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Some Comments on Advertising

Roy L. Steinheimer, Jr.

From the Law Schools

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SOME COMMENTS ON ADVERTISING

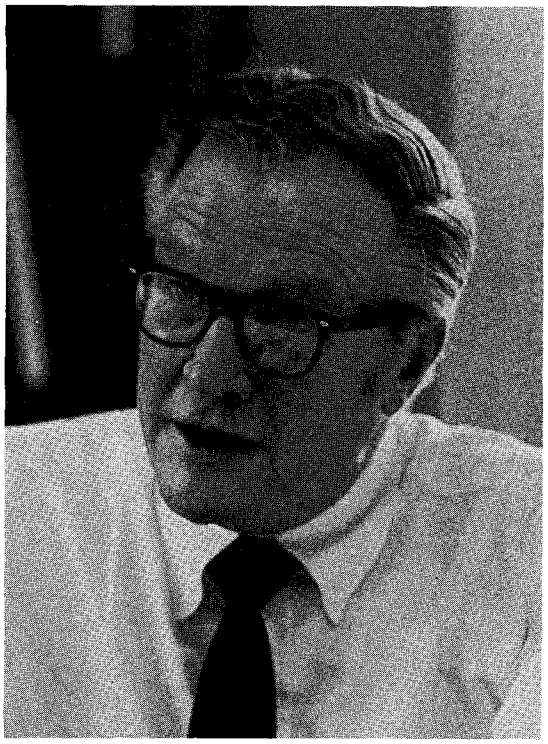
THROUGH the years, the public image of lawyers has been less than flattering. One of Shakespeare's characters said "Kill all of the lawyers." Carl Sandburg's hearse horse snickered as he hauled the lawyer away. Charles Dickens was not kind to lawyers in his novels. Samuel Johnson once observed that "I do not like to speak ill of any man behind his back, but I do believe he is a lawyer." A recent public opinion survey in Virginia which was conducted under the auspices of the Virginia Bar Association indicates that public esteem for lawyers ranks below plumbers and only slightly above television newscasters and members of city councils.

In the past, we may have been able to shrug off this somewhat tarnished image by rationalizations born of a smug complacency about our status as professionals. But the scene is changing. In this age of consumerism, public attitude toward lawyers is giving way to public action against them. The legal profession is increasingly under attack. Despite some resistance from our profession, we have been told to accept group legal services as a viable concept. Our minimum fee schedules have been struck down. Our resistance to change has resulted in an erosion by the courts of our status as a profession. We could well be on the brink of becoming tradesmen rather than professionals if we aren't careful. To maintain our status as professionals, we must demonstrate a capacity to foster change within our ranks which will make lawyering fulfill the needs of the public. We must be willing to experiment with ways and means of bringing legal services to a broader spectrum of the public in a manner and at a price which is acceptable to the public.

One criticism of our profession which is gaining momentum, is that under our Code of Professional Responsibility we prevent the dissemination of information which would make it possible for the public to understand the availability of legal services and to make informed decisions in arranging for such services. The point is made by consumer groups that advertising by lawyers would be the answer to this problem. Indeed, the Consumers Union now has an action pending in which it charges that the provisions of DR 2-102(A)(6) of the Code of Professional Responsibility violate the First and Fourteenth Amendment rights of the public to obtain and publish information concerning attorneys practicing law in Arlington County, Virginia. Actions along similar lines are pending in California, New York and Wisconsin. The Department of Justice only thinly veils its feelings that the Code's restrictions on advertising may have antitrust implications.

Once again our methods of conducting our professional affairs are under the guns. It is difficult to gainsay the public's need for more information. But to suggest that such information should be disseminated through advertising would seem to many in our profession to be akin to an attack on motherhood. After all, haven't we always diligently striven to control the size of name plates and the information which can appear on letterheads and cards in order to maintain the dignity of our profession? What, then, should be our reaction to this issue of advertising? Should we fight still another case to the highest court in the land and put our status as a profession in further jeopardy? Or should we, instead, recognize the public need for information and voluntarily seek ways and means of providing such information in a dignified and responsible manner? Advertising need not necessarily mean neon lights and TV commercials.

I think the reaction of the ABA to the advertising issue is heartening. It indicates a desire to solve this problem from within our profession by orderly change in our methods of operation rather than by resort to the courts. As a trial balloon intended to stimulate discussion, the Committee on Ethics and Professional Responsibility recently suggested that the flat prohibition on advertising now found in DR 2-101 be changed to permit advertising so long as it does not contain a "false, fraudulent, misleading, deceptive, or unfair statement or claim." The text of the proposed amendment to DR 2-101 is as follows:



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"DR 2-101. Publicity and Advertising

"(A) A lawyer shall not, on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent misleading, deceptive, or unfair statement or claim. A 'public communication' as used herein includes, but is not limited to, communication by means of television, radio, motion pictures, newspaper, book, law list, or legal directory.

"(B) A false, fraudulent, misleading, deceptive, or unfair statement or claim includes a statement or claim which:

(1) contains a remisrepresentation of fact;

(2) is likely to mislead or deceive because in context it makes only a partial disclosure of relative facts;

(3) contains a client's laudatory statements about a lawyer;

(4) is intended or is likely to create false or unjustified expectations of favorable results;

(5) implies unusual legal ability, other than as permitted by DR 2-105 [designation of specialty and statement of limitation of practice];

(6) relates to legal fees other than a standard consultation fee or a range of fees for specific types of services without fully disclosing all variables and other relevant factors;

(7) conveys the impression that the lawyer is in a position to influence improperly any court, Tribunal, or other public body or official;

(8) is intended or likely to result in a legal action or legal position being taken or asserted merely to harass or maliciously injure another;

(9) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;

(10) contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived.

