LEGAL COLUMN: ARE LAWYERS PEOPLE TOO? ABA'S NEW ADVERTISING RULE PROPOSAL, BY: ALICE M. SHERREN, ESQ. AND DONALD PATRICK ECKLER, ESQ.

Since lawyers were first found to have the right to advertise in the mid-1970's state bars have heavily regulated, though not vigorously enforced those rules. With the emergence and near ubiquity of social media, lawyer communication with current and prospective clients has grown exponentially. On a recent trip to Florida, a state with among the most robust regulations on legal advertising, but with likely most of such advertising, there was a billboard marketing a traffic ticket firm's mobile application. Rules drafted even five years ago could never have been prepared for this.

Into this gap, the ABA, at the recommendation of the Association of Professional Responsibility Lawyers, has issued a proposed modification of the rules related to lawyer advertising. The current version of the draft, which was released on December 21, 2017, can be found at https://www.americanbar.org/news/abanews/aba-news archives/2017/12/aba_releases_propose.html. The ABA's proposal is based upon a report from APRL issued on June 22, 2015. https://aprl.net/wp-content/uploads/2016/07/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf

These proposals, which will be discussed further below, seek to liberalize and standardize rules related to legal marketing while maintaining and protecting the constitutional right of lawyers to advertise their services. There is some irony in the ABA proposing such rule changes in the wake of the addition of Rule 8.4(g) to the Model Rules that arguably chills lawyer speech in other areas, including in areas of public concern. What protection for commercial speech is afforded by the First Amendment has long been a subject of debate, while its protection of political speech has rarely been seriously questioned.

Short History of Rules Regarding Lawyer Advertising

In 1908, the ABA adopted the Canons of Professional Ethics that prohibited all advertising by lawyers. Following that, in 1969 the ABA created the Code of Professional Responsibility which maintained this policy. The first suggestion from the United States Supreme Court that lawyers might have constitutionally protected commercial free speech rights came in 1975, when the Court, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-788 (1975), concluded that the practice of law is a business. After recognizing that commercial speech is entitled to protection in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976), the Court struck down a state imposed prohibition on lawyer advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). Since that decision, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), set forth a four part analysis, if the first two inquiries yield positive answers, the Court then turns to the third and fourth

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inquiries:

1. whether the expression is protected by the First Amendment because it concerns lawful activity and is not misleading;

2. whether the asserted governmental interest is substantial;

3. whether the regulation directly advances the governmental interests; and

4. whether it is not more extensive than is necessary to serve that interest.

Following that decision there have been several tests of this analysis, including in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 101 (1990), which held that lawyers' letterhead was not misleading or deceptive where the certification and licensure referenced were both true and verifiable. The standard has become that commercial speech is not subject to ban or restriction where the advertising is not misleading advertising and to impose a regulation the regulator must present objective evidence to support the ban or restriction. See, e.g., *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth.").

The Market for Lawyer Advertising and the Proposed ABA Model Rules

We rarely think of advertising as providing a service, but it does. Advising consumers of available services is essential for the market to work. This same principle applies to legal services. For good or for ill, many people would never know that they might have a cause of action if it were not for advertising by lawyers. With that information, consumers can then investigate whether they need such services. As a result, it is imperative that lawyer advertising, in whatever form it comes, be truthful.

Perhaps unintentionally, the proposed rules serve to encourage that market service by simplifying the regulations. The proposal cuts down the number of rules, eliminating Model Rule 7.5 in its entirety (moving it to the comments of Model Rule 7.1), includes a definition of "solicitation" that only includes personal contact, and provides that a lawyer may advertise through "any media." As has been the emphasis for some time, it is personal communication with unsophisticated potential clients that concerns bar regulators the most. In contrast, and in accord with the constitutional protections of commercial speech, these rules liberalize the regulation of the broadest definition of advertising by lawyers.

Concomitant with that simplification and a step back from significant regulation, the proposed rules would make both compliance and enforcement easier. If adopted, these rules would do away with the regulation and approval in some states of website, business cards, letterheads, and the like. In its study, APRL found that there are few bar cases brought against lawyers based upon a violation of the somewhat complex patchwork of advertising rules. As anyone with a television knows, these regulations have not served to curtail the amount of legal advertising available, but they have likely served to increase costs without substantial benefit to the public. The position of the drafters seems to be that arming potential consumers of legal services with more truthful information, while insulating them from direct solicitation, will yield better more informed decisions by those consumers.

