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Lawyer Advertising In Maryland: Will It Work For You?

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by A. Thomas Krehely, Jr.

Well, you finally graduated from law school and now you're thinking about starting your own practice; or, maybe you've been working with a firm for several years and you've decided to hang out your own shingle and go it alone. In either event, in order to make a success out of your new venture you're going to need clients. Question: How do you get those clients? Answer: You advertise!

When you think about it, attorneys are really delivering a product to the public in the form of legal services and those services can be marketed like every other product. Attorneys want to tell the public what services they have to offer and the cost of those services. This can be accomplished by advertising.

The purpose of this article is to examine the current regulations on advertising by Maryland attorneys and to provide an overview of such advertising in general.

Ever since the landmark case of *Bates v. State Bar of Arizona*,[1] which allowed truthful advertising of attorneys' fees and services, advertising and permissible solicitation have been valuable aids to attorneys wishing to start their own law practice rather than joining a large traditional-style firm or a well-known legal clinic. At the same time, advertising performs a valuable service to the community. It provides relevant information, such as the type and cost of legal services available to legal consumers, who are then in a better position to make an informed decision when selecting an attorney.

Although many attorneys argue that advertising will only reduce the public's confidence in the legal profession, it would seem more likely that the converse of that argument is true. As the Supreme Court stated in *Bates*:[2] "The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney." The Court went on to say that: ". . .(C)ynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients."[3]

The arguments for and against advertising by attorneys are many and varied, but it is not the purpose of this article to explore them. Rather, the fact is that advertising is here to stay and the legal profession should learn how to use it responsibly.

Attorney Advertising Is Still Subject To State Regulation

While the *Bates* decision opened the door to attorney advertising, it nevertheless allowed for some regulation by the Bar and state courts. For example, a state bar can still pass regulations designed to eliminate advertising which is false, deceptive, or misleading.[4] Also, restrictions on the time, place or manner of attorney advertising will be allowed provided that they are imposed without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.[5]

Moreover, states may impose a ban on in-person solicitation of business for pecuniary gains,[6] and may also prohibit a lawyer from practicing under a trade name or one that is misleading as to the identity of the lawyer or lawyers practicing under such a name.[7]

Following the *Bates* decision, the Maryland Court of Appeals amended the Maryland Code of Professional Responsibility in order to conform with the new guidelines enunciated by the Supreme Court. The Court of Appeals adopted what can best be described as a wide-open, "anything goes" attitude towards advertising. Generally, as long as an attorney complies with Maryland's new DR 2-101 and DR 2-102,[8] advertising may take any form.

Specifically, the new Maryland Rules prohibit lawyer advertising which is false, misleading, deceptive or unlawful.[9] The Rules, in contrast with the rules of some other states,[10] do not prohibit the use of any particular communication form by advertisers. Advertisements that contain misstatements of facts,[11] or, that are misleading or deceptive because of relevant facts are only partially disclosed,[12] are prohibited by the Rules. In addition, advertisements that are intended or likely to create false expectations,[13] or, that cause a reasonable person to misunderstand or be deceived,[14] or, that constitute an otherwise unlawful act,[15] are likewise prohibited.

A notable aspect of the Maryland Rules is that advertisement of fees is not restricted, except as such advertisements violate the general prohibitions of Maryland DR 2-101(A) (1) through (5). The Rule that regulates the names of law firms is identical with the ABA Model Code of Professional Responsibility.[16] The Rules also prohibit lawyers from holding themselves out as having a partnership unless they in fact do,[17] and regulate partnerships between lawyers licensed in different jurisdictions.[18] Unlike the ABA Model Code of Professional Responsibility, the Maryland Rules do not specifically regulate the use of

professional cards, office signs, letterheads and similar devices, nor do they prohibit lawyers from indicating that they are also engaged in another profession or business. These kinds of public communications are instead regulated under the general provisions of Maryland DR 2-101.

Using the broadest interpretations possible, it would appear that the Maryland Disiplinary Rules allow the following forms of advertising: Newspaper ads, *Yellow Pages,* handbills, billboards, radio and television. The advertisement of contingency fees and fees for other services would also seem permissible. Whether attorneys may use direct mail advertising is open to question since the Maryland Rules are by no means clear on this point. However, since the Maryland Rules, as stated above, do not prohibit the use of any particular form of advertising, and since Maryland DR 2-101(A) uses the words "...any advertisement or other *public* communication..." (emphasis added), then it seems arguable that direct mail advertising sent to the general public would be permissible.

