



**IOWA STATE BAR ASSOCIATION
COMMITTEE ON
ETHICS AND PRACTICE GUIDELINES**

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July 15, 2008

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
625 E. Court
Des Moines, IA 50309

Re: Ethics Opinion 08-04 Bar Association
Branded Advertisements

Dear Mr. Dinkla:

The Public Relations Committee of the Iowa State Bar Association has submitted 24 proposed print ads to the Committee and asked for an Opinion as to their propriety under the Iowa Rules of Professional Conduct. Initially we note that the Committee is not empowered as a matter of law to pre-approve a lawyer's advertising or marketing program. Our function is to advise and opine regarding the application of the Iowa Rules of Professional Conduct. Lawyers and law firms about to embark on an advertising and marketing program should conduct a thorough analysis of the Rules regarding their program. In fact, because of the natural tendency for the lawyer or law firm to view the matter subjectively they would be well advised to seek an independent objective legal opinion. For these reasons we have not accepted requests from lawyers and law firms to opine as to the propriety of their advertising and marketing programs.

We are now faced with a request from a bar association seeking to provide public awareness of the services of its members and we are asked to depart from our traditional position. The history

of lawyer advertising in the United States and in Iowa leads us to conclude that in the best interest of the public we must re-evaluate our position. We begin our re-evaluation by analyzing the role of the bar association in today's commercial market place and conclude by revisiting the concepts underlying the regulation of lawyer advertising from its inception in 1977 to the present.

Bar associations are not-for-profit entities composed of lawyers dedicated to the advancement of jurisprudence in a particular locale or regarding a particular area of the law. Some are general in their scope having as their targeted constituency the profession, the courts and the public. Others are more targeted in their catchment focusing only upon those members who share a common philosophy regarding a particular area of the law. Regardless of their operational vision, all have service to their lawyer members and the public as the reason for existence. Were we to depart from our refusal to issue advisory opinions regarding advertising and marketing programs and accept requests from bar associations we would be treating the association different from its individual members. However if we were to carve out an exception for bar associations it would have comfort in knowing that this Committee, as an independent and objective body of lawyers has looked and opined regarding the proposed advertisements. Before we decide which of the competing positions should prevail, we must turn our attention to the development of the law regarding legal professional advertising.

The protections afforded commercial speech were first made applicable to the legal profession in Bates v. State Bar of Arizona, 433 U.S. 350, 384, 97 S.Ct. 2691, 2709, 53 L.Ed.2d 810, 836 (1977). In Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 355 N.W.2d 565 (Iowa 1984)(Humphrey I), the Iowa Supreme Court adopted what is known as the Bates "rational decision-making" standard. The Iowa Supreme Court stated that the interest sought to be protected by Iowa's lawyer advertising regulation was a rational, intelligent and voluntary decision-making process used by the public to determine the need for legal services and selection of a lawyer. 355 N.W.2d. at 571.¹

¹ This interest was first recognized by the United States Supreme Court in Bates at 433 U.S. at 377. It was later re-affirmed by the Iowa Supreme Court in Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 377 N.W.2d 643 (Iowa 1985). We believe it to be incontestable.

Over a quarter century has passed since Bates and Humphrey. New and different forms of marketing have developed, particularly with the advent of the Internet. Likewise, a plethora of non-lawyer sellers of information and advisors have entered the marketplace. Today's public has many options from which to procure its legal information, and, in some instances, take advice. Sadly, some of those options are un-regulated and lack the quality assurance afforded by a professional and highly regulated legal profession. Consequently, we perceive that since Bates and Humphrey a new and equally dangerous hazard has entered the commercial marketplace. While Bates and Humphrey were concerned with hazards posed by overreaching and misleading lawyers, today's public may be equally at risk by its own ignorance of and reticence to consult the legal profession for assistance. This causes us to turn our attention to the role of bar associations.

Bar associations have as their constituents not only the legal profession but also the public that it serves. This is true of bar associations which have focused upon a certain area of the law as well as those concerned with a broader legal landscape. As not-for-profit organization, a bar association is not concerned about promoting the economic interests of a particular lawyer member. Instead in its public marketing, it is concerned with a broader and more institutional approach to provide the public with objective information regarding the need for legal services. Were it to do otherwise, the association and its members would lose market credibility. Bar associations accomplish this task by either institutional marketing or by providing its members with pre-prepared association-branded marketing and advertising materials. We find this to be consistent with the legal theory underlying Bates and Humphrey. Likewise we find the motivating factors underlying prepared bar association-branded advertising and marketing to be so significantly different from that involved in individual lawyer and law firm advertising so as to justify a departure from our previous position. We believe the significance difference to lie in the fact that the bar association has used its name in branding the advertisements. In essence it has put its reputation as well as those of its members on the line and acts as a safeguard against communication that is false, misleading or unverifiable or relies upon an emotional appeal or that which claims to relate to the quality of a lawyer's legal services. Consequently, we accept the Public Relations Committee's request and will accept requests from other bar associations regarding association-branded lawyer advertising materials. We now turn our attention to a review of the proposed lawyer marketing and advertising program.

Lawyer advertising is regulated by Rules 32:7.1 through 32:7.4. We find nothing in the 24 draft bar association branded advertisements that violate Rule 32:7.1(a) prohibiting false or misleading statements or Rule 32:7.1(b) prohibiting advertisements which "rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services." Furthermore, it would appear that the content of the draft advertisements comply with Rule 32:7.2 and is intended to be used and disseminated in accordance with the Rule.

However we do have concerns regarding advertisements No. 19 and 24 inasmuch as they use the term "expert" in their copy. The Committee is concerned that by using the term expert a reader may imply specialization or certification and that such implication may not in accord with Rule 32:7.4(d). We find nothing in the other proposed advertisements that would violate Rule 32:7.4 regarding communication of fields of practice and specialization.

We caution Iowa State Bar Association and its members who may use the prepared advertisements that even though the content of the advertisements may be in compliance with the Rules they must used and disseminated in accordance with the Rules.

Conclusion

It is the Opinion of the Committee that except as stated, the 24 draft association branded advertisements listed in the Annex as proposed by the Public Relations Committee of the Iowa State Bar Association are in accord with the Iowa Rules of Professional Conduct.

For the Committee,



Nick Critelli, Chair

Annex

The 24 advertisements in question are captioned:

1. "Your legal needs come and go. But we're always with you."
2. "You have a legal right to ignore this ad."
3. "Is the most dangerous weapon a pen?"
4. "Justice need not be blind."

5. "Good legal advice isn't expensive."
6. "Starting a business involves a ton of decisions."
7. "Do you want an LLC, PLC, LP or Inc.?"
8. "It's a jungle out there."
9. "Ready for a pop; quiz about your new business?"
10. "Most new businesses fail within the first few years."
11. "It takes more than a good idea to make a new business great."
12. "Buying a house? The last thing you need is Home Sweat Home."
13. "Your home is your biggest investment."
14. "We tie up real estate loose ends before they tie you down."
15. "Is closing on a home keeping you awake at night?"
16. "Buying a home is an adventure."
17. "Q: Who protects you when you buy a home?"
18. "Pay Uncle Sam what you owe."
19. "Is Uncle Sam making you cry 'uncle?'"
20. "Why shouldn't you prepare your own tax returns?"
21. "Want some light reading for tax time?"
22. "We prepare tax returns that add up."
23. "If tax laws were simple, just anyone could prepare returns."
24. "There's a lot of legal advice offered in a barbershop."