unjustified expectations about the results that the lawyer can achieve, regardless of whether that lawyer had achieved one or more million dollar verdicts."

In a concluding footnote, the Committee stated it "has neither been asked nor had it considered whether any disclaimer would be sufficient to defeat the unjustified expectations that may be created by the phrases."

The Committee has received an inquiry asking about million dollar advocate advertising on a law firm's website. Perhaps unaware of the Committee's 1997 practical ethics article, the inquiring lawyer asked the Committee whether such advertising is permissible.

The Committee concludes that advertising a lawyer is a "million dollar advocate" or member of the "Million Dollar Advocates Forum" is permissible but only *if it includes an appropriate disclaimer*. The Committee rests its opinion on two grounds.

First, even though the 1997 Committee analyzed the issue under *Central Hudson*, it did not consider the effect of a disclaimer and, thus, did not focus on the fourth step of the *Central Hudson* test. That step asks whether the restriction is "narrowly drawn." In discussing the fourth step in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the United States Supreme Court stated it "did not 'foreclose the possibility that some limited supplementation, by way of warning

or *disclaimer* or the like, might be required’ in promotional material.” 447 U.S. at 565 (emphasis added).

In *Appeal of Sutfin*, 141 N.H. 732 (1997), the New Hampshire Supreme Court reversed a decision by the state dental board that a dentist’s advertisement of a patented dental device was false and misleading. Referring to *Central Hudson* and *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91(1990), our court stated: “The Supreme Court’s decisions in this area reflect a preference for regulations that impose lesser burdens on speech, such as disclosure requirements, as opposed to outright suppression. (Citing *Texans Against Censorship v. State Bar of Texas*, 888 Fed. Supp. 1328, 1347 (E.D. Tex. 1995) (collecting cases), *aff’d* 100 Fed. 3d. 953 (5th Cir. 1996) and *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)).

*Appeal of Sutfin* and *Central Hudson* make clear that the government bears the burden of demonstrating that a restriction on commercial speech not only is necessary to, and directly does, advance a “substantial” governmental interest,” but that it is “narrowly drawn” and suppresses no more speech than necessary. For this reason, it is difficult to conceive how prohibiting a lawyer from advertising he or she is a million-dollar advocate or a member of the “Million-Dollar Advocates Forum,” *accompanied by an appropriate disclaimer*, could survive a free speech challenge.

Second, the ABA Model Rule Comments to Rule 7.1 states, in part: “The inclusion of *an appropriate disclaimer* or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client” (emphasis added). At the very least, this comment indicates that the ABA recognizes the problem of an outright ban of certain types of advertising.

In conclusion, the Committee reaffirms the opinion it reached in 1997: *without an appropriate disclaimer*, advertising that a lawyer is a “million-dollar advocate” or a member of the “Million-Dollar Advocates Forum” would violate Rule 7.1(b) and (c).

## **NH RULES OF PROFESSIONAL CONDUCT:**

Rule 7.1

## **NH ETHICS COMMITTEE OPINIONS AND ARTICLES:**

Committee opinion on same topic: 1997 Ethics Committee – Practical Ethics Article “Million Dollar Advocate”

## **SUBJECTS:**

Lawyer Advertising

Disclaimer

- **By the NHBA Ethics Committee**

*This opinion was submitted for publication to the NHBA Board of Governors at its January 17, 2013 meeting.*