

This opinion is merely advisory and is not binding on the inquiring attorney or the Courts or any other tribunal.

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1993-1

A member of the Delaware Bar has requested an opinion from the Committee concerning whether a proposed print advertisement by the lawyer complies with the Delaware Lawyers' Rules of Professional Conduct. The proposed print advertisement contains a sketch depicting a couple having a conversation with their lawyer while standing in front of a house. In the advertisement, the couple exclaims: "We finally have our home!"; to which the attorney replies: "Not until you go to settlement!" Above the sketch, is a lead sentence as follows: "To benefit the United Negro College Fund."

Below the sketch, the attorney's name appears in large print. Directly below the attorney's name are two columns of text. The top left paragraph states:

"Any residential real estate settlement  
\$400.00 flat fee for attorney's work.  
\* \$50.00 will be donated to the United Negro  
College Fund.  
\* You must present this ad at the time of initial  
consultation."

The top right paragraph of the advertisement lists the attorney's areas of practice as follows:

"Personal Injury  
Auto Accidents  
D.U.I.  
Medical Malpractice  
Wills  
Criminal  
Probate"

After the two paragraphs of text discussed above, the attorney's telephone number appears with two additional columns of text below it, which contain disclaimers. The bottom left paragraph states: "Listing of areas of practice does not represent official certification as a specialist in those areas." The bottom right paragraph provides: "The extent of legal services

required depends upon the facts in each case. If additional services are required, full information on additional charges will be provided at the first consultation."

### CONCLUSION

With respect to the listing of areas of practice in the proposed advertisement, the Committee concludes that the proposed advertisement complies with the applicable provisions of the Delaware Lawyers' Rules of Professional Conduct, since the proposed advertisement contains the disclaimer required by Rule 7.1(b)(1). The Committee further concludes that the reference to a specific fee (i.e., "\$400.00 flat fee for attorney's work" regarding "any residential real estate settlement") in the proposed advertisement does not comply with Rule 7.1(b)(3)(a) because the proposed advertisement does not identify with particularity the specific service or services to which the fee information applies. Finally, the Committee concludes the \$50.00 donation is allowed under the Rules.

### DISCUSSION

An attorney's use of advertising is subject to the restrictions on advertising found in Rules 7.1 through 7.5 of the Delaware Lawyers' Rules of Professional Conduct. Rule 7.1 provides in pertinent part:

(a) **Advertising by a lawyer shall not:**

(1) Contain any untrue statement;

or,

(2) Contain any matter or present or arrange any matter in a manner or format which is false, deceptive or which tends to confuse, deceive or mislead the public; or

(3) Contain any statement concern-ing the quality of any legal services offered (best, excellent, better, experienced and the like); or

(4) Contain any statements charac-terizing the size of the advertiser's fees or directly or indirectly comparing the size of the advertiser's fees (lowest, low, modest, reasonable, affordable and the like) to fees of other attorneys for like services

unless such advertising lawyer has substantial evidence that such a statement is correct; or

(5) Omit to state any fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading to the public.

(b) **Disclosures.**

(1) A lawyer who advertises areas of practice shall either comply with Rule 7.5 or include the following disclaimer: "Listing of areas of practice does not represent official certification as a specialist in those areas."

(2) A lawyer who advertises contingent fee services shall state that a client must pay the expenses of litigation regardless of its outcome unless the lawyer intends to absorb those expenses pursuant to Rule 1.8(e).

(3) When a specific fee, magnitude of fee or range of fees is advertised by a lawyer the advertisement shall:

(a) Identify with particularity the specific service or services to which the fee information applies.

(b) State that: "The extent of legal services required depends upon the facts in each case. If additional services are required, full information on additional first consultation."

(c) If the lawyer's costs and disbursements are not included in the advertised fee, this fact must be disclosed.

(c) **Prominence of disclosures.**

(1) In written or printed advertising, the required disclaimers and disclosures shall be in type size at least as large as the language qualified.

...

