

Professional Responsibility

By MARTIN COLE

Advertising: The Song That Never Ends

*"This is the song that never ends,
It just goes on and on my friend.
Some people started singing it, not
knowing what it was,
And they'll continue singing it forever just
because ..."*¹

Perhaps the topic in the field of professional responsibility that best fits the (in)famous lyrics above is lawyer advertising—it's an issue that never seems to go away! Just when it seems that regulations have stabilized and commentary ceased, some state revises its rules, most often to more strictly regulate lawyer advertising and solicitation. Then the national debate begins anew. "It just goes on and on my friend."

National Trends

From the late 1970s through the mid-1990s, the United States Supreme Court every few years accepted lawyer advertising cases under the commercial speech doctrine. Most often, it did so to find some state's restriction on advertising to be in violation of the 1st Amendment. It has now been over a decade since the Court's last major lawyer advertising pronouncement.

The urge to regulate lawyer advertising remains powerful in many jurisdictions. Thus, in between the Supreme Court's occasional forays into this area, or as now, some states seek to amend their rules to increase advertising regulation to the extent legally possible.

Worsening economic conditions may spawn more intense competition for clients, and thus advertisements that test the limits not only of good taste but truthfulness begin to appear.

In 2007, New York and Nevada adopted substantially modified rules for lawyer advertising in their states. Missouri did so two years earlier. New York's new rules, not sur-

prisingly, and specifically the various disclaimers that these rules require, received the most media attention since a large percentage of major law firms and media sources have a presence in New York.

Missouri and Nevada created new requirements for screening and approving advertisements by disciplinary counsel staff. States vary as to this type of approach, as some require all ads be so approved while others make filing an optional "safe harbor" upon approval. States that undertake to review advertisements before publication usually discover it to be a major task.

Why does this trend to restrict lawyer advertising and solicitation continue on and on? Perhaps it's as simple as the fact that rules do exist and "regulators need to regulate," but I suspect it also reflects an honest distaste by many lawyers and courts for the content of certain advertisements, especially television ads containing questionable dramatic presentations. Ironically, "good taste" is not one of the bases for rejecting an ad even in the states requiring approval; rather, the reviewer or adjudicator must find false or misleading content. This does, therefore, often lead to an expanding list of the types of content that by rule are deemed to be misleading, such as the use of actors, dramatic recreations, or testimonials. Others have attempted to limit "self-laudatory" designations such as "Super Lawyer."²

Minnesota's Approach

Minnesota last amended the Rules of Professional Conduct in October 2005. There were several changes to Rules 7.1-7.5 concerning advertisement and solicitation. If anything, Minnesota seems to be bucking the national trend, as the revisions appear to have loosened some of the restrictions on lawyer advertising that existed previously.

For example, several types of communications that previously were expressly considered to be misleading under Rule 7.1, MRPC, now are discussed only in the comment to the rule as possible examples of misleading statements. Statements that are likely to create an unjustified expectation about the results a lawyer can obtain or that make an unsubstantiated comparison of a lawyer's services with those of other lawyers were expressly prohibited before 2005. Now, as to comparisons, the

comment indicates that such a comparison would be misleading if "presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." Assuming not all comparisons would be of this level, it appears that some comparisons may now be permitted.

Minnesota also amended Rule 7.3 to allow direct contact with prospective clients with whom the lawyer has a "close personal" relationship. Previously, in-person or telephone solicitation was permitted only as to family members or individuals with whom the lawyer had a prior professional relationship (essentially former clients); contact with such individuals remains permitted. The reach of the "close personal" exception has not yet been fleshed out, but it appears to enlarge the group of persons a lawyer may contact directly.

There is not any general movement afoot to increase advertising regulation in Minnesota. For example, neither the Director's Office nor the Lawyers Board has ever expressed interest in screening advertisements. The use of terms such as "Super Lawyer" remains permitted as long as the designation was granted by some valid entity that is identified. This should not be read to imply that Minnesota has completely abandoned all regulation of false or misleading advertisements. For example, the Lawyers Board's recently reconstituted opinion committee is considering several possible subjects for issuing opinions, including some advertising topics such as whether the use of "& Associates" in the law firm name of a solo practitioner is per se misleading. Several other states have so opined.

Advisory Opinions

That most lawyers want to comply with the advertising rules is reflected in the fact that advertising remains one of the most common areas for requests for an advisory opinion from the Director's Office while a minimal source of complaints.⁴ Consistent with policy identified above, the attorneys answering advisory opinion inquiries will not review or approve specific copy for advertisements or solicitation letters, as they do not know whether assertions made about the lawyer or law firm are in fact true.⁵ Nor will they tell you whether your competi-



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tor's advertisements comply with the Rules of Professional Conduct. They will nevertheless try to assist lawyers generally with questions about advertising and solicitation to help ensure compliance.

Common questions for advisory opinion requests about advertising include: whether the words "Advertising Material" must accompany a particular proposed solicitation letter; whether a particular proposed trade name for a law firm is allowed; are there any limitations on the use of dramatic presentations, the use of actors, or testimonials; what are the current restrictions on calling yourself a specialist; can comparative or superlative adjectives (better, best) ever be used; is it misleading for an attorney to maintain her maiden name as a lawyer if she is taking her husband's name for other purposes. By the way, the answer to that last question is that she need not change her professional name, as long as only one name is used for all purposes in practicing law and there is no attempt to mislead or defraud.

Conclusion

It has been said on several occasions that the lack of advertisements of questionable taste or truthfulness in Minnesota is what allows us to continue to maintain a less restrictive approach to lawyer advertising enforcement than many other states. It is impossible to speculate whether that approach would or could continue should the tone of advertising substantially change. For now, while nationally the urge to regulate advertising seems to never end, here in Minnesota we're just humming quietly.

Notes

¹ This version of the lyrics is from Wikipedia. There may be some slight variations found elsewhere. There is at least one website that claims to have the "complete" lyrics to the song, which I visited on a whim, then thought better of it.

² *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371 (1995).

³ New Jersey has most notably attempted to prevent the use of this unofficial designation or participation in the process of nominating or voting for the designees. That opinion remains under review.

⁴ Questions about conflicts of interest overwhelmingly are the most common area for inquiry.

⁵ In fact, the Lawyers Board has authorized the Director's Office to decline to issue an opinion concerning lawyer advertising whenever it is deemed appropriate.



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