ADVERTISEMENTS BY ADVOCATES- AN INDIAN PERSPECTIVE

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE LL.M. DEGREE

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DECLARATION

I HEREBY DECLARE THAT this dissertation is written by myself, Senthil Vannan N., during the period (2002 – 2003) at National Law School of India University, Bangalore. The work in this dissertation is original except for such help taken from such authorities, as has been reffered to at the appropriate places. This work has not been submitted either in whole or in part for any degree at any university.

Bangalore
21st April 2003

(Senthil Vannan N.)

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LIST OF ABBREVIATIONS

1. A.B.A.Rep.	- American Bar Association Report
2. A.I.R.	- All India Reporter
3. A.I.R. Jul.	- All India Reporter Journal
4. Ala. Law.	- The Alabama Lawyer
5. C.U.L.R.	- Cochin University Law Review
6. Creighton L. Rev.	- Creighton Law Review
7. Det. C.L.Rev.	- Detroit Colleges of Law at Michigan State
8. Drake J. Agric. L.	- Drake Journal of Agricultural Law
9. Ed.	- Edition
10. Fordham L.Rev.	- Fordham Law Review
11. Geo. J. Leg.	- Georgetown Journal of Legal Ethics
12. Harv. C.R. – C.L.L. Rev	- Harvard Civil Rights – Civil Liberties Law Review
13. I.B.R.	- Indian Bar Review
14. J. Advertising Research	- Journal of Advertising Research
15. J. Legal Prof.	- The Journal of the Legal Profession
16. J.Inst. Stud. Leg. Eth.	- Journal of the Institute for the Study of Legal Ethics
17. J.Law, & Pub. Pol'y	- Florida Journal of Law and Public Policy
18. J.Marketing	- Journal of Marketing
19. Loy.L.A. Ent. L. J.	- Loyola of Los Angeles Entertainment Law Journal
20. n	- note
21. New Law J.	- New Law Journal
22. p	- page
23. Rev. Litig.	- The Review of Litigation
24. S.C.C.	- Supreme Court Cases

25. S.C.J. - Supreme Court Journal
26. S.Ct. - Supreme Court
27. Seton Hall Const. L.J. - Seton Hall Constitutional Law Journal
28. Temp.L. Rev. - Temple Law Review
29. Tex. Tech. L. Rev. - Texas Tech Law Review
30. U.Rich. L.Rev. - University of Richmond Law Review
31. Wake Forest L. Rev. - Wake Forest Law Review
32. Wash. L. Rev. - Washington Law Review
33. Washburn L. J. - Washburn Law Journal
34. Wm & Mary L. Rev. - William & Mary Law Review
35. www - World Wide Web

TABLE OF CASES

1. *Bar Council of Maharashtra v. M.V. Dabholkar*, (1976)2 S.C.C. 291
2. *Bates v. State Bar of Arizona*, 97 S.Ct. 2691(1977)
3. *Bennett Coleman & Co. v. Union of India*, A.I.R. 1973 S.C. 106.
4. *C.D.Sekkhizhar v. Secy., Bar Councils* A.I.R., 1967 Mad. 35.
5. *Central Hudson Gas & Electric Corp. v. Public Service Commission of NewYork*, 100 S.Ct. 2343(1980).
6. *Cohen v. California*, 91 S.Ct. 1780 (1971).
7. *Florida Bar v. Went For It Inc.,* 715 S.Ct. 2371 (1995).
8. *Government Pleader v. S.A. Pleader*, A.I.R. 1929 Bom 335.
9. *Hamdard Dawakhana v. Union of India*, A.I.R. 1960 S.C. 554.
10. *In re Primus*, 98 S.Ct. 1893(1978).
11. *In re R.M.J.,* 102 S.Ct. 929(1982).
12. *Indian Express Newspapers (p) Ltd v. Union of India*, A.I.R. 1986 S.C. 515.
13. *Office of Disciplinary Counsel v. Bradley*, 695 N.E. 22 248 (Ohio 1998).
14. *Ohralik v. Ohio State Bar Assn.*, 98 S. Ct. 1912 (1978).
15. *Re A, an Advocate*, A.I.R. 1962 S.C. 1337.
16. *Re Advocate*, A.I.R., 1934 All. 1067.
17. *Sakal Papers (P.) Ltd. v. Union of India*, A.I.R. 1962 S.C. 305.
18. *Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988)
19. *TATA Press Ltd. V. Mahanagar Telephone Nigam Ltd.*, A.I.R., 1995 S.C. 2438.
20. *Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265(1985)

TABLE OF STATUTES

Indian Statutes

1. Advocate Act 1961.
2. Consumer Protection Act, 1986.
3. Bar Council of India Rules, 1975.

Foreign Statutes

1. The Solicitor's Publicity Code, 1990.
2. European Union Directive 98/5.
3. Dissemination of Information about Legal Services Act, 1991 of New Zealand.

CHAPTER I

INTRODUCTION

'Our profession is good if practiced in the spirit of it, it is a damnable fraud and inequity' when its true spirit is supplanted by mischief-making and money making" - Daniel Webster

The legal profession has traditionally been opposed to advertisement by lawyers and solicitation of clients. The ideal form of attracting clients was for the attorney to develop a reputation and moving them to come towards him. In fact the ban on advertising by lawyers began as a rule of etiquette and then later evolved into a rule of ethics[1]. Advocacy is a branch of administration of justice and not a mere money making occupation. It is not a vocation for private gain but an institution created by the state for public good. The very existence of honour and dignity of practice of law depends on the time honoured rule that advocacy is a profession and not a business.

In any profession pecuniary gain is subordinate to efficient service. Compared to business, profession has to maintain certain standards, intellectual and ethical, for the dignity of the profession and also for the better quality of service of the public[2]. Advocates raised themselves above the mere 'traders' or 'businessmen' and formed a cult of public service notion, more than merely earning a living. There is voluminous literature

[1] See: Henry Dinker, "Restrictions on Speech by Attorneys", *Creighton L. Rev.* 357, 361 (1995).
[2] Refer: Bruce Green, 'Conflicts of Interest in Litigation: The Judicial Role', *65 Fordham L. Rev.* 145 (1996)

available on 'professionalism', from Max Weber to Talcott Parson. All these writings explain why professions behave as they do now. At the most basic level, the bar has to always claim that it is a profession for asserting its right to govern itself and to enforce them. However the legal systems of developed and developing countries started showing contradictory signs because of the transition from the notion being law strictly a profession to law as a service offered on payment or business[3].

The State has a compelling interest in regulating the practice of professions within their boundaries. This also emanates partly from their duty to protect the public health, safety and other valid interests. This is normally done by creating independent professional bodies and vesting them the power to codify the standards to issue practice licenses etc. The other aspect that meticulously has to be observed and made observed is to eliminate the forms of competition[4], which would demoralise the ethical standards of the profession and will lead to a diminished and tarnished image among the public.

In a legal system existing in a constitutional democracy like ours with more than one third of population being illiterate, imagining a person wishing to achieve a lawful goal by lawful means with the help of a lawyer is an awesome experience. Given a situation of the adversarial system[5] and if lawyer uses only legal means in consonance with legal ethics, but a coherent theory of moral philosophy may label the conduct of lawyer as immoral. So a lawyer doing anything within the attributes of the legal

[3] For further discussion see: Kevin McMunigal, "Rethinking Attorney Conflict of Interest Doctrine", *5 Geo. J. Legal Ethics* 823 (1992)

[4] See: Veronica Wotten Brace, "Limits on Marketing of Attorney Services", 8 *J. Law & Pub. Pol'y* 109 (1996). See also: D.C.Mukherjee, "India's Stand on Lawyer Advertising and Specialisation", *A.I.R.* 1981 *Jnl.* 25.

[5] In India we follow the Adversarial system borrowed from Anglo-American tradition as opposed to inquisitorial system or continental legal system, where the judge or the jurors play the leading role.

system for the benefit of the client is protected by the legal ethics, on the other hand if he does something like advertisements, he is condemned by the legal ethics. This shows that a good lawyer may be a bad person.[6]

There has been a sea change in all walks of life because of scientific advancements especially in the area of communications and information technology. Added to this, the nature of law and type of lawyering is also undergoing transition, in the view of economic liberalisation, globalisation, emergence of W.T.O. etc. These clearly indicate that there is a vast change in operational environment of legal profession with the march of time, technology and ultimately civilisation. But the rules were not made to suit these changes and neither have they reflected the popular sentiment in this aspect. There is a crying need to immediately undertake reforms in the area of information dissemination about the profession to the public[7]. This has to be done in a way that benefits, both the information provider (i.e. the members of the legal profession) and the public, who receive it.

The entire family of law would agree that dignity and honour have to be upheld, on the same vein would also agree to the fact that standards of professional conduct and etiquettes should also be in consonance with time and space. This is an era, where the entire family of law is continuously striving to suitably amend and accommodate the above said technological developments and its impact on society, within the existing legal framework, for governing the society efficiently. It is unfortunate in that process we are not including and updating the regulating environment of our own system (i.e. Internal regulation of the profession) as per the need,

[6] See: Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation", 85 *Yale L.J.* 1060 (1976), where a proposition of, can a good lawyer be a good person, was raised.

[7] This is evident from the fact that many of the State Bar Councils are organizing conferences to discuss the issue of "lawyers' right to advertise".

but preferring to maintain the standards of lawyering based on archaic notions. The scenario worldwide is encouraging, as most of the countries have adapted to the changing needs.[8]

[8] See: The Solicitor's Publicity Code, 1990.

CHAPTER 2

RESEARCH METHODOLOGY

2.1 Aims and Objectives

⇒ To examine and explain existing legal position with respect to advertisement by lawyers in India and in rest of the world

⇒ To analyse the various views regarding advocate's advertisement

⇒ To critically comment on the present stand taken by India on the basis of above arguments

⇒ To suggest a suitable policy in the area of lawyer's advertisement

⇒ To discuss the nature of problems that may arise after allowing advertisements by lawyers

⇒ To study the effective way to tackle the issues likely to come in future

⇒ To propose a comprehensive code to regulate the advertisements by lawyers within the evolved parameters.