(3) The advertising lawyer shall maintain a copy of each advertisement, or in the case of broadcast advertising, a recording capable of producing a replica, for at least one year after its last dissemination.

(d) **Adherence to advertised fees.**

(1) Unless otherwise stated in the advertisement: (a) in the months after the fee information is last made public, to undertake and complete all services advertised for the fee case of advertised fees, a lawyer shall be bound, for two advertised; provided, however, that, (b) if the advertisement occurs in a periodical which occurs less frequently than once every two months, the lawyer is so bound until the publication of the next succeeding issue of the periodical, and (c) if the advertisement occurs in a format which is not periodical, the lawyer shall be so bound for one year after the last publication.

(2) If legal services required by a client whose representation arose either in whole or in part in response to the advertisement shall exceed those for which fee information was advertised, the client shall be charged no greater fee without prior written consent.

. . . .

**Advertisement of Areas of Practice**

Rule 7.1(b)(1) provides that "[a] lawyer who advertises areas of practice shall either comply with Rule 7.5 or include the following disclaimer: 'Listing of areas of practice does not represent official certification as a specialist in those areas.'" Here, the listing of areas of practice (personal injury, auto accidents, D.U.I., medical malpractice, wills, criminal, and probate) in the proposed advertisement is qualified by the disclaimer set forth in Rule 7.1(b)(1) and, therefore, the lawyer is not required to comply with the provisions of Rule 7.5. Consequently, the listing of areas of practice in the proposed advertisement complies with Rule

7.1(b)(1), provided that the disclaimer "shall be in type size at least as large as the language qualified," as required by Rule 7.1(c)(1).<sup>1</sup> See also DSBA Ethics Comm. Op. 1992-5 at 4-5.

### **Advertisement of a Specific Fee for Services**

The advertisement of a specific fee for services rendered by a lawyer must comply with the provisions of Rule 7.1(b)(3). Rule 7.1(b)(3) states:

(3) When a specific fee, magnitude of fee or range of fees is advertised by a lawyer the advertisement shall:

(a) Identify with particularity the specific service or services to which the fee information applies.

(b) State that: "The extent of legal services required depends upon the facts in each case. If additional services are required, full information on additional charges will be provided at the first consultation."

(c) If the lawyer's costs and disbursements are not included in the advertised fee, this fact must be disclosed.

Here, the proposed advertisement lists a "\$400.00 flat fee for attorney's work" relating to "any residential real estate settlement," and contains the required disclaimer set forth in Rule 7.1(b)(3)(b). However, the proposed advertisement does not "[i]dentify with particularity the specific service or services to which the fee information applies," as required by Rule 7.1(b)(3)(a). Merely stating that the "\$400.00 flat fee for attorney's work" is for "any residential real estate settlement" does not identify with sufficient particularity the specific service or services to

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<sup>1</sup> In addition, the Committee notes, as set forth in Rule 7.1 (c) (3), 11(t)he advertising lawyer shall maintain a copy of each advertisement, or in the case of broadcast advertising, a recording

which the fee information applies and, therefore, it is the opinion of the Committee that the proposed advertisement must be more specific with respect to the services to be provided in order to comply with Rule 7.1(b)(3)(a). Moreover, Rule 7.1(b)(3)(c) provides that "[i]f the lawyer's costs and disbursements are not included in the advertised fee, this fact must be disclosed." Here, the proposed advertisement does not address the question whether the advertising lawyer's costs and disbursements (such as recording fees and title insurance premiums) are included in the "\$400.00 flat fee for attorney's work" and, consequently, it is assumed by the Committee that such costs and disbursements are included in the "\$400.00 flat fee." Otherwise, the proposed advertisement would violate Rule 7.1(a) in that it may mislead the public into believing that the "\$400.00 flat fee" included all costs and disbursements.<sup>2</sup> The mere inclusion of the disclaimer<sup>3</sup> in Rule 7.1(b)(3)(b) in the proposed advertisement does not cure the lack of specificity regarding the service or services to be provided. Finally, since the proposed advertisement does not set forth a period of time that the advertised price and services will be provided, the advertising lawyer must comply with the provisions of Rule 7.1(d)(1).<sup>4</sup>

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capable of producing a replica, for at least one year after its last dissemination."

