



"Ovelmen, Richard J." <ROvelmen@carltonfields.com> on 08/30/2018 02:50:15 PM

Please respond to "Ovelmen, Richard J." <ROvelmen@carltonfields.com>

To: "eto@floridabar.org" <eto@floridabar.org>
cc: "alex@alexhannalaw.com" <alex@alexhannalaw.com>, "alinag@alexhanna.com" <alinag@alexhanna.com>, "Blickensderfer, Steven" <SBlickensderfer@carltonfields.com> (bcc: Ethics Mail)
Subject: Alex Hanna's Proposed Rule Amendment and Comment to Rule 4-7.13
Staff: Elizabeth Tarbert/The Florida Bar

Good afternoon Ms. Tarbert,

On behalf of Alex Hanna, please accept the attached letter and proposed rule/comment to Rule 4-7.13. If you would please add myself and Steven Blickensderfer to the email group for any future correspondence on the matter, that would be most appreciated. Also, could you provide us with a copy of any proposed rules and comments and related materials that have been (or will be) submitted on this matter before the deadline, or tell us how to obtain any such copies? Thank you.

Sincerely,
Rjo



Richard J. Ovelmen
Attorney at Law

Miami Tower
100 S.E. Second St., Ste. 4200
Miami, Florida 33131-2113
Direct: 305.347.6805 | Fax: 305.530.0055

ROvelmen@carltonfields.com | www.carltonfields.com
[bio](#) | [vcard](#)

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2018-08-30 RJO Letter to Fla Bar re Proposed Rule Amendment to 4-713 obo Hanna.pdf



ATTORNEYS AT LAW

Miami Tower

100 S.E. Second Street | Suite 4200
Miami, Florida 33131-2113
P.O. Box 019101 | Miami, Florida 33101-9101
305.530.0050 | fax 305.530.0055
www.carltonfields.com

Rick Ovelmen
305-347.6805 Direct Dial
rovelmen@carltonfields.com

Atlanta
Hartford
Los Angeles
Miami
New York
Orlando
Tallahassee
Tampa
Washington, D.C.
West Palm Beach

August 30, 2018

Via US Mail and email to
eto@floridabar.org

Elizabeth Clark Tarbert
Ethics Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Re: Alex Hanna's Proposed Rule Amendment and Comment to Florida Bar Rule 4-7.13 On Deceptive and Inherently Misleading Advertisements

Ms. Elizabeth Clark Tarbert:

Alex Hanna recently retained me for my First Amendment expertise and experience with the lawyer advertising rules to prepare a proposed rule amendment and comment to Florida Bar Rule 4-7.13, which prohibits lawyers from using deceptive and inherently misleading advertisements. In 2011, I joined several of Florida's largest law firms in submitting comments on the proposed website advertising rules, to ensure they comply with the First Amendment. See *In re Amendments to Subchapter 4-7, Lawyer Advertising Rules*, FSC Case No. 11-1327.

Today, I am enclosing a proposed rule amendment and comment to Rule 4-7.13 that addresses a growing concern in the legal marketplace: the use of another lawyer's or law firm's name, tradename, trademark, or logo without permission for the purpose of generating an online, internet, or website advertisement in response to an internet search for that specific lawyer or law firm. The proposed rule change is not intended to hinder internet advertising, but rather to prevent the confusion, tarnishing, misappropriation, unfair competition, or dilution caused by lawyers engaging in this practice, which Mr. Hanna unfortunately witnessed firsthand.

This proposed rule is consistent with trademark law, Florida common law on misappropriation, and Florida's misappropriation statute, § 540.08, Florida Statutes. A brief memorandum on these topics in support of the proposed rule change will be submitted shortly hereafter. I look forward to presenting this proposed rule and comment to the Board of Governors at the Amelia Island meeting in October, and answering any questions at that time.

Sincerely,



Richard J. Ovelmen

cc: Alex Hanna; Alina Gonzalez

Carlton Fields Jordan Burt, P.A.

Carlton Fields Jordan Burt, P.A. practices law in California through Carlton Fields Jordan Burt, LLP.

RULE 4-7.13 DECEPTIVE AND INHERENTLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in deceptive or inherently misleading advertising.

(a) Deceptive and Inherently Misleading Advertisements. An advertisement is deceptive or inherently misleading if it:

- (1) contains a material statement that is factually or legally inaccurate;
- (2) omits information that is necessary to prevent the information supplied from being misleading; or
- (3) implies the existence of a material nonexistent fact.