The Maryland Court of Appeals has not yet ruled on the matter and the State Bar Association has not issued any opinions offering guidance to Maryland lawyers. However, courts in other jurisdictions have already held that direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed.[19]

The confusion and uncertainty regarding direct mail advertising may soon be cleared up. In June, the Supreme Court decided to hear *In the Matter of R.M.J.*[20]. The case is being appealed by Richard Jacobs, a Clayton, Missouri, lawyer who was reprimanded for violating Missouri's Code of Professional Responsibility. Jacobs sent announcements to several strangers about the opening of his practice in 1979. The Missouri Code limits such mailings to lawyers, clients, former clients, personal friends and relatives.

Although the Missouri Bar asked the state supreme court to disbar Jacobs, the court decided that he deserved a private reprimand. Jacobs alleges in his appeal that the Missouri rules are an unconstitutional restraint of commercial speech. The case will give the Supreme Court a chance to either restrict or enlarge their holding in *Bates.*

Lawyers Are Still Shy When It Comes To Advertising Even Though It Has Proven Effective

Although advertising has increasingly been utilized by Maryland attorneys, it is not surprising that since the *Bates* decision lawyer advertising has not been used to the fullest extent possible. For example, surveys show that only nine percent of all lawyers advertise.[21] One reason for this lack of advertising may be that attorneys find advertising demeaning or else they just don't feel they need it. Another reason is that many attorneys have the idea that a "one-shot tombstone" ad is all they need to generate an increase in the number of clients who come into their office. Ultimately, when the lone ad fails to obtain the desired results, they abandon advertising altogether. Their mistake is in believing that *any* advertising will be successful. What they don't know is, advertising can only be successful if it is part of a well-planned, fully coordinated campaign targeted to those people who will need the services the attorney can provide.

Lawyers who have carefully determined the goals of their advertising and have undertaken a well-planned approach to meet those goals have had much success with advertising. For example, the Legal Clinic of Jacoby & Myers (which was the pioneer in the art of television advertising and which now has over 29 offices in California, 14 in New York and plans to have an office in every major city in the United States by 1985), acquired 4,500 new customers per month due to its television ads. Solo practitioner Ronald Sharrow of Maryland generated $500,000 a year in legal business, with a $50,000 overhead, due to his television campaign focusing on personal injury cases.[22] The response to the television ad by Cawley & Schmidt was also good. The firm ran 30-second and 60-second advertisements on three television stations over a six-week period in January and February of 1978 for the six Baltimore offices and as a result they generated over 700 appointments beyond those normally scheduled during a similar period.[23] Gary L. Gallo, who was the first attorney in the Washington, D.C. area to use extensive television advertising, has expanded his clinical practice from one office to six since he began to advertise. According to his brother, Glen Gallo, who coordinates the ad campaigns, the expansion was the direct result of the television advertising.

Generally, advertising is directed at markets that will generate high volume, e.g., simple wills, uncontested divorces, bankruptcies and name changes. Despite the success of those attorneys mentioned above, television advertising is not the only means available to the Maryland lawyer to reach specific markets. For example, attorneys can use newspapers, magazines, radio, outdoor media, *Yellow*

Pages, and transit system advertising. However, it is important to keep in mind that one form of advertising may be more cost-effective than another. This can be seen in a nationwide survey of 217 firms of all sizes conducted by the Washington, D.C. based National Resource Center for Consumers of Legal Services (NRCCLS).[24] The survey found that *Yellow Pages* advertising was more cost-effective than advertising in daily newspapers. The ad revenue/outlay ratios for firms that advertised only in the *Yellow Pages* were "much higher" than the average for all firms, while firms that used only newspapers had ratios below average. The survey also showed that "in very competitive markets (e.g., divorce and bankruptcy) it may be necessary to advertise extensively in newspapers in order to attract an efficient volume."