2.2 Scope & Limitation

The scope encompasses within itself the following:

✧ A basic understanding of advertisement by lawyers

✧ Awareness of the conflicting ideologies of nobility of the legal profession and advertisement of legal services

✧ A comprehensive understanding of the existing legal framework-governing lawyer advertising in India, US, and other countries.

✧ A critical study of the US position regarding lawyer advertising, the extension of First Amendment protection to this area and an analysis of the relevant case laws

✧ A focus on the constitutional and consumer perspectives of legal advertisement

- ✧ A realization that a fundamental right to advertise cannot be granted to lawyers in India
- ✧ An acceptance that the regulation of legal advertising should go hand in hand with the right of the public to legal information
- ✧ A focus on the difficulty in policing legal advertisement on the Internet due to the unique features of this medium
- ✧ A marked emphasis on the role of the Bar Council and other bodies in regulating lawyer advertising in India and bringing about an equitable balance between regulation and information dissemination
- ✧ A submission as to what can be done regarding the regulation of legal advertising and the formation of specific laws
- ✧ Limited availability of commentaries, criticism and textbooks or articles in the related area and few case laws.

2.3 Research Questions

- ➢ Whether lawyers should be permitted to advertise?
- ➢ Why they should be allowed?
- ➢ Is India is in a disadvantaged position because of its stand in lawyers advertisement?
- ➢ What are arguments in favor of allowing lawyers advertisements?
- ➢ Is this change needed in the interest of clients, in particular and the public in general?
- ➢ Whether such a change makes law 'less a profession'?
- ➢ Does this affect the difference that exists between practicing a profession and being in a trade or business?
- ➢ What is the best/alternative way to provide legal services to persons who are not benefiting from such services now?
- ➢ How compatible is lawyer's right to advertisement within the ambit of rights guaranteed under *Article 19(1) (a) of the Constitution?*

- What are the impacts on legal profession in post GATS scenario?
- How to distinguish between Promotional advertisements and Informational advertisements?
- What are the strategic ways to promote Informational advertisements and restrict promotional advertisement?
- What are issues likely to arise due to lawyer's presence in cyberspace?
- How far the U.S and Western experiences can help us in regulating Internet advertisements?

2.4 Method Adopted

The method adopted for the purpose of this paper is largely doctrinal and analytical. However an element of descriptiveness may be found here and there. The library and online database materials are extensively used to bring out this article.

A uniform style of footnoting is followed throughout the paper.

CHAPTER 3

TRACING THE ROOTS

3.1 Noble place in the society

There is nothing higher or nobler open to human effort than the administration of justice and the lawyer is indispensable and invaluable as a minister of justice whose paramount duty is to promote reverence for law. The opportunities of the lawyer for public service and social advancement are greater than many other professionals. Lawyers have always occupied very high positions connected to the business of the Government. Despite the calumnies hurled against the lawyer community and the proverbial attacks against the trickeries of the profession, the magnitude and nobility of the task, which lies before a lawyer cannot be under estimated.

Advocacy is a branch of administration of justice and not a mere money making occupation. It is not a vocation for private gain but an institution created by the state for public good. The very existence of honour and dignity of practice of law depends on the time honoured rule that advocacy is a profession and not a business. In a profession pecuniary gain is subordinate to efficient service. Compared to business, profession has to maintain certain standards, intellectual and ethical, for the dignity of the profession and also for the better quality of service of the public. No society can exist sans law.

A lawyer is always fighting for the causes of others. He has an important role to play in shaping the conduct of others in life and through them the conduct of the community. Protection of society and its members against wrongs by enforcement of all rights and redressal of all wrongs is an important part of the duty of an Advocate.

3.2 Evolution of the Profession & Professional Ethics

Law is an instrument for social engineering and social change and must march with the dynamism of human attitudes, norms, values, needs, aspirations and dreams, along with the entire family of law, which comprises of lawmakers, law-administrators, law-authors, law-educators, law-researchers and law-practitioners.

As early as the fourteen century, an English statute of 1403 states that advocates admitted to the bar need to be virtuous, learned and sworn to their duty. [9] Further in the 15th Century attorneys were required to take an oath pledging that they would be good, virtuous and of good fame[10]. The 1729 act mandate the attorneys to swear that he will be truly and honestly demean himself in the practice of an attorney according to the best of his knowledge and ability. [11]

These early restrictions were of minimum enforceable standards and aspirations, with an emphasis on moral rather than pragmatic basis. In the late 80's of 19th Century the treaties and essays of David Hoffman [12] and George Sharswood[13] dominated the scene. Both Hoffman and Sharswood adopted an aspirational approach, which painted the attorney as a nineteenth century 'gentleman-lawyer ideal'. This was grounded in a moral framework, with attributes of an ideal lawyer to be sought by oaths.

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[9] James E. Moriterno, "Lawyer Creeds and Moral Seismography", 32 *Wake Forest L. Rev.* 781
[10] Op cit – James, "The Punishment of an Attorney found in default, 4 *Hen.*4, ch.18 (1402) (Eng).
[11] Op cit; James; "An Act for better Regulation of Attorneys and Solicitors", *L Geo*-2, Ch.23, 13 (1729)(Eng)
[12] David Hoffman, A Course of Legal Study (Arno Press 1972) (1836).
[13] George Sharswood, *An Essay on Professional Ethics* (1854), reprinted in 32 *A.B.A. Rep.*1 (1907).

This above English tradition which evolved as a result of social, economical, political and religious conditions prevailing in the United Kingdom at that period of time, was wholly embraced by the colonial legislatures including India. It is important to note here that facts are always perceived within the legal and ethical cultural context of the time.

Judge George Sharswood heavily borrowed the moral framework propounded by Hoffman. He advocated the much admired 'gentleman – lawyer' model, which served as an ethical beacon for the American lawyers, as it was coded in 1908 ABA Canons[14].

3.3 Coming to India

The preamble to the Rules of the Bar Council of India speak about misconduct and it signifies the legal ethics system in India.

"An advocate shall at all times comport himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non- professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquettes adopted as general guides, yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned"[15].

[14] See: "Transactions of the 28th Annual Meeting of American Bar Association", 28 *A.B.A. Rep.* 3, 1320 (1905).
[15] See: The Preamble of Bar Council of India Rules,1975.

But before arriving to this structured regulation, there were several regulations that contributed to enhance the body of literature of the evolution of profession and professional ethics, with common undercurrent in all those regulations i.e. to uphold the dignity of the legal profession. For example, the Bengal Regulation 1793 controlled both recruitment and conduct of legal practitioners in the Company's courts. This regulation prohibited paying or receiving less than the established fees with the object of inducing men of character and education to become pleaders in the courts of justice, and thereby rendering the office of Vakil respectable and desirable. If any pleader enters into such agreement to receive less than the prescribed fees as per the regulation, he shall be liable to immediate dismissal from his office.

The next legislation is the *Legal Practitioners Act, 1846*. This regulated the conduct of barristers also and made a welcome step ahead from the existing position with respect to fee to advocates. By this Act, Pleaders and clients were given full freedom to settle the fees payable by private agreements. Further with the object of establishing a unified Ba,r the Bar Councils Act was passed in 1926. All India Bar Committee was established in 1953 and Justice S.R.Das of the Supreme Court of India was made as the Chairman. The recommendations of this committee were accepted and the Advocates Act, 1961 was passed. It unified and organized the legal profession and gave the Indian Bar a national character. The institution of legal profession was made autonomous and independent.

A Full Bench of Kerala High Court in 1968 has held that counsel has a tripartite relationship, one with the public, another with the court and the

third with his client.[16] This is a unique feature. Other professions or services may include one or two of these relationships, but none has triple duty. Counsel's duty to the public is unique in the sense he has to accept any work from any client in courts in which he holds himself out as practicing, however unattractive the case of the clients may be.

An Advocate shall conduct himself with dignity and self respect and shall maintain a respectful attitude towards courts. But that does not mean that he shall be servile. There is no independent judiciary without independent bar. Whenever there is a proper ground for serious complaint against a judicial Officer, it shall be his right and duty to submit his grievance to proper authorities.

Oswald's comment is very relevant in this context - 'An over-subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice'.[17] The court has reciprocal duty to be courteous to a lawyer and to maintain his respect in the eyes of the public. So also an advocate is not the servant of his client, but is the servant of justice. Nor is he a sub-ordinate officer of court. It is no part of the professional duties of an advocate to act merely as a mouthpiece of his client.

Generally speaking, all professional lapses, though not inherently wrong, which shake the confidence of the litigants or which tend to bring reproach on the legal profession would come within the mischief of professional misconduct. Sri Alexander Cockburn in his classic definition of the function of the bar said an Advocate should be fearless in carrying out the interest

[16] 1968 KLT 1.
[17] See: Sandeep Bhalla, *Commentaries on Advocates Act and Professional Ethics* (Aurangabad: Nasik Law House, 1st ed., 2001)at 11

of his client.[18] Justice Krishna Iyer has stated in his inimitable style in *Bar Council of Maharashtra v. M.V. Dabholkar*[19]

"The canons of ethics and propriety for the legal profession totally taboo by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is no trade-briefs no merchandise and so leaven of commercial competition or procurement should vulgarize the legal profession".

As, in our society, commercialization of the profession is fast growing assuming different dimensions, the canons of ethics and propriety shall be given more importance and relevance.

[18] *Legal Ethics and Professional Responsibility* (Cranston (ed.), Oxford: Clarendon Press, 1995) at 46
[19] AIR 1976 SC 242

CHAPTER 4

THE INTERNATIONAL SCENARIO

4.1 The American Experience

The spate of cases in the United States, that paved the way for regulations governing advertisement by lawyers, was initiated by the landmark decision of *Bates v. State Bar of Arizona* [20] starting from this decision and extending down to the jurisprudence declared in the 1995 Florida Case[21], we see a series of further Supreme Court opinions on lawyer advertising and related commercial speech issues. Therefore the dispute that was set in motion by Bates still continues, as advertising lawyers, regulators and the courts continue to build on Bates and its progeny.