(b) Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain:

- (1) statements or information that can reasonably be interpreted by a prospective client as a prediction or guaranty of success or specific results;
- (2) references to past results unless the information is objectively verifiable, subject to rule 4-7.14;
- (3) comparisons of lawyers or statements, words or phrases that characterize a lawyer's or law firm's skills, experience, reputation or record, unless such characterization is objectively verifiable;
- (4) references to areas of practice in which the lawyer or law firm does not practice or intend to practice at the time of the advertisement;
- (5) a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm. The following notice, prominently displayed would resolve the erroneous impression: "Not an employee or member of law firm";
- (6) a dramatization of an actual or fictitious event unless the dramatization contains the following prominently displayed notice: "DRAMATIZATION. NOT AN ACTUAL EVENT." When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: "ACTOR. NOT ACTUAL [. . .]";
- (7) statements, trade names, telephone numbers, Internet addresses, images, sounds, videos or dramatizations that state or imply that the lawyer will engage in conduct or tactics that are prohibited by the Rules of Professional Conduct or any law or court rule;

(8) a testimonial:

- (A) regarding matters on which the person making the testimonial is unqualified to evaluate;
- (B) that is not the actual experience of the person making the testimonial;
- (C) that is not representative of what clients of that lawyer or law firm generally experience;
- (D) that has been written or drafted by the lawyer;
- (E) in exchange for which the person making the testimonial has been given something of value; or
- (F) that does not include the disclaimer that the prospective client may not obtain the same or similar results;

(9) a statement or implication that The Florida Bar has approved an advertisement or a lawyer, except a statement that the lawyer is licensed to practice in Florida or has been certified pursuant to chapter 6, Rules Regulating the Florida Bar; ~~or~~

(10) a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name in reference to a current, former or retired judicial, executive, or legislative branch official currently engaged in the practice of law. For example, a former judge may not state "Judge Doe (retired)" or "Judge Doe, former circuit judge." She may state "Jane Doe, Florida Bar member, former circuit judge" or "Jane Doe, retired circuit judge...";
or

(11) an online, internet, or website advertisement generated in whole or in part through the use of the name, tradename, trademark, or logo of another lawyer or law firm without permission, whether through the use in search algorithm of hidden text, metatags, competitive keywords, or similar online advertising techniques.

Comment

Material Omissions

An example of a material omission is stating “over 20 years’ experience” when the experience is the combined experience of all lawyers in the advertising firm. Another example is a lawyer who states “over 20 years’ experience” when the lawyer includes within that experience time spent as a paralegal, investigator, police officer, or other nonlawyer position.

Implied Existence of Nonexistent Fact

An example of the implied existence of a nonexistent fact is an advertisement stating that a lawyer has offices in multiple states if the lawyer is not licensed in those states or is not authorized to practice law. Such a statement implies the nonexistent fact that a lawyer is licensed or is authorized to practice law in the states where offices are located.

Another example of the implied existence of a nonexistent fact is a statement in an advertisement that a lawyer is a founding member of a legal organization when the lawyer has just begun practicing law. Such a statement falsely implies that the lawyer has been practicing law longer than the lawyer actually has.

Predictions of Success

Statements that promise a specific result or predict success in a legal matter are prohibited because they are misleading. Examples of statements that impermissibly predict success include: “I will save your home,” “I can save your home,” “I will get you money for your injuries,” and “Come to me to get acquitted of the charges pending against you.”

Statements regarding the legal process as opposed to a specific result generally will be considered permissible. For example, a statement that the lawyer or law firm will protect the client’s rights, protect the client’s assets, or protect the client’s family do not promise a specific legal result in a particular matter. Similarly, a statement that a lawyer will prepare a client to effectively handle cross-examination is permissible, because it does not promise a specific result, but describes the legal process.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include “goal,” “strive,” “dedicated,” “mission,” and “philosophy.” For example, the statement, “My goal is to achieve the best possible result in your case,” is permissible. Similarly, the statement, “If you’ve been injured through no fault of your own, I am dedicated to recovering damages on your behalf,” is permissible.

Modifying language can be used to prevent language from running afoul of this rule. For example, the statement, “I will get you acquitted of the pending charges,” would violate the rule as it promises a specific legal result. In contrast, the statement, “I will pursue an acquittal of your pending charges,” does not promise a specific legal result. It merely conveys that the lawyer will

try to obtain an acquittal on behalf of the prospective client. The following list is a nonexclusive list of words that generally may be used to modify language to prevent violations of the rule: try, pursue, may, seek, might, could, and designed to.

