

REGULATION OF LAWYER ADVERTISING

By
Charles E. Lundberg, Member
Lawyers Professional Responsibility Board

Reprinted from *Bench & Bar of Minnesota* (February 1995)

What role should the lawyer discipline agency play in policing lawyer advertising? This issue has been the subject of much debate for the past several years. In 1992, the MSBA Lawyer Advertising Committee issued a report which recommended several restrictions on lawyer advertising. The report contained a resolution noting that the Lawyers Professional Responsibility Board had in the past "made a considered judgment to maintain a reactive posture" to complaints involving lawyer advertising, and recommended that the board revise its approach to be more "pro-active."

The committee's assertion that the board has not been "pro-active" in policing lawyer advertising is, if anything, an understatement. It is and has been the board's general policy not to issue formal or informal advisory opinions concerning advertising.

For example, the board recently considered whether it should issue an opinion interpreting the language in Rule 7.2(f) that requires the word "ADVERTISEMENT" to appear "clearly and conspicuously" at the beginning of any written solicitation. The request for an interpretation of this phrase was occasioned by several complaints about advertising (interestingly, all complaints by other lawyers) involving ads where the required disclaimer arguably did not comply with the rule. In one instance, for example, far from being "conspicuous" the word "advertisement" was buried in the smallest print of the letterhead.

CLEAR AND CONSPICUOUS

The rule requiring a clear and conspicuous advertising label was part of the 1992 MSBA Lawyer Advertising Committee Report. It appears that the committee decided not to define this language further for Minnesota lawyers. Other states, however, have attempted - by rule - to explain what "clearly and conspicuously" means in this context. Kentucky, for example, requires the language to be "in type at least as large as the type in the body of the letter." Delaware, Oklahoma, and Tennessee have similar requirements. South Carolina's rule says no more than the Minnesota rule does, requiring the language to be "printed in capital letters and in prominent type." North Carolina has an intriguing way of leveraging off the advertising lawyer's self-image, requiring the label "advertisement" to appear in print "as large or larger than the lawyer's or law firm's name." Finally, Nevada requires print "at least as large as the largest of any telephone number" appearing in the solicitation.

BOARD CONCERNS

The Minnesota Lawyers Professional Responsibility Board ultimately decided not to address this issue in a formal opinion, for several reasons. In the first place, advertising issues are generally deemed less important from a public protection standpoint than other ethical issues that the board must address. To this extent the board's limited resources preclude a "pro-active" approach to advertising. Indeed, some states

that have been more active in this area have found their professional responsibility agencies overwhelmed by their role as the advertising police. In Florida, for example, a staff of seven is reportedly required to review and approve proposed lawyer advertisements.

Moreover, it has generally been the case that complaints about lawyer advertising come not from consumers or the general public but rather from other lawyers. The board is loath to get involved in commercial wars among competing lawyers.

The board is also concerned about potential antitrust and constitutional implications that may be raised by restrictions on commercial speech. This area of the law has recently undergone numerous changes, and it is still unclear to what extent a state agency may properly regulate advertising.

AD ADMONITIONS

Notwithstanding the foregoing, the board has acted on a number of advertising issues over the past few years. For example, at least 20 private admonitions relating to advertising have been issued, including the following:

| A lawyer's yellow pages ad offered a "free consultation" to new potential clients. A potential client complained after consulting with the lawyer about a legal matter for approximately two hours, for which the lawyer billed the client \$200. The lawyer explained that the "free consultation" was limited to a five- to ten-minute preliminary discussion. The Office of Lawyers Professional Responsibility found that in light of this undisclosed limitation, the ad was false and misleading in violation of Rule 7.1.

| A lawyer received an admonition for advertising his practice under a law firm name when in fact there was no firm but merely an office sharing arrangement.

| Lawyers have been disciplined for running ads that made unsubstantiated comparisons in violation of Rule 7.1(c). For example, claiming to have special expertise and knowledge about juries, claims adjusters, etc. where that claim cannot be factually substantiated is a violation of the rules.

| A couple of admonitions have been issued where lawyers' advertisements claimed that they were "specialists" in certain areas of the law where there is no certified specialty approved by the Minnesota State Board of Legal Certification.

SPECIALIST ADVERTISING

The "specialist" issue promises to be an area of further development over the next few years. A complaint was recently brought against a Minnesota lawyer for advertising that he was certified as a specialist by a law association in an area of law not approved by the Minnesota Board of Legal Certification. Minnesota Rule 7.4(b) flatly states that a lawyer shall not state or imply that he or she is a specialist in a field of law unless the lawyer is certified as a specialist in that field by a board or other entity which is approved by the Minnesota Board of Legal Certification. Since the Minnesota certification board had not approved a specialty certification in this area of law, the lawyer's ad appeared to be a clear violation of the rules. The Office of Lawyers Professional Responsibility, however, recognized that in light of the developing constitutional protection for commercial speech, including several U.S. Supreme Court cases striking down restrictions on truthful advertising by professionals, there was a serious concern about whether it would be constitutionally permissible to sanction this (admittedly true) advertisement. Accordingly, the Office

determined that discipline was not warranted.

A related certification issue was raised at the September 9, 1994, meeting of the MSBA Board of Governors based on a recommendation of the Rules of Professional Conduct Committee. The committee had proposed changes to Rule 7.4 that would allow lawyers to call themselves “specialists” even in absence of a certification. After lengthy debate, the Board of Governors revised the proposal to maintain the prohibition on claiming to be a specialist absent certification. (This proposal was before the MSBA House of Delegates at its January meeting but results were not available in time to be included here.)

CONSTITUTIONAL QUESTIONS

Substantial questions remain about whether the constitutional commercial speech doctrine might preclude a state agency from sanctioning truthful and verifiable claims to be a “specialist.” This is especially true where the state has not approved or recognized a certifying board or entity in the pertinent area of law. On the other hand, of all the advertising-relating issues, an inaccurate claim to be a specialist in a particular area of law may well pose the most potential risk to the public, especially since the word “specialist” is subject to such broad interpretation.

Not all advertising issues raise such broad constitutional concerns, however. Minnesota lawyers should be aware that the advertising rules remain in effect, and when a particular advertisement which appears to violate the rules is brought to the board’s attention, it may well result in discipline.