Since the pronouncement of Bates that no blanket suppression can be imposed on lawyer advertising which is neither false, deceptive nor misleading, large quantities of energy and money have been devoted by lawyers to advertising. This has now been accepted as a vital means of building a clientele. The plethora of decisions on lawyer's advertising has helped to elaborate on the various nuances of advertising and initiate the codification of laws, rules and regulations touching upon each of these aspects.[22]

Evolution of the law

Attorney advertising was not allowed by the bar associations during the twentieth century. The *Bates case* in 1977 proved a watershed case in this

[20] 433 U.S. 350 (1977)
[21] *Florida Bar v. Went For It Inc.*,115 S.Ct. 2371, 2378(1995)
[22] For a detailed discussion of the case – by case development of the law in this regard, see: Elizabeth D. Whitaker, David 8. Coale, "Professional Image and Lawyer Advertising", 28 *Tex.Tech L.Rev.* 801 (1997).

regard. However, prior to the Bates decision, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[23] In this case, the Supreme Court recognised that commercial speech has a certain amount of First Amendment Protection. It held that the responsibility for dealing with the problem of misleading the ignorant public, through false or deceptive information, vests in the state. Thus, even before Bates, the general rule was that only commercial speech that was truthful would give First Amendment Protection. Thus the flow of information cannot be curbed, if the information is true and it regards a lawful activity.

Soon after the *Virginia State Board Case*[24], the court set forth a four prong test in *Central Hudson Gas & Electric Corporation v. Public Service Commission.*[25] The main purpose of this test was to scrutinize restrictions on commercial speech. As originally stated, the *Central Hudson* test provided that:

"At the outset,
We must determine whether the First Amendment protects the expression. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading next,
We ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers,
We must determine whether the regulation directly advances the governmental interest asserted, and
Whether it is not more extensive than necessary to serve that interest[26].

[23] 425 US. 748 (1975).
[24] Id.
[25] 447 U.S. 557,566(1980).
[26] Id.

Since announcing this test in 1980, the court has analyzed any regulations concerning legal advertising in the light of these tests.

The issue of attorney advertising next came up before the U.S. Supreme Court in *Bates v. State Bar of Arizona*.[27] The case was regarding an advertisement by a lawyer, advertising his legal services at very reasonable prices. The advertisement also contained the fees he was charging for various legal matters like uncontested divorces etc.

The Court first classified the ad as a commercial speech.[28] It then pointed out any question relating to the quality of the legal services offered, had not been placed b before it. Neither was there a situation of in-person solicitation. The basic issue was identified by the court to be whether lawyers could constitutionally advertise their prices for the performance of certain routine services. The court further examined the various arguments of the bar justifying a prohibition of such advertisement. The arguments advanced were that: -

- Advertising could create an adverse impact on the image of the bar and the justice system.
- Advertisement of legal services has an inherent tendency to be misleading in nature.
- Advertising of legal services may stir up litigation.
- There may be increase in the cost of the legal services, due to passing on the cost of advertising to the client.
- The quality of legal services may decline.
- There may be difficulty in enforcing advertising rules.[29]

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[27] Supra n.18
[28] Ibid at 366.
[29] Ibid at 368-79.

The State Bar of Arizona argued that advertising legal services was inherently misleading for three reasons:

- Legal services are so individualized in their content and quality that a consumer can't make an informed choice.
- No awareness on the part of the consumer, in advance, as to what services he needs.
- Instead of focusing on the skill of the lawyer, advertisement tends to focus on irrelevant aspects.

The court answered these concerns by opining that it would be difficult to say that a connection between the clinics' advertisement in the instant case, and each of the concerns voiced by the bar, would justify a ban. As the same time court recognised and appreciated the concern of the bar about these harms.

The court finally held that while an advertisement by itself should not be the basis on which a client selects an attorney, it does assist in making an informed decision.[30] It observed that restraint should always be placed on false or misleading advertisements. From the dissenting opinions it is evident that the court had difficulty in deciding the boundary between an advertisement, which is misleading, and one, which is not[31].

Attorneys again examined Bates in a pair of cases dealing with the solicitation of clients. The first case was *In re Primus*.[32] In this case the court upheld the act of an ACLU attorney who wrote letters to women who

[30] Ibid at 374. The State Bar's role should be to correct advertising, which presents an inaccurate picture, but requiring more disclosure not less.
[31] Ibid. At 386, Burger, J. dissenting, Id at 391, Powell, J, dissenting.
[32] 436 U.S. 412 (1978)

had been sterilized by a state program, and offered to represent them in the legal proceedings. The attorney was working in tandem with the ACLU and it came to light that a group of pregnant women, who were on state assistance, were being forced to get sterilized. They were threatened by saying that the free medical assistance they were receiving would be withdrawn unless they opted for sterilization.

The concerned attorney advised these women of certain legal rights they might have as a consequence of sterilization. The attorney also sent them a letter saying that they could get all legal assistance in this regard from the ACLU. It was observed that such activity constituted ACLU's political work that was protected. The court took into consideration the fact that there was no sign that the letters to the women were meant to be "in-person solicitation for pecuniary gain".[33] Again the court also recognized the fact that ACLU uses litigation as a means of political expression, political association, and communicating information to the public. The activity therefore could not be termed as deceptive, coercive or misleading.[34]

The second case was *Ohralik v. Ohio State Bar Association*[35] in which an attorney had solicited his legal services to two women who were victims of a car accident, while they were in hospital. In this case, the court looked into the aspects of inclient solicitation and reached the conclusion that it served the similar purpose as a public advertisement, since its function was to inform the layman about the availability of legal services. The difference between the two, according to the court, was that a public advertisement gave the person sufficient time to go through it and analyze it and take a decision. However an in-person solicitation was aimed at getting an

[33] Ibid at 422.
[34] Ibid at 431, 435-36.
[35] 436 U.S. 447 (1978)

immediate response without giving an opportunity for thought. The Court held that it was the responsibility of the state to protect the public from any solicitation involving fraud, undue influence, overreaching, or any other type of vexatious conduct.[36]

Another important conclusion arrived at by the court in this case was that even more than protecting the interests of the consumers and the public at large, the state should maintain the high standards for its licensed professions.[37] The court in this case condemned the action of the advocate, having solicited a client who was lying in traction in a hospital bed. It upheld the discipline a lawyer was expected to maintain and found this conduct to be a blatant abuse of his training as an advocate.[38]

The next case the court decided on was *In re R.M.J.*[39] in which the main question was regarding the quality of legal services. The State Bar in this case had placed certain rules, which the lawyer had violated. The pertinent State Bar rule was: -

- A prohibition on lists of areas of practice using terms other than those provided by a rule;
- A ban on lists of the courts and state bars to which a lawyer was admitted to practice; and
- A ban on announcement cards to persons other than lawyers, clients, former clients, personal friends, and relatives.

The attorney was charged with having violated four of the Missouri Supreme Court rules. Out of these, three were considered by the court:

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[36] Ibid at 462.
[37] Ibid at 460.
[38] Ibid at 464-67.
[39] 455 U.S. 191, 202 (1982).

- Listing certain areas of practice in terms other than the specific terms provided in the rule.
- Listing courts and states where he could practice law
- Mailing announcement cards seeking potential clients

The court examined the lawyer's list of practice areas and held that even though the attorney's listing of certain areas of practice did not confirm to the rule issued by the bar, it was not misleading. In reaching this conclusion, the court applied the Hudson test. It however struck down that part of the rule, which prohibited listing the states where the attorney was licensed to practice. Again applying the Hudson test, the Court looked into the regulation, which restricted the mailing of cards announcing the opening of an office. It held that there was no indication that a less restrictive regulation would not be efficient to supervise the contents of the mailings.

The decision of *Zauderer v. Office of Disciplinary Counsel*[40] was the next to come up before the court. In this case, a lawyer ran an ad with a picture of a Dalkon shield, a contraceptive device, and offered to handle any Dalkon shield injury claim or a contingent fee basis. The two main questions before the court were:

- Whether a state can prevent an attorney from advertising by using any non-deceptive illustration and offers legal advice
- Whether the state can demand the details of the fee and all other claims to be specified in the advertisement[41]

The Court could not agree to the bar's ban on illustrations. However, it held that a bar could make rules regarding an ad about contingent fees and

[40] 471 U.S.626 (1985)
[41] Ibid at 629.

makes rules regarding disclosure of obligation to pay costs. The court held that Zauderer's ad did not explain in a comprehensive manner a client's potential liability for costs of a claim, which did not succeed. Therefore it was held that the ad run by the lawyer was deceptive.[42] Justice O'Connor's dissenting opinion is relevant in this regard. She opined that the states have a substantial interest in regulating advertisements that render professional standards. She said that the majority had failed to understand the importance of the state's role in this regard.

The question of allowing targeted direct mail was considered in detail in the *Shapero case*.[43] After *Zauderer*, the court was once again faced with the issue of whether a state could prohibit attorneys from soliciting business from persons known to be faced with a particular legal problem. The important question in this case was whether the mode of communication can be used by the lawyer to take advantage of the potential client's susceptible condition. Following the reasoning in Zauderer, the court held that prophylactic rules, which prohibit solicitation for pecuniary gains, are apt to regulate in-person solicitation. But they are not useful regarding written advertisements.

A similarity can be established between the mode of communication: i.e. the letter in the *Shapero Case* and the advertisement in the *Zauderer Case,* due to the fact that either can be kept aside and be taken up later or totally ignored. The court was of the opinion that a blanket ban on direct mail could not be sustained.[44]

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[42] Ibid at 647-53.
[43] 486 U.S. 466 (1988)
[44] Ibid at 475-80.

In *Peel v. Attorney Registration & Disciplinary Commission,*[45] the court was faced with questions regarding an attorney's claims about specialization and certification. The concerned attorney claimed that he had a constitutional right to advertise that he has a 'Certificate in Civil Trial Advocacy'. This was contained in the lawyer's letterhead, which said that he was the member of a particular legitimate organization of trial lawyers. This action of the lawyer was against two rules contained in the Illinois Code of Professional Responsibility.

