

Opinion 1 of 1999

Issue Before the Committee

The Committee has been requested to provide an advisory opinion concerning the propriety of advertising by attorneys in telephone books under names such as "A Attorney Association" or "AA Jane Smith." A cursory review of any telephone book in Indiana will reveal various examples of attorneys placing the letter "A" or using a string of "A" words for the obvious intent of being listed near the front of the attorney section of the phone book. The issue raised to the Committee is whether such advertising violates either Indiana Rule of Professional Conduct 7.1(b) or (c), in that the use of such names is false, misleading, unfair and deceptive or Rule 7.2(b), in that the use of such constitutes the impermissible use of a trade name.

Legal Background

Since the Supreme Court's determination in Bates v. State of Arizona, 433 U.S. 350, 363-64 (1977) that attorney advertising is constitutionally protected commercial speech, legal debate surrounding attorney advertising has focused on the permissible scope of appropriate state regulation of such advertising. Within the commercial speech "intermediate scrutiny" analysis of Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 477 U.S. 557, 564-65 (1980), a state may properly place restrictions on attorney advertising if the government: 1) asserts a substantial interest in support of its regulation; 2) establishes that the restriction directly and materially advances that interest; and 3) demonstrates that the regulation is narrowly drawn. See e.g. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (Court upholds 30-day ban on direct mail solicitation from attorney to potential personal injury or wrongful death clients).

In Indiana, an attorney may advertise legal services, provided, inter alia, that such advertising contain neither “a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim” nor the use of a trade name to identify the practice. See Matter of Anonymous, 689 N.E.2d 442 (Ind. 1997); In re Sekerez, 458 N.E.2d 229 (Ind. 1984); Indiana Rules of Professional Conduct 7.1(b) and 7.2(b).

Analysis

1. Multiple A's

Initially, it is important to differentiate between the two types of questionable advertising presented to the Committee. First, there is the situation where an attorney lists her name with multiple A's (e.g. AA Jane Smith). In the opinion of the Committee, assuming “AA” is not the attorney's middle initials, such advertising violates Rule 7.1(b) as well as 7.1(c). Initially, the Committee notes that such information, although arguably immaterial, is, in fact, false. Moreover, the Committee is concerned that some in the public might perceive such multiple A's as ratings or a reflection on the attorney's legal acumen and thus be misled. Finally, although the Committee acknowledges that the practice of multiple A's is utilized by various industries (e.g. A-1 Towing), unlike the legal profession, they are not bound by Rules of Professional Conduct.

The Committee would temper its conclusion by noting that the circumstances and manner of Multiple A advertising would obviously mitigate the severity of the violation. Although such listings exploit and manipulate the logical ordering of names in the telephone book, the Committee recognizes that the harm to the public may be small and that although the intended result of the attorney to be placed at the front of the telephone book listing may be achieved, the public might be turned away by such unprofessional advertising and view the lawyer with a jaundiced eye.

2. **Descriptive Names**

The second type of advertising contains a string of A words (e.g. "A Attorney Association" or "A Arrest Attorney"). Similar to the use of Multiple A's, the obvious intent of the advertising attorney is to list his practice towards the front of the phone listing. In the opinion of the Committee, these types of names, as defined under Indiana law, are trade names and thus violate Rule § 7.2(b); however, they do not appear to violate Rule § 7.1, since they do not rise to a level of false, misleading or deceptive.

1. **Trade names**

Indiana Rule of Professional Conduct § 7.2(b) provides, inter alia :

[a] lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair within the meaning of Rule 7.1, or is contrary to law. In that it is inherently misleading, a lawyer in private practice shall not practice under a trade name.