General statements describing a particular law or area of law are not promises of specific legal results or predictions of success. For example, the following statement is a description of the law and is not a promise of a specific legal result: "When the government takes your property through its eminent domain power, the government must provide you with compensation for your property."

Past Results

The prohibitions in subdivisions (b)(1) and (b)(2) of this rule preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, if the results are not objectively verifiable or are misleading, either alone or in the context in which they are used. For example, an advertised result that is atypical of persons under similar circumstances is likely to be misleading. A result that omits pertinent information, such as failing to disclose that a specific judgment was uncontested or obtained by default, or failing to disclose that the judgment is far short of the client's actual damages, is also misleading. The information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. An example of a past result that can be objectively verified is that a lawyer has obtained acquittals in all charges in 4 criminal defense cases. On the other hand, general statements such as, "I have successfully represented clients," or "I have won numerous appellate cases," may or may not be sufficiently objectively verifiable. For example, a lawyer may interpret the words "successful" or "won" in a manner different from the average prospective client. In a criminal law context, the lawyer may interpret the word "successful" to mean a conviction to a lesser charge or a lower sentence than recommended by the prosecutor, while the average prospective client likely would interpret the words "successful" or "won" to mean an acquittal.

Rule 4-1.6(a), Rules Regulating the Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless one of the exceptions to rule 4-1.6 applies. A lawyer who wishes to advertise information about past results must have the affected client's informed consent. The fact that some or all of the information a lawyer may wish to advertise is in the public record does not obviate the need for the client's informed consent.

Comparisons

The prohibition against comparisons that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is "the best," or "one of the best," in a field of law.

On the other hand, statements that the law firm is the largest in a specified geographic area, or is the only firm in a specified geographic area that devotes its services to a particular field of

practice are permissible if they are true, because they are comparisons capable of being factually substantiated.

Characterization of Skills, Experience, Reputation or Record

The rule prohibits statements that characterize skills, experience, reputation, or record that are not objectively verifiable. Statements of a character trait or attribute are not statements that characterize skills, experience, or record. For example, a statement that a lawyer is aggressive, intelligent, creative, honest, or trustworthy is a statement of a lawyer's personal attribute, but does not characterize the lawyer's skills, experience, reputation, or record. These statements are permissible.

Descriptive statements characterizing skills, experience, reputation, or a record that are true and factually verified are permissible. For example, the statement "Our firm is the largest firm in this city that practices exclusively personal injury law," is permissible if true, because the statement is objectively verifiable. Similarly, the statement, "I have personally handled more appeals before the First District Court of Appeal than any other lawyer in my circuit," is permissible if the statement is true, because the statement is objectively verifiable.

Descriptive statements that are misleading are prohibited by this rule. Descriptive statements such as "the best," "second to none," or "the finest" will generally run afoul of this rule, as such statements are not objectively verifiable and are likely to mislead prospective clients as to the quality of the legal services offered.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include "goal," "dedicated," "mission," and "philosophy." For example, the statement, "I am dedicated to excellence in my representation of my clients," is permissible as a goal. Similarly, the statement, "My goal is to provide high quality legal services," is permissible.

Areas of Practice

This rule is not intended to prohibit lawyers from advertising for areas of practice in which the lawyer intends to personally handle cases, but does not yet have any cases of that particular type.

Dramatizations

A re-creation or staging of an event must contain a prominently displayed disclaimer, "DRAMATIZATION. NOT AN ACTUAL EVENT." For example, a re-creation of a car accident must contain the disclaimer. A re-enactment of lawyers visiting the re-construction of an accident scene must contain the disclaimer.

If an actor is used in an advertisement purporting to be engaged in a particular profession or occupation who is acting as a spokesperson for the lawyer or in any other circumstances where the viewer could be misled, a disclaimer must be used. However, an authority figure such as a judge or law enforcement officer, or an actor portraying an authority figure, may not be used in

an advertisement to endorse or recommend a lawyer, or to act as a spokesperson for a lawyer under rule 4-7.15.

Implying Lawyer Will Violate Rules of Conduct or Law

Advertisements which state or imply that the advertising lawyers will engage in conduct that violates the Rules of Professional Conduct are prohibited. The Supreme Court of Florida found that lawyer advertisements containing an illustration of a pit bull canine and the telephone number 1-800-pitbull were false, misleading, and manipulative, because use of that animal implied that the advertising lawyers would engage in “combative and vicious tactics” that would violate the Rules of Professional Conduct. *Fla. Bar v. Pape*, 918 So. 2d 240 (Fla. 2005).