The rules stated that a lawyer cannot portray himself as a specialist or as one having any certification, and also that any communication from the lawyer should contain enough information, so that it is not termed as false or misleading. The court however reversed the discipline imposed on him by the Bar. The Court was divided regarding the various issues at hand. Five members of the bench were of the opinion that no ban should be imposed and three justices voiced the opposite opinion. Again four said that the letterhead was not deceptive and one said that although this was true, the outright ban could not be justified on this ground.[46]

The latest case of *Florida Bar v. Went For It, Inc.,*[47] is the most recent Supreme Court decision in this regard. The two amendments to the Florida Rules regarding attorney advertising, were in question. The Florida Bar had passed a rule requiring lawyers to wait for 30 days after a person's accident, before sending direct mail solicitations to them. This was because the bar felt that sending letters of solicitation to the accident victims or their families, immediately after the accident, would only serve to aggravate the pain they had otherwise undergone.

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[45] 496 U.S. 91, 99(1990).
[46] Ibid at 111.
[47] Supra n. 19.

The court observed that such solicitations would truly damage the nobility and dignity of the legal profession. The Florida bar rules was thus upheld. These series of cases have succeeded in shaping the law on the regulation of attorney advertisements as it exists now in the U.S.

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Through these cases the Supreme Court has established the fact that "lawyer advertising is in the category of constitutionally protected commercial speech"[48]. But it is seen that the Central Hudson test has become difficult to apply. Before the application of this test, the court has to first determine whether the communication is false or misleading. Mostly, the justices deciding a particular case find difficulty in concurring on this point and this leads to problems.

In the case of *Hanez v. Florida Department of Business and Professional Regulation*[49] this difficulty of non-concurring opinions voiced by the various judges, was evident. These experiences make one think as to whether the US Supreme Court should decide which is not in an ad-hoc basis. If the court finally agrees that a certain advertisement is not misleading, this leads to an application of the Central Hudson test, which again creates difficulties.

The problem lies in deciding whether or not the proposed regulation directly advances the asserted state interest in a manner that is no broader than necessary. This potential for disagreement was revealed in both *Shapero Case* as well as *Florida Bar Case*. In the first, there was a six-three split on the issue of whether a total ban on targeted direct-mail

[48] Supra n. 41 at 472.
[49] 512 U.S. 135 (1994).

solicitation was necessary to advance the asserted state interest.[50] In the second, the question was whether the proposed regulation was more extensive than necessary to advance the state interest.[51]

Another area of debate in applying this test is whether the proposed regulation directly furthers the asserted state interest. The primary problems in deciding if a restriction or advertisement directly promotes as asserted state interest, depends on the burden of proof, which the court requires. In *Went For It* case, the court was unable to clearly ascertain whether the regulation advanced the asserted state interest of protecting persons in their time of trauma and grief.

The Court distinguished the *Shapero* decision in this case. It pointed out that in *Shapero,* there was no attempt to show any actual harm caused by targeted direct mail.[52] Thus an analysis of the evolution of the law regulating lawyer's advertisement depicts a snapshot of the law developed by those cases as if stands today.

4.2 Stand of European Union

The European equivalent of *Bates* is considered to be the decision of European Court of Human Rights in 1994 in the *Casado Coca's* case[53]. However it is more cautious than *Bates* in the sense it does not disturb the variety of ways in which European Nations have approached the problem of attorney advertisement and how rapidly the matter is being reconsidered

[50] See supra n. 41 at 480, O' Connor J dissenting.
[51] Ibid at 2384, Kennedy, J., dissenting.
[52] Ibid at 2378.
[53] See: *Casado Coca v. Spain*, Series A, No. 285, 18 Eur. H.R. Rep. 1(1994).

and changed. It therefore leaves much discretion to individual jurisdiction, what is termed as 'margin of appreciation' by the European lawyers.

The Spanish Bar rule bars the members from announcing or circulating information about their services directly or through advertising media. During the course of appeals the Spanish bar promulgated a new set of rules that basically permitted advertising but imposed certain requirements, including an admonition that the members of the bar must show regard for truth, rigour and exactness without detracting from other members' advertisements by imitating them or inviting confusion with them, without lapsing into self-praise and comparisons with or denigration of their colleagues and without citing their own professional success, their clientele or the financial terms on which they provide services[54]. To ensure compliance, such advertisements had to be cleared with the local Bar Council.

In essence, Spanish law is trying to permit its lawyers to advertise but without lapsing into the general profession notion of bad taste, misleading material etc. In this aspect, the policy of Spanish Bar Council is similar to bars of other European jurisdictions, such as Swiss Cantons and German's Law relating to the Professional Code of Conduct for Lawyers etc. The German Statute on Legal Profession expressly declares that legal profession is not a business, but an analysis of certain provisions of German Rules makes it hard to reconcile with that declaration.

The German bar considers contingent fees as immoral and since 1994 its rules have expressly prohibited them. However both French and German courts have regarded such agreements as not sufficiently immoral as to be

[54] Id. at 4.

unenforceable if entered into under the aegis of a legal system that permitted them.

If a lawyer from country X carries on in country Y negotiations intended to lead to a contract between his or her client and another party, the rules of X would be governing. There are compelling reasons to make that link. Most of the disciplinary sanctions available to deal with errant lawyers are bound up with their status as members of a bar – suspension, disbarment, censure and so forth. Being a member of the bar of X is something that accompanies one on one's travels. It is somewhat similar to being in the armed forces of a country.

Thus, assertion of jurisdiction by X over the behavior of X lawyers abroad would strike other countries as being objectionable on the ground that it claimed an inappropriate extraterritorial jurisdiction. The questions is complicated by the fact that other jurisdictions may or may not be inclined to enforce the sanctions imposed by X, such as disbarring or suspending the errant lawyer from membership in their bars if that individual possesses memberships in several bars that are independent of each other. [55]

Complexities are piled on when the lawyer is admitted to practice in more than one jurisdiction. The rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices: provided that if particular conduct clearly has its predominant effect in another

[55] For the US practice in this regard, see Charles W. Wolfram, *Modern Legal Ethics* 3.4.6. (1986). The EU Directive 98/5 in Article 7(4) leaves it to the discretion of the lawyer's home state what effect to give to disciplinary action taken by a host state, while Article 7 (5) makes it clear that loss of license in the home state automatically terminates rights in the host state that are dependent on it.

jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.[56]

A rather rare step on the international front is to admit a single lawyer in two or more jurisdictions. The most important rule is a relatively new one, Article 6 of the European Union Directive 98/5, intended "to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which the qualification was obtained".[57]

The provision reads as follows: Irrespective of the rules of professional conduct to which he is subject in his home member state, a lawyer practicing under his home country professional title shall be subject to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host member state in respect of all the activities he pursues in its territory.[58]

Another European product is the Code of Conduct for Lawyers in the European Community (CCBE), which scatters conflicts references throughout its text.

4.3 Emerging Trends in the Contemporary World

A perusal of the code of conduct of several bar councils around the world shows that majority of them have modified their rules and regulations facilitating the advertisement by lawyers about their services. However, the rules of most of these countries forbid advertisement, which are in the nature of promotional or misleading or deceptive, which may bring disgrace

[56] Model Rules on Professional Conduct, Rule 8.5(1998).
[57] European Union Directive 98/5.
[58] Id.

to the profession. Pertinent among them is the Code of Conduct of New Zealand and Canada.

When the law relating to advertisements by attorney was growing in U.S., across the border in Canada, a movement emerged for finding ways and means of assisting the public in making use of legal services in an efficient and convenient manner. Pressure was mounted on the governing bodies of Law Societies to re-examine their regulations, which prohibited advertising.[59]

Increased attention and focus was given by the media in Canada, about the ability of members of public to make an informed selection of lawyers and appraise charges for legal services, in the absence of information availability due to the ban on advertising by attorneys. Large debates took place in the academic circle over the developments in this area that took place in England and United States in the past decade.

This extensive brain storming debates and discussions over the issue had resulted in a change of attitude in the minds of the Canadian Bar and the Public. This heralded in enacting a new code to meet the demands of the modern consumer society. However, a careful study of the 'code of professional conduct of Canadian Bar Association will reveal that a careful blend of conservatism of traditional approach and relaxations to live up to the new ideas have been achieved.

The thrust of the code is a positive discourse to make legal services available to the public in an efficient, economic and convenient manner, which will command respect and repose confidence on the profession. At

[59] See: G.M.Turner, "Change in Canadian Traditional Attitudes", *International Legal Practitioner* (May 1980).

the same time the integrity, independence and effectiveness of the profession are also taken care of. The code explicitly recognises the need for assisting citizens to find and obtain suitable legal services.[60] The code disapproves of unregulated advertising by lawyers as it is neither in the interests of the public or the profession. One striking aspect in the code is that in selected cases it even allows appearances in radio and television programmes provided appropriate rules are complied with.

Another interesting code is that of New Zealand. It has adopted the code titled as 'DISSEMINATION OF INFORMATION ABOUT LEGAL SERVICES'[61]. The peculiarity of the code is that it is very simple [only 6 rules] and allows the advertisements precisely for the purpose of disseminating information alone. The structure of the code is in such a way, that there will be a rule and below that there will be a commentary to that rule, which in reality explain the application of the rule.

One of the rules says that practitioner must not claim to be a specialist or to have expertise in any field or fields in the advertisement unless such a claim is capable of verification on enquiry. The commentary for this rule of prohibiting claims of specialisation, says that since the New Zealand Law Society does not have a scheme for certification of specialists, the practitioner's claim has to be substantiated on the basis of his;

- Academic qualifications
- Number of years of experience of practice in that field of practice.
- The proportion of the practitioner's total working time involved in that field of practice.
- The level of success achieved by the practice in that field.

[60] New Zealand Law Society (NZLS) adopted this on 1st August 1991 and some amendments were made subsequently in 1994.

- The importance or significance of the matters in which he appeared in that field and
- By peer review.

Though the code in this aspect cannot be said to be without any flaw, still since most of the codes do not have such restrictions on claims of specialisation or expertise, this will certainly throw some guiding light on the issue.

