



Ohio Board of Professional Conduct

OPINION 2017-1

Issued February 10, 2017

Withdraws Opinion 98-9

Advertisement of Contingent Fee Arrangements

SYLLABUS: A lawyer who advertises litigation services on a contingent fee basis may not use statements such as “There is no charge unless we win your case” or “No fee without recovery,” if the lawyer intends to recover advanced litigation costs and expenses from the client, regardless of the outcome of the litigation. If a lawyer intends to recover advanced costs and expenses of litigation from the client, a disclaimer is required in the advertisement that explains the client’s obligations for repayment.

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Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.supremecourt.ohio.gov/boards/boc

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VICE-CHAIR

RICHARD A. DOVE
DIRECTOR
D. ALLAN ASBURY
SENIOR COUNSEL
HEIDI WAGNER DORN
COUNSEL

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QUESTION PRESENTED: ¹ Whether it is proper for a lawyer who advertises to use statements such as “No fee without recovery” or “You pay no fee unless you win” or “There’s no charge unless we win your case” or “You pay us only when we win.”

APPLICABLE RULES: Prof.Cond.R. 1.5, 1.8, and 7.1

OPINION: Because of the potential to mislead prospective clients, any obligation of a client to repay litigation costs and expenses must be revealed by a lawyer when advertising the availability of legal services on a contingent fee basis. In contingent fee cases, it is common for the lawyer to advance litigation costs and expenses, which may include filing fees, medical reports, expert testimony, and depositions, with the expectation that any recovery will be sufficient to cover the costs. Prof.Cond.R. 1.8

¹ The question presented in this advisory opinion is the same or substantially similar to the question presented in Adv.Op. 98-9.

permits a lawyer to “advance the court costs and expenses of litigation, the repayment of which may be contingent upon the outcome of the matter.” A lawyer is not required to recover the costs and expenses from the client. However, in some instances, a lawyer may require the client to directly repay the costs advanced by the lawyer if the case is unsuccessful or the recovery is too small to recoup the costs of litigation advanced by the lawyer. *See*, Prof.Cond.R. 1.5(c)(1).

Prof.Cond.R. 7.1 prohibits the use of false and misleading communications about the lawyer’s services. A statement is considered false or misleading under the rule if it omits a fact necessary to make the statement as a whole not materially misleading. Prof.Cond.R. 7.1 may be implicated when a lawyer advertising services on a contingent fee basis uses statements such as “No fee without recovery,” “There’s no charge unless we win your case,” or “You pay no fee unless we win” without the inclusion of additional information regarding repayment, if any, of costs and expenses. Statements such as these that omit reference to the client’s responsibility for expenses and costs are inherently false or misleading since the statement implies that the client will not be required to pay litigation costs, regardless of the outcome of the litigation. Furthermore, consumers of legal services may be misled by these statements because, without more information, the statements do not adequately differentiate between legal fees and litigation costs. After viewing a lawyer’s advertisement, a client may be unaware, until given the written contingent fee agreement to sign, or settlement funds are disbursed at the end of the case, that the lawyer’s initial advertisement was either false or misleading. If the lawyer intends to recover the costs and expenses from the client, the inclusion of a statement in advertising such as “contingent fee clients are responsible for the costs and expenses of litigation” is required to prevent a false or misleading communication.

The obligation of a lawyer to not use false or misleading communications in the context of advertising services on a contingent fee basis was first addressed in *Office of Disciplinary Counsel v. Zauderer* (1984), 10 Ohio St.3d 44.² In *Zauderer*, the respondent advertised that there would be no fee without a recovery, but did not inform his clients

² Under former DR 2-101(E)(1)(c), a lawyer advertising services on a contingent fee basis was required to, *inter alia*, disclose “the contingent fee litigant could be liable for payment of court costs, expenses of investigation, expenses of medical examinations, and costs incurred in obtaining and presenting evidence.” A similar specific requirement was not adopted under the Rules of Professional Conduct.

that they were still responsible for paying litigation costs. The Supreme Court found the respondent violated former DR 2-101(A) prohibiting false, fraudulent, misleading, and deceptive communications and received a public reprimand. On appeal to the Supreme Court of the United States, the sanction was upheld. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In affirming *Zauderer* in part, the U.S. Supreme Court underscored the importance in protecting the public from misleading advertising and reasoned that “[t]he advertisement makes no mention of the distinction between ‘legal fees’ and ‘costs,’ and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge.” *Id.* at 652. While *Zauderer* applied the former Code of Professional Responsibility to lawyer advertising misconduct, a lawyer’s obligation to not use false or misleading statements about his or her services remains unchanged under the Rules of Professional Conduct.

CONCLUSION: A lawyer may not advertise legal services on a contingent fee basis using statements such as “No fee without recovery,” “There’s no charge unless we win your case,” or “You pay us only when we win” if the lawyer intends to recover advanced litigation costs and expenses from the client, regardless of the outcome of the litigation. Such an advertisement is inconsistent with the Prof.Cond.R. 7.1 prohibition against false or misleading communications unless a disclaimer is included that explains the obligations of the client to repay costs and expenses. A lawyer seeking to avoid the inclusion of an explanatory statement regarding the payment of litigation costs also has the option to not advertise his or her services on a contingent fee basis.