

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2015-03
Issued November 19, 2015**

FACTS

The inquiring attorney has maintained a personal injury practice for about fifteen years and wants to expand his/her law practice by initiating an advertising and marketing campaign. He/she has engaged an advertising agency to create a competitive marketing campaign that will consist of internet, print, television, radio and billboard advertising. The inquiring attorney states that in order to be effective, a marketing campaign must be short, simple, and memorable. The agency has developed a marketing campaign that is premised on a short and simple rhyming slogan with the inquiring attorney's last name. The slogan is "Win with [inquiring attorney's last name]." Use of the slogan would be accompanied by a disclaimer, such as "Prior results do not guarantee similar outcome." In addition, the inquiring attorney states that his/her contingent fee agreement would include similar disclaimer language which would be separately initialed by the client. The inquiring attorney also proposes a variation, "When you want to win, call [inquiring attorney's last name]."

The inquiring attorney desires to use the rhyming slogans as part of his/her marketing campaign, but before doing so seeks the Panel's opinion.

ISSUE PRESENTED

The inquiring attorney asks whether use of the rhyming slogans "Win with [inquiring attorney's last name]" and a variation, "When you want to win, call [inquiring attorney's last name]," constitute false or misleading communications prohibited by the Rules of Professional Conduct.

OPINION

The proposed slogans are permissible under Rule 7.1 as they are neither false nor misleading.

REASONING

The fundamental rule that governs lawyer advertising is Rule 7.1, which prohibits false or misleading communication about a lawyer or a lawyer's services. The question to be resolved in this inquiry is whether the proposed rhyming slogans, "Win with [inquiring attorney's last name]" and the variation, mislead the public about the inquiring attorney's services.

Rule 7.1 was amended effective April 15, 2007. Prior to the 2007 amendment, Rule 7.1 provided as follows:

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 as a whole 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;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(d) contains any testimonial about, or endorsement of, the lawyer without identifying the fact that it is a testimonial or endorsement, and if payment for the testimonial or endorsement has been made, that fact must also be disclosed. If the testimonial or endorsement is not made by an actual client that fact must also be identified. If the testimonial or endorsement appears in a televised advertisement, the foregoing disclosures and identifications must appear continuously throughout the advertisement;

(e) contains a dramatization or simulated description of the lawyer, partners or associates, offices or facilities, or services without identifying the fact that the description is a simulation or dramatization. If the dramatization or simulated description appears in a televised advertisement, the fact that it is a dramatization or simulated description must appear continuously throughout the advertisement. (As amend by the court on October 30, 1997.)

In 2007, Rule 1.7 was amended to state as follows:

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 as a whole not materially misleading;

(b) contains any testimonial about, or endorsement of, the lawyer without identifying the fact that it is a testimonial or endorsement, and if payment for the testimonial or endorsement has been made,

that fact must also be disclosed. If the testimonial or endorsement is not made by an actual client that fact must also be identified. If the testimonial or endorsement appears in a televised advertisement, the foregoing disclosures and identifications must appear continuously throughout the advertisement;

(c) contains a dramatization or simulated description of the lawyer, partners or associates, offices or facilities, or services without identifying the fact that the description is a simulation or dramatization. If the dramatization or simulated description appears in a televised advertisement, the fact that it is a dramatization or simulated description must appear continuously throughout the advertisement. (As adopted by the court on February 16, 2007, eff. April 15, 2007.)

Former subsections (b) and (c) were deleted from Rule 7.1 consistent with ABA Model Rule 7.1 which was amended in 2002 following the recommendation of the ABA's Ethics 2000 Commission. The language relating to unjustified expectations and unsubstantiated comparisons of lawyers in the former ABA rule were criticized as being overly broad, and in 2002, the ABA moved that language to the rule's commentary as examples of misleading communications. See ABA Annotated Model Rules of Professional Conduct, at 534 (7th ed. 2011.) That language in the Rhode Island Rules was likewise moved to the commentary in 2007. In line with the 2002 ABA amendments, the latter portion of former subsection (b) prohibiting statements that indicate a lawyer can achieve results by violating the Rules of Professional Conduct or other law, was added to Rule 8.4 (e) under the 2007 amendments to the Rhode Island Rules.

The new language about misleading statements and unjustified expectations in the Rhode Island commentary adds noteworthy qualifiers that were not part of the predecessor rule. Comments 2 and 3 now include "substantial likelihood" and "reasonable person" standards. In pertinent part, Comments [2] and [3] state as follows.

[2] A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. . . .

The issue before the Panel, more particularly stated, is whether there is a substantial likelihood that the proposed rhyming slogan “Win with [inquiring attorney’s last name]” and its variation would lead a reasonable person to form an unjustified expectation about the results the inquiring attorney can achieve. The Panel is of the opinion that they do not.

Advertising today is everywhere – internet, television, radio, billboards and printed media of every variety. The marketplace is saturated with all manner of slogans, jingles, rhymes, and sound bites developed to capture the attention of prospective consumers of goods and services in a competitive business world. Whether and to what extent an advertisement is deemed misleading must be measured by standards of reasonableness.

The inquiring attorney’s proposed rhyming slogans contain the word “win” together with the inquiring attorney’s last name. The Panel does not believe that there exists a substantial likelihood that a reasonable member of the public would conclude from the inquiring attorney’s rhyming slogans that the inquiring attorney has won or will win every case. The likelihood that the slogans might possibly be interpreted as creating such expectations is neither substantial nor reasonable, and would not justify a finding under the Rules that the slogans are misleading. The Panel notes that the inquiring attorney will include language in his/her retainer agreement which makes clear that the outcome of every case depends on its unique facts and circumstances, and other language that will dispel any unreasonable expectations.

Attached to the inquiring attorney’s request was a list of very brief descriptions of future video advertisements that may contain the proposed slogans. The Panel’s opinion is limited to the permissibility of the slogans, and does not extend to the overall content of future videos.

The Panel concludes that the proposed rhyming slogans, “Win with [inquiring attorney’s last name], and its variation, are permissible under Rule 7.1 as they are neither false nor misleading.