Another interesting provision in the sense that it is not found in any other code, is Rule 4.06 of the New Zealand Code, which speaks of restricting a practitioner to not create a public impression that he is running a financial or banking business apart from providing legal services.

This rule might be exclusively made to suit the prevailing scenario with respect to misappropriation of client's money by the attorneys. However this shows that the rules we make should be organic in nature, tailoring to the needs of our society and not a mere emulation from the West or U. S.

In Australia the position is that the public's need to know about legal services can be fulfilled partially through advertising. It was felt that the need is so acute in the case of people who have moderate means of living and also not exposed to the extensive use of legal services. However, it cannot be overruled that advertising by lawyers also invites the risk of practices that are misleading or overreaching.[62]

62 See: Report of the Legal Profession Advisory Council in Relation to Review of Lawyers Advertising in Australia, available at http://www.lawlink.nsw.gov.au/lpac.nsf/pages/adver.htm

CHAPTER 5

JURISPRUDENTIAL ENQUIRY

5.1 The Constitutional Angle

Rule-36 of Bar Council of India Rules states that an advocate is restrained from soliciting or advertising work either directly or indirectly. There is an argument, that this rule, which bans lawyer's advertisement, violates the right to equality granted under Article 14 of the Constitution. Under Article 14, equal treatment in similar circumstances is required[63] and differential or preferential treatment amounts to violation of equality in the absence of any reasonable classification[64].

The contention is that today there is a significant overlapping of areas of work of lawyers with other professions[65] and while lawyer is incapacitated by professional restriction, others who do the same work are not so. This not only acts as a detriment to a lawyer's professional advancement, but also affects his equality under Article 14 with other professions. However this argument stands weak, because the quantum of work common between an advocate and a non-advocate who can do the same is negligible. Further the primary work of an advocate is to appear before the court of law and to defend his client's legal rights, which can only be done by an advocate. So the overlapping occurs only in the fringe areas like giving advice on tax matters, preparing share deeds etc. where Chartered

[63] See: Srikrishna v. State of Rajasthan, (1995) 2 SCR 531.
[64] See: Babulal v. Collector of Customs, A.I.R 1957 SC
[65] For example, both lawyers and chartered accountants deal in tax matters, lawyers and financial experts deal with mergers and acquisitions of corporations, lawyers and insurance executives deal in the case of insurance matters etc.

Accountants come into play and this does not entail a protection under Article 14 of the Constitution[66].

5.2 Evaluating the Commercial Speech Doctrine

The 'Commercial Speech doctrine' emanated from *Bates* decision[67] in US and was quoted by Supreme Court of India in *Tata Yellow Pages* case,[68] in trying to classify advertisements by professionals as commercial speech and thereby establish protection under Article 19(1) (a).

The judicial journey of the commercial speech doctrine in India can be traced back to the *Hamdard's* case.[69] In this case, the court was dealing with advertisements in prohibited drugs and commodities. Justice Kapur held that for an advertisement to come under Article 19(1)(a), the true object for the promotion of which it is employed, must be seen. Accordingly the advertisement was scrutinized using the object test[70]. The court in this case relied heavily on the words of Justice Lewis in *Valentine's Case*[71], where he categorically held that prohibition of a purely commercial advertisement does not entitle recourse to freedom of speech and expression guaranteed by the First Amendment in the U.S. Constitution.

[66] However a valid argument from the consumer perspective is possible, which is dealt at p.34 ibid.
[67] A detailed analysis is given in the chapter 4, which deals with the position in US.
[68] Tata Press Ltd. V. Mahanagar Telephones Ltd. A. I. R. 1995 S. C. 2438.
[69] Hamdard Dawakhana v. Union of India, A.I.R. 1960 S.C. 554.
[70] Under 'object test', the content of an advertisement is analyzed. If it has elements of trade and commerce, then they do not have the protection of article 19(1)(a), on the other hand if the objective of the advertisement is in the interest of general public or for the propagation of social, political or economic ideas or in furtherance of literature or human thoughts, then it is protected and falls under the freedom guaranteed by article – 19(1)(a).
[71] *Valentine v. F.J. Chreston*, 1941 (86) Law Ed. 1262.

However this position in the United States subsequently changed in the *Virginia Board Case.* [72] This decision had settled the law in the United States with respect to affording protection to commercial speech under the First Amendment of the U. S. Constitution. It was held that however tasteless and excessive advertisement may sometimes be, nonetheless if it disseminates information, it falls under the First Amendment protection.

In the *Indian Express Case,* [73] the court got inspiration from the *Virginia Board Case* and went on to say that the observations made in *Hamdard Case* were too broad and that all commercial advertisements cannot be denied the protection of Article 19(1)(a), merely because businessmen issued them. This proposition gained acknowledgement in the later decisions of the Supreme Court like *Sakal Case* [74]and *Bennett Coleman Case* [75].

It was in this backdrop that the *Tata Yellow Pages Case'*[76] came before the three member bench of Supreme Court. In this landmark judgment, Justice Kuldip Singh observed that,

"The combined reading of *Hamdard Dawakhana's* case and the *Indian Express Newspaper case* leads us to the conclusion that 'Commercial Speech' cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same are issued by businessmen".[77]

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[72] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748 (1976).
[73] Indian Express Newspapers (Bombay) Pvt. Ltd v. Union of India, A. I. R. 1986 S. C. 515
[74] See: Sakal Papers (P) Ltd. V. Union of India, A. I. R. 1962 S. C. 305
[75] See: Bennett Coleman and Co. v. Union of India, A. I. R. 1973 S. C. 106
[76] See: Tata Press Ltd. V. Mahanagar Telephones Ltd., A. I. R. 1995 S. C. 2438
[77] Ibid at 2446.

It was further stated that the public at large is benefited by dissemination of information through advertisements and examined from another angle, has a right to receive that commercial speech. In their opinion, Article 19(1)(a) not only guarantees freedom of speech and expression but also protect the rights of an individual to listen, read and receive the said speech. This right is available to the speaker as well as to the recipient. It was held that 'commercial speech' is a part of the freedom of speech and expression guaranteed under article 19(1)(a) of the Constitution.[78]

So this closely brings us to an expectation that, in the near future the Supreme Court may even recognise the lawyer's right to advertise as a fundamental right under Article 19(1)(a), as per the 'commercial speech' doctrine it has established in *Tata Press Case*. Further, in the above discussion, it was clearly elaborated how the American case-law had profoundly influenced the Indian Supreme Court in arriving at this attitude of constitutionalisation of commercial speech.

Even there exists an extreme view that the obvious outcome of *Tata Press Case* is that the lawyers also possess a fundamental right to advertise so as to solicit clients. [79] It was further stated that in the light of above reasoning, Rule 36 of the Bar Council of India Rules, which is 'law' within the meaning of Art. 13(3) (a)[80] falls foul of Art 19(1)(a) and is *ultra vires* of the Constitution and hence void. [81] However, in the researcher's opinion, this proposition is fundamentally wrong and not tenable because the ratio of the above mentioned case is different and was not decided by a constitutional bench.

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[78] Ibid at 2448.
[79] Gautam Narasimhan and Shuva Mandal, "Lawyer's Right to Advertise in the Context of Constitutionalism of Commercial Speech, *C. U. L. R.* 186 [1998].
[80] Art 13(3)(a)
[81] Supra at 190

Risk of elevating the right to advertisement to a fundamental right

The American courts had taken the position that advertisement by a lawyer falls within the protection offered by commercial speech guaranteed by first amendment rights[82]. The course followed by the U.S. Courts through the decisions spanning from Bates in 1977 to the latest Florida case in 1996, and the efforts taken by the American courts to reiterate the position that state possess a substantial interest in regulating the professional standards of lawyers, as dealt with in the previous chapter, is significant here.

United States of America unlike India, does not have any restrictions on the right to commercial speech, similar to the restrictions contained in Arts 19(2) as related to Art 19(1)(a). In spite of this fact, taking into consideration the difficulties faced by the U. S. Supreme Court in the area of regulation, calls for a second thought for Supreme Court of India, before elevating the lawyer's right to advertise as a fundamental right through judicial interpretation.

However, it is advisable that the Bar Council of India Rules may be suitably amended to allow for advertising by lawyers in order to avoid such judicially recognised right. The advantage of this is that the subject matter and the kind of advertising can be effectively regulated by laying down specific rules under a statutory mechanism. Further, on one hand you are satisfying the long felt demand of advocates[83] and on the other hand the State still retains the role of preserving the high standards of profession, which would

[82] See supra n.18 .

[83] As it is increasingly, demanded by some vociferous advocates and some State Bar Associations.

not be possible, if this right to advertise by lawyers is raised to the level of fundamental rights.

But the debate on lawyers' right to advertise cannot be restricted to constitutional issues alone and there are also other angles involved.

5.3 The Consumer Perspective

The word of mouth source of information about an attorney, which is the only source available now, is highly imperfect because of the serious limitation one has in expressing the quality of service and integrity of the lawyer. One client might think that a lawyer is an able person only if he can obtain a fair settlement, another may think that a lawyer is able if he wins the case and so on. The other possible way to avoid this ambiguity in information is to interact with the concerned lawyers, which is practically impossible.

These subjective characteristics like quality and integrity, which are manifested through behaviour, can only be accessed from personal observations or report of the attorney's behaviour[84]. However, an inference can be made on the basis of objective data like the number of years in practice, law school from where he has graduated, areas of practice, etc.

On whole advertisements can play a positive role in the selection and engagement of an advocate, because;
Firstly it considerably help to overcome the client, the information void in this area,
Secondly it increases the probability that the client would choose an appropriate advocate and

[84] See: Smith and Lusch, "How Advertisement Can Position a Brand", *J. Advertising Research* 39 (16 Feb 1976).

Finally a professionally regulated advertisement also serves as an efficient information database about the nature and extent of legal services available in our country.

A mere Right or a Duty combined

The question remains whether the so-called 'profession – occupation' distinction holds good today[85]. As identified by Mason,[86] the main characteristics of the profession are: i) skilled nature of the work ii) commitment to moral principles, and iii) professional associations to regulate admissions and set up standards. But in this century and during the last lap of 20th century, this distinction started thinning down. The Supreme Court in *Shanta's Case*[87] observed that an increasing number of occupations have been seeking and achieving professional status and this has led inevitably to the blurring of features between them.