(Emphasis added).¹

Our Supreme Court, in In re Sekerez, 458 N.E.2d 229 (Ind. 1984), addressed the issue of trade names. In Sekerez, the attorney advertised his practice under various names depending on the

¹ But see Florida Rule of Professional Conduct 4-7.7(b) (allowing the use of trade names in attorney advertising). However, Florida Rule 4-7.7(c) provides that the attorney's trade or fictitious names must also appear on the lawyer's letterhead, business cards, office sign, fee contracts and on all legal pleadings and other documents filed by the firm. As noted in the Comments to the Florida Rule:

this rule precludes a lawyer from advertising under a nonsense name designed to obtain an advantageous position for the lawyer in the alphabetical directory listing unless the lawyer actually practices under the nonsense name. Advertising under a law firm name that differs from the firm name under which the lawyer actually practices violates [this rule.]

office's location. As such, the Valparaiso office was the "Valparaiso Legal Clinic" and the South Bend office was the "South Bend Legal Clinic" and so on. 458 N.E.2d at 241. In most instances, Sekerez's name also accompanied the listing. Id. The Sekerez Court defined the term "trade name" to be

names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or a class of goods, but which are not technical trademarks, either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation, by one as trademarks.

Id. at 241 (quoting Hartzler v. Goshen Churn & Ladder Co., 104 N.E. 34 (1914)). See also In re Oldtowne Legal Clinic, P.A., 400 A.2d 1111, 1114 (Md.Ct.App. 1979) (trade name is "any designation which is adopted and used by a person to denominate goods which he markets, or services which he renders, or a business which he conducts, or has come to be so used by others, and through its association with such goods, services, or business, has acquired a special significance as the name thereof.").

The rationale for the prohibition of trademarks was also articulated in Sekerez by reference to Friedman v. Rogers, 440 U.S. 1, 12-13 (1979), in which the Supreme Court upheld the restriction on the use of trade names by optometrists.

The possibilities for deception [from the use of trade names in advertising] are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one.

458 N.E.2d at 243. The Sekerez Court concluded that “the same rationale proscribing the use of a trade name in the professional practice of optometry, is fully applicable to the practice of law.² It is this inherently misleading characteristic which is the basis for our [Rule of Professional Conduct].” Id. It is the opinion of the Committee that based on the analysis provided by our Supreme Court in Sekerez, advertising legal services under a name such as “A Attorney Association” constitutes the impermissible use of a trade name. The preceding example “designate[s] a particular business of certain individuals considered somewhat as an entity” in violation of Sekerez. Moreover, the fact that an attorney may attach his name at the end of a litany of “A” words does not mediate the violation.

False, Misleading or Deceptive

False or misleading advertising by lawyers concerning their services is not constitutionally protected. See e.g. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985). It is the opinion of the Committee that advertising legal services as, for example, “A Arrest Attorney Association” is not false, misleading or deceptive as articulated under Rule 7.1(b). An attorney is permitted to advertise his area of practice, see Rule 7.1(b)(2), and nothing in our cited example appears to go beyond stating that the attorney will provide legal services in a particular area.

² The Committee would note, in passing, that in reviewing the rationale articulated in Friedman v. Rogers, 440 U.S. at 12-13 and adopted by Sekerez for the prohibition of trade names, it is clear that such arguments could also be applied to almost any long-established firm that continues to practice law under the names of retired or deceased partners. See Rule 7.2(b) (“a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm . . .”). Often times, an established firm name, like a trade name, takes on a meaning or reputation wholly apart from the attorneys presently practicing at the firm. If the central objection to attorneys advertising under trade names is the concern that the trade name will take on a meaning independent of the attorneys providing the legal services, then, tradition aside, it is hard to reconcile such with allowing a firm to continue practicing law under the names of lawyers who no longer practice law.

Obviously, the preceding presupposes that the advertising attorney is competent to practice in the criminal law area. Moreover, were the attorney to advertise under the name "A Amazing Attorney" such would undoubtedly run afoul of Rule 7.1(b). See e.g. Matter of Anonymous, 689 N.E.2d 442 (Ind. 1997).

Conclusion

The Committee concludes that both the use of multiple A's preceding an attorney's name and the use of multiple A words does run afoul of our Rules of Professional Conduct. We strongly advise all practitioners who engage in this type of advertising to seriously consider the propriety of such.