Whatever medium the attorney selects it is apparent that an effective ad campaign can bring results. One of the most startling conclusions reached by the survey quoted above was that responding lawyers made an average of $7.93 in fees for each dollar spent on advertising. Of the fifty attorneys who responded to the survey, thirty-three supplied information about their advertising revenues and expenses. They had an average of 174 ad-generated cases in the past year, and the average revenue for each of those cases was $215. Their advertising costs averaged $27 per case, for their nearly $8 average yield per dollar spent. None of the firms made less than twice what was spent on advertising from the ad-generated cases. Although the survey has been criticized because of the small number of attorneys responding to it,[25] it nevertheless demonstrates that advertising can bring results.

William A. Bolger, who is staff attorney for the NRCCLS, offers a word of caution to those attorneys who are considering the possibility of advertising. He says, "Attorneys may find that their advertising campaigns are so successful that they are bringing in more clients than they can efficiently handle. This is particularly true for attorneys who are unwilling to expand their operation." While this comment may put dollar signs in the eyes of some young attorneys, it is perhaps a sobering thought to remember that an attorney with too many cases on his hands may find himself being sued for malpractice before he knows it.[26]

Advertising Campaigns Can Have Disastrous Results

Of course, advertising campaigns can backfire if they are not effective in achieving the desired results. This happened in Boston where the firm of Springer & Langson went into bankruptcy as a result of its unsuccessful advertising campaign. $300,000 was spent on advertising which did not generate a sufficient response. The firm apparently received only ten responses to a thirty second television ad when it needed thirty or forty in order to make money. The ads began running in May 1979 and by October of that year the firm had gone into bankruptcy.

Lack of a well-planned ad campaign is often the major cause behind disasters like that of Springer & Langson. This is especially true for Legal Clinics. For example, the July/August 1979 issue of the *Reports* of the State Bar of California indicated that the high advertising budget of clinics raises their overhead eighty percent rather than the forty percent of the average law office. Therefore, a heavy initial reliance on advertising could spell disaster for a legal clinic unless its advertising campaign is carefully planned and tied to already well-functioning office procedures.

Advertising Agencies Can Be A Big Help To Attorneys Who Decide To Advertise

Attorneys who feel reluctant about planning their own advertising campaigns may want to consult with an advertising agency. An ad agency can help attorneys in defining their target audience, developing specific advertising objectives and strategies, creating production schedules which would include precise production costs and helping to evaluate the success or failure of their advertising campaigns by using field research techniques.

However, a caveat is in order: before selecting an ad agency, attorneys should be certain that the agency is qualified to handle their particular account as legal advertising is a newly emerging specialty.

Conclusion

For many years now advertising has been a subject involving a great deal of debate within the legal profession. However, instead of debating the issue of whether attorneys should or should not advertise, it might be more constructive if the legal profession focused its attention on developing clear and precise guidelines that will encourage responsible lawyer advertising.

In this regard, perhaps the advertising guidelines proposed in May of this year by the ABA (Kutak) Commission on Evaluation of Professional Standards will be of some help. No doubt more involvement is necessary by the local Bar Associations in educating attorneys on the rules and proper forms of advertising. Ultimately, it is the individual responsibility of all attorneys to educate themselves on the rules of advertising and to stay within the bounds of those rules. As the Code of Professional Responsibility states: "The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy."[27]

Certainly, lawyer advertising that contains catchy slogans and all the other "gimmicks" now used by advertising professionals will not benefit the consumer, nor will it improve the image of the legal profession. But, responsible lawyer advertising can and will be a benefit to the consumer, as well as the legal profession.

Those attorneys who would like more information on lawyer advertising should write to the ABA Commission on Advertising, American Bar Center, 1155 East 60th Street, Chicago, Illinois 60637.[28]

Footnotes

[1] 433 U.S. 350, 97 S.Ct. 2691 (1977).
[2] *Id. at* 370, 97 S.Ct. at 2702.
[3] *Id. at* 371-2, *97 S.Ct. at* 2702.