Apart from this, in the *Tata Press Case* it was held that not only was the right of the advertiser protected under 19(1)(a), but also the right of the receiver of such speech. This shows that the Supreme Court had recognised the right to receive information in the above context, though nothing was spelt out on the constitutionality of restrictions against advertising by lawyers, doctors and other professionals.

Consumers are generally faced with a considerable information gap in their attorney selection process as it is mostly turns out to be by 'word of mouth'. The consumer's legal right to receive information about the services or products that they are likely to consume was discussed

[85] See: Jackson and Powell, *Professional Negligence* 66 (1994).
[86] Mason et.al;, *Law and Medical Ethics* 192 (1992).
[87] *Indian Medical Association v. V.P. Shanta*, (1995) 6 S.C.C. 651 (per Kuldip Singh, S.C. Agarwal and B.L. Hansaria J.J). This was a case concerning medical negligence under the Consumer Protection Act, 1986.

elaborately in the West by several authors such as Bloom, 1977, Cohen, 1978, Meyer and Smith, 1978, Sothi, 1979, etc[88] culminated in the awareness and formation of consumer right movements across the globe. This resulted in the enactments of legislation to protect the consumer's rights in many countries in the 80's of the last century[89]. In spite of this, because of restrictions placed by the professional bodies on their members not to advertise about their services, the public at large are in a disadvantaged position and not able to reap the fullest benefit of the Consumer Protection Act.

The consumers require substantial data before selecting an attorney for their legal requirements. This conclusion raises the question as to how this information need can be satisfied. The best possible solution is to allow the advocates to advertise about their services.

It is a universally accepted notion that advertising is a reasonably efficient technique for the dissemination of information on products and services[90]. However, the nature of the legal profession and the respectable position it enjoys in the society poses some unusual problems, which does not arise in allowing advertisements in other professions. The major problem is that the nature of information content should not go against the 'quality' and 'integrity' aspects among other aspects, of professional ethics. The outcome is to allow a regulated advertisement right for the lawyers, with a mechanism to monitor the advertisements and to take action in the case of violating the restrictions.

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[88] Op.Cit: Robert Smith & Tiffany S. Meyer, "Attorney Advertising: - A Consumer Perspective", *J.Marketing* 56 (1980).

[89] Even India is a part of it and responded affirmatively by enacting the Consumer Protection Act, 1986.

[90] See: "Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available", 81 *Yale L.J.* 1186 (1972).

5.4 Various other views on Lawyer's advertisement

From a Law and Economics perspective advertising in the market is seen like other services, information about legal services would be producing a better-informed body of consumers. The other argument is that clients can more easily find their way to the lawyer who can fulfill their needs most efficiently and economically.

Empirical study conducted in the United States in the 1980's about attitude of public and professionals towards advertising by professionals (lawyers, doctors, Accountants etc) has resulted in some interesting outcomes [91]. The study showed that consumers were optimistic about potential benefits that may be available to them by advertisement of professionals and majority of the consumers disagreed that advertisements will damage the image or dignity of the profession. Contrary to that and surprisingly, the findings stated that majority of professionals expressed strong reservations against advertisements.

This strange phenomenon was explained by the reason that ethical considerations and associated reservations for a long period was imbibed and strongly internalised by the members of the profession. The professional's skepticism was also attributed to the belief that advertisements create a negative impact on image, credibility and dignity.[92]

The above study clearly indicates that the consumers are interested in advertisements, as they believe that it will benefit them and knowing the

[91] See: Robert White & Cynthia Fraser, 'Meta-Analysis of Attitudes Towards Advertising By Professionals, 52 *Journal of Marketing* 97 (July 1988).
[92] See: Hite Robert & Joseph Bellimmi, 'Consumers Attitude Towards Lawyers, Accountants & Physicians w.r.t. Advertising Professional Services', 26 *Journal of Advertising Research* 45 (June-July, 1986).

attitude of the public from the study, the apprehension that advertisement will lower their image in the eyes of public, no longer holds good.

The legal services need of the public can be well met only if they recognize their legal problems, understand the importance of seeking assistance and the right counsel to help them. In order to achieve this, the profession has to facilitate and educate the public. So it can be said that facilitating advertisements acts as a duty of the profession to disseminate the information about their services, the existing legal system, etc.

People's interest vis-à-vis professional detachment

The people's right to know about the legal system and the legal services outweighs considerations traditionally associated with the profession, particularly because of the increasing complexity of law. Though other forms of dissemination in forums and seminars, writing professional articles for publications, etc exist, the role of advertising cannot be equated to all these, because of its wide reach. All over the world, including in England,[93] rules have been amended in the 1990's itself, permitting advertisement by lawyers.

So advertisement can be well said to be a duty to the public from the profession, rather than the right of an individual lawyer to advertise about his services to the public.

[93] See: The Solicitor's Publicity Code 1991 of England.

CHAPTER 6

THE WINDS OF CHANGE

6.1 Existing Legal Framework

The All India Bar Committee Report, 1953 along with the recommendations of the 14th Law Commission Report[94] resulted in the enactment of the Advocates Act, 1961. This Act provides for the establishment of an All India Bar Council and a common roll of advocates who have the right to practice in any court. A person who has a law degree[95] recognized by the Bar Council of India[96] and who is enrolled with any State Bar Council is an advocate.

It is interesting to note that "Right to Practice" as an advocate is neither an absolute right nor a fundamental right, but is a privilege conferred by statute and therefore is governed by the provisions of the Act[97]. The Bar Council of India has been conferred with the power to make rules to discharge its functions under the Advocates Act 1961. An important rule-making power is with reference to laying down guidelines for the standards of professional conduct and etiquette to be observed by advocates[98].

An advocate is restrained from soliciting or advertising work either directly or indirectly[99]. Advertising in every form, whether it is through circulars, advertisements, touts, personal communications or interviews not warranted by personal relations, is prohibited.

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[94] Law Commission's 14th Report under the chairmanship of M.C. Setalvad submitted its Report in 1958 under the heading 'Reform of Judicial Administration'.
[95] See: Sec-2 (1) (a). See also *Shitab Khan v. Bar Council of India*, A.I.R. 1969 Raj. 136.
[96] See: Bar Council of India Rules 1975, Part IV, Section A, Rule 17.
[97] See: Y.G. Ramamurthy v. Chairman Central Board of Exercise, 1984 Lab IC 498(A.P.)
[98] See: Sec- 49 (1) (c) of Advocates Act, 1961.
[99] See: Supra n. 93, Rule-36.

It was held that advertising is considered as a kind of misconduct from the point of view of professional ethics[100]. The rule also prohibits that no reference must be made to the fact that the advocate specialises in any particular type of work or has been a judge or an Advocate General. The punishment for misconduct is governed by S. 35 (1) of Advocates Act 1961. The procedure is initiated by the State Bar Council on receipt of a complaint or even otherwise, if it has reason to believe that an advocate on its roll has been guilty of professional misconduct, can refer the case for disposal to disciplinary committee[101].

Further the law says that whenever a State Bar Council receives a complaint it is required to apply its mind to find out whether there is any reason to believe that an advocate is guilty of misconduct or not, prima facie. In a loose sense any conduct, which brings or tends to bring reproach to legal profession, can be termed as misconduct.

With respect to standard of proof and nature of evidence, the court has laid down certain clear guidelines[102]. The Advocates Act 1961 vests the Disciplinary Committees of the State Bar Councils with the powers of a Civil Court and its proceedings and orders has to be in compliance with 'Principles of Natural Justice'.

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[100] C.D. Sekkizhar v. Secretary, Bar Council, A.I.R. 1967 Mad. 35

[101] Supra n. 93, S. 35(1)

[102] See: *V.C.Rangadurai v.D.Gopalan*, AIR 1979 SC 281 (Convincing preponderance of evidence) & *P.S.Gupta v. Bar Council of India*, AIR 1997 SC 1338 (Quasi criminal in nature and requires proof beyond reasonable doubt).

6.2 The way forward

Restrictions on solicitation of clients through advertisement are necessary to maintain the integrity of the profession and to protect the public from unethical advertising tactics. But the difficulty lies in drawing the line between permissible advertisements and illegal advertisements. If the demarcation is not clear and justified, then case-by-case will come up before the courts.

However, an attempt is made here to strike a balance between the attorney's advertising rights and profession's image and ethical standards.[103] The basic emphasis on allowing advocates to advertise in India should be based on the information – provision function of advertising. The social costs and social benefits of permitting advocates to advertise have to be weighed.

One major doubt is raised about the feasibility and practicality of regulating the advertisements. It is argued that it is impossible to regulate all advertisements that are put up by lawyers, because of their large population[104] even if an independent authority is created for this sole purpose of regulation. As it will involve huge infrastructure facility and manpower to screen each and every advertisement.[105]

The above view is countered by two arguments. Firstly, that so far no advertisements are allowed to come up openly and overtly. This is

[103] See: Grace Natarajan, 'Balancing Act – Line between the Pros and Cons of Attorney solicitation of clients' 29 *Seton Hall L. Rev.* 1543 (1999).
[104] India has the second largest number of registered legal practioners in the world after the United States of America.
[105] See: H.R. Saviprasad and Prakash, "Lawyer's Right to Advertise: A Rejoinder", (1999) C.U.L.R 200.

achieved due to the existence of the strong professional body namely the Bar Council of India at the National level and state Bar Councils at state levels. So the logic is that if they are strong enough so far, to stop their members from doing any advertisements, they will probably stronger to do so in regulating with additional help of the Regulatory Authority.

Secondly, there is no question of impracticality of scrutinizing all the advertisement occurs, because the law will prescribe the standards of advertisements and if only any violation of that regulation is brought to the notice of the authorities then the action will be taken after proper enquiry. So all these arguments against, feasibility of regulations is not tenable.