Testimonials

A testimonial is a personal statement, affirmation, or endorsement by any person other than the advertising lawyer or a member of the advertising lawyer’s firm regarding the quality of the lawyer’s services or the results obtained through the representation. Clients as consumers are well-qualified to opine on matters such as courtesy, promptness, efficiency, and professional demeanor. Testimonials by clients on these matters, as long as they are truthful and are based on the actual experience of the person giving the testimonial, are beneficial to prospective clients and are permissible.

Florida Bar Approval of Ad or Lawyer

An advertisement may not state or imply that either the advertisement or the lawyer has been approved by The Florida Bar. Such a statement or implication implies that The Florida Bar endorses a particular lawyer. Statements prohibited by this provision include, “This advertisement was approved by The Florida Bar.” A lawyer referral service also may not state that it is a “Florida Bar approved lawyer referral service,” unless the service is a not-for-profit lawyer referral service approved under chapter 8 of the Rules Regulating the Florida Bar. A qualifying provider also may not state that it is a “Florida Bar approved qualifying provider” or that its advertising is approved by The Florida Bar.

Judicial, Executive, and Legislative Titles

This rule prohibits use of a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person’s name, when used to refer to a current or former officer of the judicial, executive, or legislative branch. Use of a title before a name is inherently misleading in that it implies that the current or former officer has improper influence. Thus, the titles Senator Doe, Representative Smith, Former Justice Doe, Retired Judge Smith, Governor (Retired) Doe, Former Senator Smith, and other similar titles used as titles in conjunction with the lawyer’s name are prohibited by this rule. This includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards.

However, an accurate representation of one's judicial, executive, or legislative experience is permitted if the reference is subsequent to the lawyer's name and is clearly modified by terms such as "former" or "retired." For example, a former judge may state "Jane Doe, Florida Bar member, former circuit judge" or "Jane Doe, retired circuit judge."

As another example, a former state representative may not include "Representative Smith (former)" or "Representative Smith, retired" in an advertisement, letterhead, or business card. However, a former representative may state, "John Smith, Florida Bar member, former state representative."

Further, an accurate representation of one's judicial, executive, or legislative experience is permitted in reference to background and experience in biographies, curriculum vitae, and resumes if accompanied by clear modifiers and placed subsequent to the person's name. For example, the statement "John Jones was governor of the State of Florida from [. . . years of service . . .]" would be permissible.

Also, the rule governs attorney advertising. It does not apply to pleadings filed in a court. A practicing attorney who is a former or retired judge may not use the title in any form in a court pleading. A former or retired judge who uses that former or retired judge's previous title of "Judge" in a pleading could be sanctioned.

Use of Competitor Names, Tradenames, Trademarks, or Logos in Online Advertising

A lawyer violates this rule if he or she generates or causes to be generated an online, internet, or website advertisement that uses the name, tradename, trademark, or logo of a lawyer or law firm other than the responsible lawyer without the authorization of that other person or entity. This rule is not intended to prohibit lawyers from using online advertising techniques. It is intended to prevent the confusion, tarnishing, misappropriation, unfair competition, or dilution caused by lawyers using the name, tradename, trademark, or logo of a competing lawyer or law firm without permission for purposes of generating an online, internet, or website advertisement in response to an internet search for that specific lawyer or law firm. Such an advertisement has a tendency to mislead and confuse consumers into believing that the displayed advertisement is for someone other than the lawyer responsible for the advertisement.

Further, lawyers must not be permitted to indirectly seek the benefits of another lawyer's reputation or another law firm's reputation, including any board certifications, specializations, or areas of expertise, by using the name, tradename, trademark, or logo of another lawyer or law firm in online, internet, or website advertisements without permission. The reputation of a lawyer or law firm can be extremely valuable and take years to develop. Principles of professionalism, as well as the bar's interest in protecting the public by preventing deceptive advertising techniques, dictate that a lawyer should not intentionally use someone else's name in an online advertising scheme that results in misleading or deceptive advertisements or practices. A lawyer may otherwise use another lawyer's or law firm's name, tradename, trademark, or logo in online advertising when used in such a way that, if displayed, the advertisement would not violate a disciplinary rule.