How Should Defense Firms and Individual Lawyers Respond?

As with all ABA Model Rules, if these rules are accepted by the ABA, the speed of adoption by individual states is likely to be slow. Lawyers should monitor what their states do in this regard and comply with their states rules. If a lawyer practices in several jurisdictions, the lawyer should monitor changes to each state's rules. As the proposed changes simplify the standard, compliance will be easier upon adoption, but states rarely adopt the rule changes wholesale; there is often at least slight modification. As always, careful review of the rules governing professional responsibility is the best course of action.

Defense practitioners rarely use mass marketing techniques to advertise their services, but they do use websites, blogs, social media, and publications like this one to market their services. There is often integration among those media streams to attract web traffic through search engine optimization. Clear procedures should be established within the firm to review publications and control social media advertising. If marketing professionals are engaged by a lawyer or a firm, either as outside contractors or firm employees, their activities should be monitored pursuant to Model Rule 5.3. A lawyer could be found responsible for false or misleading information that is posted by a marketing professional.

The good news is that the APRL survey from June 2015 confirmed that complaints about lawyer advertising are rare, and that people who complain about lawyer advertising are more likely to be other lawyers rather than clients. In addition, ethics boards are more likely to handle complaints relating to advertising informally, with a focus on correcting how the advertising violates ethical rules. Many ethics boards have regulatory staff address such complaints by seeking voluntary

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compliance, saving significant resources for more serious lawyer misconduct. In most cases where a lawyer is disciplined, it is because the advertising in question was determined to be dishonest, fraudulent, deceitful or a misrepresentation in violation of Rule 8.4(c), or in situations involving coercion, duress, harassment, or intimidation.

And now, the bad news: lawyers facing ethical or malpractice complaints relating to advertising may not have coverage under their legal malpractice policies. As discussed earlier, advertising provides a service…but arguably advertising is not providing professional services to others as required for coverage under many professional liability policies. For example, complaints relating to advertising which incorporates images owned by others in violation of copyright have nothing to do with providing professional services to others, and are not likely to be covered claims despite sometimes significant damages being demanded.

The best way to avoid ethical or malpractice claims relating to advertising is for lawyers to be cognizant of the rules when developing marketing strategies. Do not over-offer and under-deliver, do not embellish experience or predict results, and do not advertise in distasteful or unprofessional ways. Lawyers can use outside specialists to create marketing and advertising plans, but the lawyers must supervise all endeavors to ensure compliance with ethical rules. Some ethics boards will review proposed advertising preemptively to ensure it complies with ethical rules.

Potential Insurance Coverage Implications

In the event that an ethics complaint is lodged or lawsuit filed against a lawyer or law firm for improper advertising, it is possible that the lawyer's professional liability carrier will disclaim coverage on the basis that advertising does not fall within the ambit of providing legal services. If the professional liability carrier denies coverage for an ethics complaint based upon advertising, the lawyer is likely going to have to mount the defense themselves as there is unlikely to be time to have a judicial determination as to coverage before the ethics complaint is adjudicated.

Whether there is merit to the denial on this basis or not, is a point not addressed here, but with regard to a lawsuit, lawyers and their firms may have to look to their CGL coverage and, in particular, the advertising injury coverage to obtain a defense. This would particularly be the case in a situation in which there are a number of claims, or a class of claims, for improper advertising. In order to cover this risk, prior to undertaking advertising efforts, lawyers and their firms should review their policies, both their professional liability and CGL policies, to determine if they have the appropriate coverage and consult with their broker on options. Of course, the best policy is to assiduously follow the rules of professional conduct in the jurisdictions in which the lawyer and law firm practice so as to avoid any claims.

Conclusion

Irrespective of whether the ABA amends the Model Rules or what any state does to amend its rules in response, the basic tenet of professional conduct and good business is to tell the truth to prospective clients. It turns out that with an overlay of some additional rules lawyers are people too and can exercise the right to commercial free speech.

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