India is a founder member of World Trade Organization and signatory to various agreements under it, including the General Agreement on Trade in Services [GATS]. An increasing number of Indian lawyers are studying and qualifying in foreign universities and working with international law firms.[106] Indian law firms, primarily the large ones in the metro cities are forming informal associations with overseas practices.[107]

The Raghavan Committee Report[108] on drafting of competition law, has addressed a whole chapter to professional services sector in India in light of the GATS commitments and has dealt on issues relating to promotional activities of professions like Advocates, Accountants etc. The report further states that all restrictions on sharing of information with the general public constitute a significant obstacle to the growth of these professions and all these professional bodies should realise the fact and should take steps to improve the situation.

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[106] Firms like Nishit Desai & Associates, Singhania & Co have overseas offices.
[107] The best example is the formation of Anderson Legal India, which is formed on January 1st 2002 with the support of Indian firm DSK Legal and foreign firm Anderson Legal.
[108] Available at www.nic.in (visited on 07-12-2002)

As stated earlier, the GATS[109] agreement mandate the signatory nations to open up their service sector to the other member nations of W.T.O. Accordingly, India has to allow the entry of foreigners in its service sector by the year 2003. From that year onwards foreign lawyers and foreign law firms would be entitled to practice in India, subject to the relevant changes that has to be made in the existing provisions. Presently also foreign nationals are allowed to practice in India on the basis of reciprocity.[110]

Once this becomes a reality, then we will face covert advertisement problems by these foreign lawyers and law firms. Though under the Indian law, which they also has to abide by if they seek to practice in India, expressly prohibited advertisements, they will advertise in the internet from their country as well as press & magazines, satellites, television, where the law permits advertisements, which can be accessed by the Indian public. This will clearly lead to a situation, where the Indian lawyers will be under a total disadvantage vis-à-vis their foreign counterparts, because of this unwarranted and outdated ban on advertisements.

6.3 Justifications for the Regulation

As the objective of allowing lawyers to advertise, has been clearly elucidated in the previous chapters, now we shall justify the restrictions that have to be placed on those advertisements. The purpose of allowing advertisements should not be to lure prospective clients, but to facilitate the public to make an informed choice. Further they should not tend to promote a trend or to encourage people to litigate, but to inform them about their rights and duties. There should be a regulatory agency to

[109] See Articles V II & XVII of GATS agreement available at www.wto.org/english/tratop_e/serv_e/serv_e.htm
[110] See: S. 47 of Advocates Act 1961.

monitor effectively the restrictions imposed on lawyer's advertisements preferably on the lines of the Disciplinary Committee that already exists, may be known as "Advertisements Regulatory Committee".

The regulation of advertisement is essential in order to mitigate the negative effects of allowing advertisement by advocates, as apprehended by a section of people. There will be disruptive impact on the profession and on the society, if the advertisements are left without regulation. This limited right to advertise should not be construed as an open license by the advocates and that they can advertise whatever they wanted and whichever manner they like. Except for the rule that they cannot make misleading or deceptive statements, one can advertise any thing one wants. This is the position that exists in many of the countries including U.S[111].

However, this above stated stand of allowing unlimited advertisements is not tenable. Firstly, the right to advertise is not a fundamental right or an absolute right, as it exists elsewhere. Here it should be recognised as a statutory right on the basis of justification elaborated in the earlier chapter. Secondly even those countries, which gave a blanket permission to advertise, find it difficult to accept the mode and manner of advertisements and trying to now indirectly regulate it[112].

While truthful and non-deceptive advertisements as a general rule are allowed, however in the case of lawyer's advertisements, it can't be so.

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[111] Under these conditions, professionals are allowed to advertise themselves as specialists, to quote prices or fees or discounts, to report their previous experiences or to publish true testimonials etc.

[112] See: *Florida's case*, supra note. This experience teaches us a lesson. Thirdly, due to India's socio, economic and political structure, certain things like allowing to quote prices, to publish testimonials etc. will do more harm than good, which will be discussed in detail in the coming chapter.

There may arise circumstances where even truthful advertisement by a lawyer may go too far and become illegal solicitation. The regulations or restrictions however, should have proper justifications for why a particular aspect is allowed and why another aspect is not allowed, keeping in mind that the entire concept of allowing advocates to advertise is based on the premises that it can effectively reduce the existing information gap.

Advertisements must be restricted to information that a person would find useful in identifying legal problems or choosing a lawyer. The information provided must be clear and demonstrably accurate. An advertisement that states or implies qualitative superiority to another lawyer or firm should not be allowed because it cannot be verified according to objective standard. In contrast, it can be stated as a true statement, without comparisons, about the qualities of a firm, if it is capable of verification.

Quantitative statement such as the largest firm in India can be allowed provided it is not false or misleading statement and is capable of verification.

6.4 Mode & Manner of Advertising

The following principles have to be borne in mind before formulating any guidelines or regulations or rules to regulate lawyer's advertisements;
The profession must have a reasonably flexible structure to facilitate its regulation having regard to public interest, consumer choice and quality of service.

Regulatory regime should be viable with respect to cost, accessibility and speed. Apart from the Bar, the law society (i.e. bench, academicians, etc) must also involve itself [in one or the other way or either directly or

indirectly] in these regulations. To inculcate a sense of professional responsibility and evolving for a self-standard, any mode or method in any media should be allowed as long as they are in conformity with ethics and profession's dignity. Underlying theme of any lawyer's advertisement must be compatibility with the best interests of the profession, the administration of justice and society generally.

Restrictions within Regulations

Among the other restrictions, three of the prominent ones are:

- Restriction to advertise fees or discount rates.
- Restriction to advertise by way of testimonials or endorsements as to the lawyer's achievements.
- Restriction to advertise comparison of one's own service with any other individual's or firm's services.

Classification of Advertisements

As stated earlier, advertisements can be classified into two categories on the basis of its content, namely, Informative Advertisements and Professional Advertisements. The informative advertisements with respect to an advocate may consist of statements such as:

- Standing at the bar
- Academic honors
- Specialization (based on the above mentioned criteria)
- Areas of practice (territorial and expertise).

Argument in favour of specialized service in legal profession

With the advancement of industrialization and consequent economic activities, litigation today is not confined only to disputes relating to

personal property or crimes alone. At the international as well as the domestic level, a host of other matters such as specialized contracts, arbitration, labor, intellectual property right issues, environmental issues, etc, come before the courts. It is in this background, Clients spread over the whole of Indian subcontinent and also other countries having Trade activities in India have a right to be informed about the availability of specialist services from different law firms or Professionals So that they can choose according to their Requirements. Lack of proper Information and knowledge about the availability of efficient and quality services has resulted in monopolistic tendencies and unjustified accumulation of work by a few which is detrimental to the quality and efficiency in Legal services.

CHAPTER 7

LAWYERING IN CYBERSPACE

The hardware necessary to reach the Internet, as well as the connectivity to the Internet has now become affordable. This has resulted in harnessing the advanced capabilities of the Internet to market legal services[113].

Most lawyers and law firms in India have their websites on the World Wide Web, as do their counterparts in other countries, especially the US.[114] All the large law firms, as well as most of the small firms, have websites.[115] The home pages established by these firms vary in content and size and also in the mode of expression. Most sites contain biographical information regarding the lawyers in the firm, and will also contain information about the inception of the firm. Some sites contain general information on designated legal topics and facilitate hypertext links to other material. Other information includes independent legal research materials, recruiting information, publications by its lawyers, etc.

A lawyer or a law firm posts an advertisement on the Internet in the form of a website, home pages or discussion contribution, so as to solicit clients. The Internet has no station range or circulation limitation. This is why the Internet turns out to be a medium hard to regulate.[116]

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[113] William E. Hornsby,"The Ethical Boundaries of Selling legal Services in Cyberspace", http://www.kuesterlaw.com/netethics/abawill.htm (As Visited on 2002).
[114] Adam Katz-Stone, "Law Firms Wade further into Advertising Waters", *Washington Bus. J.* 35 (1998).
[115] Louise L. Hill, Change Is In the Air: Lawyer Advertising and the Internet", 36 *U. Rich. L. Rev.* 21 (2002).
[116] Lori Christman, Keith Porterfield, Brandon Untereiner,"Ethical Considerations of Legal netvertising", Computer *Law Section of the State Bar of Georgia*, (August 1995).

The internet is used by lawyers for various purposes such as sending and receiving information through list servers, posting material for view in network newsgroups, using emails for exchanging information with designated entities, engaging in conference areas, chat groups, etc. [117] The shift witnessed, from the traditional methods of advertisements to advertising on the internet is partially because the World Wide Web dramatically alters the dynamics of attorney advertising while enlarging its scope.

7.1 Jurisdictional dilemma

The Internet has succeeded in making legal information readily accessible to the general public. Although the traditional methods of conveying information on the World Wide Web are websites and e-mail, other modes of dissemination of information have also come up. These include law school to chat rooms, all on the various websites.[118] However advertising on the web can be termed as almost entirely different from other media of advertisement due to the peculiar features of this mode of conveyance[119]. The crucial difference lies in the fact that Internet technology is far ahead of the traditional rules of ethics that have governed the legal profession. It can be said that it is extremely difficult, if not impossible, given the existing legal framework in any country, to police the world of cyberspace. There is also a jurisdictional problem; because lawyers are regulated on the basis of the territorial laws that apply to them, it is difficult to shut down far flung cyber law offices.

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117 See: Louise L. Hill, "Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards", 75 *Wash. L. Rev.* 785, 785 (2000).
118 A Re-examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purpose of Discussion, American Bar Association Commission on Advertising (July 1998) available at *http://www.abanet.org.*
119 See: Gary M. Ferman, " The Truth, the whole Truth and Legal Advertising online", http:// *www.fermanlaw.com/art-legal_advt.shtm* (As visited on 2002).

A lawyer advertising on the net necessarily goes beyond state and national jurisdictions within the context of communication. The problem arises as to how a lawyer on the web will confirm to all the different rules governing lawyer advertising in other countries. Since each jurisdictions rules vary, the lawyer with a home page on the internet will need to ensure that he is in compliance with the most stringent regulations[120]

The lawyer who uses the Internet for marketing his services should understand that the profession itself is going through a phase where the regulatory body has still not defined rules with regard to jurisdiction.[121] In the course of time, the legal profession will definitely make rules to govern these vital aspects. However, to some extent these jurisdictional problems can be addressed, if strict regulations were made in registration of domain name itself. For example, a lawyer or law firm should have Country specific Top Level Domain name, where he or she is practicing.