[4] *Id. at* 375, 97 S.Ct. at 2704.
[5] Friedman v. Rogers, 440 U.S. 1, 9, 99 S.Ct. 887, 894 (1979).
[6] *See, e.g.*, Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912 (1978) (where an attorney solicited contingent fee agreements from two accident victims. While both victims eventually discharged the attorney, he nevertheless obtained a share of the insurance recovery of one victim in settlement of his suit against her for breach of contract. The Supreme Court affirmed his indefinite suspension for professional misconduct, distinguishing the case from Bates, because in-person solicitation exerts pressure and often demands immediate response, unlike media advertising, and thus poses greater potential for harm to prospective clients).
[7] Matter of Oldtowne Legal Clinic, 285 Md. 132, 400 A.2d 1111 (1979).
[8] The Disciplinary Rules contained in the Code of Professional Responsibility and adopted by the Court of Appeals represent the mandatory, minimum level of conduct required of members of the Maryland Bar. Andresen v. Bar Association of Montgomery Co., 269 Md. 313, 305 A.2d 845, cert. denied, 414 U.S. 1065 (1973).
[9] Maryland DR 2-101(A).
[10] *See, e.g.*, Delaware's DR 2-101(A) and Missouri's DR 2-101.
[11] Maryland DR 3-101(A) (1).
[12] Maryland DR 2-101(A) (2).
[13] Maryland DR 3-101(A) (3).
[14] Maryland DR 2-101(A) (4).
[15] Maryland DR 2-101(A) (5).
[16] ABA Code DR 3-102(B).
[17] Maryland DR 2-102(B).
[18] Maryland DR 3-102(C).
[19] *See, e.g.*, Koffler v. Joint Bar Association, 51 N.Y. 2d 140, 413 N.E.2d 927 (1980); Eaton v. Supreme Court of Arkansas, 207 Ark. 573, 607 S.W.2d 55 (1980), (held the particular form of direct mail advertising unacceptable in this case, but did not disapprove of direct mail advertising in general); Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky.1978).
[20] (80-1431); 50 U.S.L.W. 3191 (1981).
[21] 67 ABA Journal 1108 (September, 1981).
[22] See, Andrews, Birth of a Salesman: Lawyer Advertising and Solicitation, *p.* 17 (ABA Press, 1980).
[23] *Id. p.* 17.
[24] Lawyer Advertising Survey, Preliminary Evaluation (1980).
[25] *Id. p.* 15.
[26] See, Code of Professional Responsibility, Canon 6, "A Lawyer Should Represent a Client Competently."
[27] Code of Professional Responsibility, Ethical Consideration 2-9.
[28] The Commission on Advertising has published a manual entitled, Individual Lawyer Advertising: A How-to-Manual. The price, as we go to press, is $7.00, which does not include postage.

Strict vs. Substantial Compliance. . . The Rocky Road of Maryland Wiretap Law

A Comment on Recent Maryland Wiretap Decisions

by Michael McDonough

In the landmark case of *State v. Siegel*, 266 Md. 256, 292, A.2d 86 (1972), (hereinafter cited as *Siegel*), the Maryland Court of Appeals held that "[T]he [Maryland Wiretap] statute sets up a strict procedure that *must* be followed and we will not abide any deviation, no matter how slight, from the prescribed path." *Id.* at 274, 292 A.2d at 95. Applying this standard, the Court suppressed evidence from a wiretap in which the order of authorization did not include provisions as to "whether or not the interception shall automatically terminate when the described communication has been first obtained," 18 U.S.C. ¶2518(4) (e) (1976). The court stated that interception would "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception" *Id.* ¶2518(5). 18 U.S.C. ¶¶2510 *et seq.* (1976) required that every order of authorization contain such provisions. The scrutiny applied by the court in *Siegel* has become known as the strict compliance standard.

Just two years later, Judge Charles Moylan, writing for the Court of Special Appeals in *Spease and Ross v. State*, 21 Md. App. 269, 319 A.2d 560 (1974), *aff'd* 275 Md. 88, 383 A.2d 284 (1975) (hereinafter cited as *Spease and Ross*), applied a more lenient substantial compliance standard. *Spease and Ross* questioned whether the police, who had intercepted conversations pursuant to a *legally sufficient order*, had also adequately minimized the interception of non-pertinent conversations in accordance with 18 U.S.C. ¶2518(5) (1976). Judge Moylan noted:

> It was in this regard that the Court of Appeals said in the *Siegel* case: 'The statute sets up a strict procedure that *must* be followed and we will not abide any deviation, no matter how slight from the prescribed path,' and we said in the *Lee* case: '... the procedure required by the federal act must be strictly followed and. . .a substantial compliance [is] insufficient.' We are not here faced, however, with the legitimacy of the authorizing order itself and do not, therefore, feel that language pertinent thereto is necessarily controlling when reviewing every subsidiary action taken in execution of an order which does meet all constitutional requirements. *Spease and Ross* 21 Md. App. at 275, 319 A.2d at 564.