"(C) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity unless the fact of compensation is made known in such publicity."

This proposal is so sweeping in its permissiveness on the matter of advertising that it has served the purpose of getting the attention of lawyers and bar groups across the country. It has stimulated discussion and counter-proposals.

In a reaction to this proposal, the Section of Economics of Law Practice of the ABA has criticized the proposal for dropping all bars to advertising so long as the vague prohibition against a "false, fraudulent,

misleading, deceptive, or unfair statement of claim" in such advertising is not transgressed. The Section of Economics of Law Practice suggests that definite limits should be placed on the contents of advertisements. The purpose of advertising is to permit the public to make an informed arrangement for legal services. This, the Section suggests, can be done by furnishing information which would be limited to (1) name, (2) address, (3) telephone number, (4) year of birth, (5) year of admission to state bar, (6) years of total practice, (7) designation of areas including designation as a general practitioner, (8) credit card acceptability, (9) office hours and out-of-office availability, (10) languages spoken and written and (11) initial consultation arrangements, e.g., no charge, fixed charge, etc.

State Bar Associations have also reacted to the ABA trial balloon. For example, at the Mid-Winter Meeting of the Virginia Bar Association, the following action was taken:

> "Resolved that the Virginia Bar Association, having reviewed the proposed revisions of Canon 2 of the Code of Professional Responsibility as submitted by the American Bar Association Standing Committee on Ethics and Professional Responsibility, concludes that such revisions are not in the best interests of the public or the profession and should not be adopted. Specifically, the Virginia Bar Association is of the opinion (a) that DR 2-101, DR 2-103, DR 3-104, and DR 2-105 and related Ethical Considerations should not be revised and (b) that DR 2-102 and related Ethical Considerations should not be revised except as to DR 2-102(A)(6) concerning law lists and directories and what information may properly be included therein, but even here the Virginia Bar Association expresses concern about the publication of fees for the reason that such information is likely to be misleading."

With the various responses to the trial balloon in hand, at the Mid-Winter Meeting of the ABA in Philadelphia, the House of Delegates approved the following amendments to DR 2-102(A) of the Code of Professional Responsibility:

> "(A) A lawyer or law firm shall not use *or participate in the use of* professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:
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> * * *
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> "(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing *in the alphabetical section* may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers, *and the listing in the classified section must comply with the provisions of DR 2-102(A)(6).* The listing shall not be in the distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.
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> "(6) A listing in a reputable law list, [or] legal directory, *a directory published by a state, county or local bar association, or the classified section of telephone company directories* giving brief biographical and other informative data. A law list or *any* directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list *or any directory* is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates[;], a statement that practice is limited to one or more fields of law[;], *or* a statement that the lawyer or law firm specializes in a particular field of law or law practice, *to the extent permitted by the authority having jurisdiction under state law over the subject and in accordance with rules prescribed by that authority;* [but only if authorized under DR 2-105(A)(4)] date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; member-

ships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; *whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject."*

This action is a step in the right direction. Whether it strikes the proper balance between the public's need for information in engaging the services of lawyers and the need to maintain the dignity and integrity of our profession remains to be seen. We need to "stay loose" as the scene unfolds.

Meanwhile the "ball is in our court." Are the lawyers of Virginia willing to face the issue of advertising in a realistic manner? I, for one, would hope so. Neon lights and TV commercials have never appealed to me in any context and certainly not in the context of a profession. Solutions short of this are possible if we will voluntarily and dispassionately address ourselves to the problem.

Malpractice!

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(11) Don't accept a complicated case in an area in which you are not fully competent. Refer it to or associate with a lawyer who is a recognized specialist on the subject.

(12) Meet your deadlines. Failure to file promptly is the *main* area in which most malpractice cases arise. If you don't have an office routine or foolproof "tickler" or reminder system which you check religiously every day, with provision made for coverage when you are out-of-town, install one *immediately.*

In conclusion, in the present epidemic of legal malpractice liability, we face a problem of monumental proportions. This is therefore the time for all of us, collectively and individually, to reflect maturely and react constructively so that we may continue to discharge as successfully as possible our heavy duty of responsibility to the public.

Book Review

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Rules Committee of the Court—which undertook the revision of the rules—might have been desirable.[3]

[3] Much of the content of these Notes has, of course, been included by paraphrase in the editorial content of the present work. Also, the official Notes of the Rules Committee have been published as a permanent record in Volume 60 of the United States Tax Court Reports. Nevertheless, one of the values of the present work lies in the fact that it brings together in one ready reference the various basic materials relevant to the formal rules of practice and procedure of the Court.

While the work is not exhaustive as a treatise on Tax Court litigation, and is manifestly not a substitute for up-to-date research for late developments, it nevertheless does have real value as a working tool for the tax practitioner by bringing together in one place for ready reference the formal rules of the Court, relevant explanation and comment concerning their interpretation and application, case law, and pertinent forms for implementation of those rules.

ARTHUR B. WHITE