7.2 Potential legal & ethical issues

There should not be misleading domain names resembling some other famous persons or firms, in order to deceive clients and get unlawful gains. This will lead to civil and criminal litigation because the lawyer will be held responsible for the material in the web site. Further direct solicitation through email and using the chatting rooms as a direct client access tool will create untoward legal problems.

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[120] James Mc Cauley, "Lawyer Advertising and Solicitation Over the Internet", *http://www.com/HB-Spring 97-advertising. html* (As visited on 18th June 2002).

[121] William E. Hornsby, "The Ethical Boundaries of Selling Legal Services in Cyberspace", *http:/www.kuesterlaw.com/netetbics/abawill.btm* (As Visited On 28th May 2002).

Preserving Confidentiality

Communicating over the Internet does not mean that the client and the lawyer have waived their right to confidentiality. This is all the more important since information on the internet is very easy to access. So the lawyers using the Internet should be careful not to receive confidential information from the internet that could disqualify the lawyer or the firm from representing a longtime client in the matter. Thus lawyers on the Internet should use the same degree of care to avoid conflict of interests that they use in the office. Lawyers talking in open chat rooms must not permit a client to disclose confidences or secrets.

7.3 Regulatory Compliance

The presence of lawyers in cyberspace and the absence of any rules or regulations in this regard, necessitate regulatory mechanisms to control lawyer's advertisements in this area. The rules that may be framed can be mainly grouped into four heads:

- Disclaimer/Disclosure Requirements (this includes warning statements such as, a lawyer should not be selected solely on the basis of the information contained in the website).
- Labeling Requirements (e.g., 'advertising material').
- Record keeping requirements (specifying that the lawyer must retain the copy for a certain specified amount of time.
- Copying/ Filing Requirements (e.g., a rule that a copy should be sent to the Bar Council).

There can also be rules prohibiting testimonials, endorsements, and illustrations. The following are some of the measures that can be incorporated into the rules in order to establish firm control over the territory of legal advertisements on the Internet.

Effect of Disclaimers

Disclaimers can be helpful for lawyers and consumers alike, but should not be regarded "as absolute shields against liability". Further, it is hard to believe a disclaimer stating that what is mentioned in that web page is not legal advice, since the website itself touts its role in providing legal services.[122] Just saying something is not legal advice doesn't make it so. At some point, the information given by the lawyer is sufficiently detailed and tailored to the facts of the case. Therefore it is legal advice regardless of what the disclaimer said.

The usual format of a disclaimer, commonly used in lawyer's websites, reads as follows:

> *Please understand that the information referenced above is provided as only general information, which may or may not reflect the most current legal developments, thus the information is not provided in the course of the attorney-client relationship and is not intended to constitute legal advice or substitute for obtaining legal advice from a licensed attorney.*

The pertinent question in this regard is whether an ordinary person will be able to comprehend the language of such a disclaimer. Further the disclaimer also states that it is not necessary that the latest legal developments be contained in the website. If a person suffers as a result of relying on the outdated laws contained in the website, will the damage and loss he suffers as a consequence, be compensated, or can the law firm absolve itself of all liability because of the disclaimer. Another doubt that arises is whether such a disclaimer necessitated periodical updating of the website in order to avoid liability.

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[122] Joan C. Rogers, "Cyber lawyers Must Chart Uncertain Course in World of Online Advice", *ABA/BNA Lawyers' Manual on Professional Conduct* (March 15, 2002).

Any attorney biographical data and other aspects of the website should be accompanied by disclaimers

Maintaining Filters

In off-line advertising, i.e. advertising in newspapers, radio, television, there are various rules and regulations regarding the standards of advertising. These rules and regulations function as a filter, cleansing the advertisement of all the ingredients, which may be potentially harmful to the society. However, this is lacking in the case of advertisement on the Internet. The webmaster who designs the site can be said to be one kind of filter. Another is the internet service provider who might review the content. The lawyer's conscience and his sense of justice and nobility acts as the final and probably the most effective filter. For example, in the United States, the ABA regards the legal profession as a self-regulatory profession.[123] But how far individual discretion can be relied upon to bring about checks in an area which lacks ample legislation, needs to be seen.

General Information v. Legal Advice

Usually, large firms tend to view their website as a chance to show their clients their mastery over the latest technology. Thus some websites act more as customer service devices rather than as a way of obtaining new clients.[124] The Internet can thus provide an opportunity to lawyers to serve society by contributing to enhancing public legal knowledge. The distribution of substantial information through legal websites should thus be freely encouraged and not curtailed by any rules that may be made in future by the Bar Councils.

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[123] Amy Haywood, Melissa Jones, Navigating a Sea of Uncertainty: How Existing Ethical Guidelines Pertain to the Marketing of Legal Services Over the Internet", 14 *Geo.J. Legal Ethics* 1099 (2001).

[124] Drew L. Kershen, "Professional Legal Organization on the Interest: Websites and Ethics", 4 *Drake J. Agric. L.* 141(1999)

Setting National Standards

Since the Bar Council has not yet come out with any rules for regulating Internet advertising, the law firms need only comply with certain ethical considerations voiced in the Bar Council Rules dealing with general advertisement by lawyers.

Even if any rules are introduced by the bar council to regulate such advertising, the lawyers may argue that no such rule will be applicable to them since they are not practicing law on the website, but only providing legal information to the public. This practice of concealing the true motive to gain profits, behind the facade of consumer information services will not serve the interest of the legal profession and falls short of the standards of nobility set by this profession. In seeking to establish a national standard the website should include the name of at least one legal practitioner responsible for the content of the website. This one particular lawyer should be designated as the party responsible for the published advertising content.

CHAPTER 8

CONCLUDING REMARKS

Rather than money, the profession's members share a common allegiance expressed in their oaths to deliver services. Towards this end they act as officers of the courts and as instruments of public interest. The problem of application of traditional rules to modern lawyering is expressed in a number of articles, advocating changes in the modern rules, due to the inadequacy of the rules for many practice areas. The legal profession is searching for ways to make the traditional rules of ethical lawyering relevant to modern practice. The moral regulation is largely an internal function of the profession, so the ethics dilemma also needs an internal remedy. But an internal response that is unresponsive to the changing demands of the society can be detrimental to the legal profession. Accommodation of the various interests voiced in this regard is more important, because they preserve pluralistic decision-making by restricting conflicted representations.

The focal point in the whole debate on advertisement by advocates is the interest clash because of regulations that arise due to the emerging trends influencing legal profession. The lawyers are being forced to react to external market pressures by non-lawyers offering quasi-legal services or multi- disciplinary practices. Of particular importance is the market capture by accountants who are driven by the consumer demand for cheaper, more efficient financial planning, domestic and international tax assistance, appraisals, alternative dispute resolution etc. Traditionally this is considered

to be areas where the legal professionals used to be involved, but it is now being gradually acquired by accountants.[125]

The next focal point of the issue is whether ban on advertisements is completely followed or there are surreptitious ways to overcome it. Almost all the leading law firms in India today are listed in the Martindale Hubbell Law Directory and several other law directories like Asia Legal 500, Asia Legal Profiles etc. They came with a justification that the above mentioned publications neither tantamount to soliciting work nor advertising of any nature either directly or indirectly as the term advertising has a different connotation[126]. Many Bar Councils has chosen not to take action against any lawyer or law firms in respect of the above activities as amounting to advertising or solicitation and this shows that these Bar Councils have implicitly recognized the need for permitting these activities in the environment in which the legal profession operates today in India.[127] There have been a number of instances where an individual lawyer tends to seek out a client as an individual or as a member of a section of the community, who is suffering a denial of fundamental or other rights and brings his case to court so that he secures relief through Public Interest Litigation. This is of course an appreciable help from a lawyer to the society. But often it seems at least some lawyers who undertake such helpful work are not unmindful of the publicity they will get. In such cases therefore the question would be whether the lawyer concerned has consciously inspired the media applause of or comments on his efforts in the practice of his profession in violation of the rules and regulations. Therefore, these types

[125] See: Zacharias and Timothy," Waiving Conflicts of Interests" *108 Yale L.J.* 407 (1998)
[126] See: The explanation filed by Bhasin & Co to the Show Cause notice served by Bar Council of Delhi. They quoted Black's Law Dictionary which states," advertisement as a notice given in a manner designed to attract public attraction or information communicated to the public or to an individual concerned by handbills, newspapers, billboards, radio etc."
[127] However the Delhi State Bar Council is an exception to some extent in the sense it has served show cause notices to law firms like Bhasin & Co. but ended in a sort of compromise. See: Bar Council of Delhi's Press release 1623/99 Dated 9th December, 1999.

of indirect advertising form an integral part of life in our country, which needs to be checked.

In most of the countries advertisement by lawyers is now allowed, therefore it is wise to fall in line with the international trend. In consonance with this notion and the existing environment, even the traditional bars like England had made suitable amendments. Moreover, Internet as a medium poses difficulty because of its easy and universal accessibility and anonymity in identification. So any one sitting in any corner of the world can send or receives advertisements about his professional service, casting a shadow on the jurisdiction of the geographical boundaries. The impact of the problem will be further compounded and be acutely felt once the foreign lawyers and foreign law firms are allowed to practice in India according to GATS Agreement as explained earlier.

Further the issue will get more complicated and will go beyond the bounds of law, if Supreme Court marches ahead with the *Tata Press case* jurisprudence and expands the scope of the fundamental right under Article 19(1)(a) to include lawyer's right to advertise. The basic emphasis on allowing advocates to advertise in India is based on the information – provision function of advertising, with an attempt being made to strike a balance between the attorney's advertising rights and the profession's image and ethical standards. On the basis of all the above stated reasons the lawyers should be allowed to advertise with an objective of facilitating the public to make an informed choice, in conformity with the dignity of the profession and not to lure prospective clients.

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