<sup>2</sup> The Committee notes that the heading to the proposed advertisement "To Benefit the United Negro College Fund" could tend to "confuse . . . or mislead the public" if not read as part of the totality of the advertisement in that it could lead one to believe that the sole purpose of the attorney's work is to benefit the Fund. Thus, in order to avoid any possibility of confusion in that regard, the Committee recommends that the heading be changed to say "Will benefit the United Negro College Fund," as such a statement goes to the effect of the attorney's work, rather than his purpose.

<sup>3</sup> The Committee notes that the disclaimer required by Rule 7.1(b)(3)(b) must "be in type size at least as large as the language qualified" in order to comply with Rule 7.1(c)(1).

<sup>4</sup> In addition, the Committee notes that the advertising lawyer must also comply with Rule 7.1(d)(2), which states that if legal services required by a client whose representation arose either in whole or in part in response to the advertisement shall exceed those for which

## Donation To United Negro College Fund

The Committee has also considered whether the \$50.00 contribution to the United College Negro Fund (the "Fund") is allowed under the Rules.

Based upon the representations of the inquiring lawyer, his usual residential real estate settlement fee is \$400.00 and thus the client is not being charged for the donation. According to the inquiring lawyer, the \$50.00 derives from the profit portion of the lawyer's fee, and he will take a tax deduction on his law firm's tax return for that amount. While the Fund is apparently aware and approves of the lawyer's proposed advertisement, the inquiring attorney has represented that there is no tacit or explicit understanding that the Fund will refer clients to him. In addition, according to the inquiring attorney, the Fund's receipt of \$50.00 will not be indicated on the settlement sheets of the real estate transactions.

Under these circumstances, the only pertinent provision of the Rules is Rule 5.4(a), which states "[a] lawyer . . . shall not share legal fees with a nonlawyer." While a superficial reading of this language might suggest the lawyer's proposed conduct is not allowed, the purposes underlying Rule 5.4(a) have no application to the lawyer's proposed conduct here.

The sharing contemplated by Rule 5.4(a) is sharing done pursuant to an agreement between the lawyer and the nonlawyer in exchange for the referral of clients by the nonlawyer. Rule 5.4(a) proscribes such agreements to protect the lawyer's professional independence of judgment. Annotated Model Rules Of Professional Conduct, Rule 5.4, Legal Background (Second ed. 1992).

Here, there is no such agreement. The lawyer solicits his clients through the advertisement for which he pays. Furthermore, copies of the advertisement will not be placed upon the premises of the Fund according to the inquiring attorney. Moreover, based upon the inquiring attorney's representations, there is no express or de facto fee-sharing between the lawyer and the Fund in exchange for the referral of clients.

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fee information was advertised, the client shall by charged no greater fee without prior-written consent."

Similarly, the Fund has no input into the lawyer's handling of the real estate settlement, and thus the lawyer's independence of judgment is not jeopardized. The donation is simply a subsequent one-way transaction between the lawyer and a not-for-profit organization.

The Committee's independent research has uncovered only one decision involving a similar situation. In PA Eth. Op. 91-34, 1991 WL 325880, a lawyer proposed an advertisement which stated he would "prepare a Living Will free of charge for a client, provided that the client had made a charitable contribution to a designated charity within the preceding three months." The opinion stated that the proposed advertisement did not violate Rules 7.1 and 7.2, and concluded, as here, that there was no sharing as contemplated by Rule 5.4(a), and that the lawyer's independence of judgment would not be impaired.

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It should be noted that in responding to this inquiry the Committee based its opinion on a review of the Delaware Lawyers' Rules of Professional Conduct as currently enacted. This opinion does not address or opine upon the constitutionality of the Rules discussed herein.

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