

ADVERTISING BY LEGAL PROFESSIONALS

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Introduction

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"

- John Milton

India is a country having over 1.2 million lawyers.¹ However, as stated by Llyod Pearson, a London-based Legal Directories Consultant, there is insufficient information about the practice of law by advocates in India.² The primary reason for this is the prohibition on legal advertising in India.

Legal advertising refers to legal professionals publicising the services provided by them through the Court of Law, implying the legitimate administrations provided by legal counsellors.³

The prohibition on advertisements by legal professionals has its origin in England, founded on the Victorian notions developed during the British rule.⁴ In India, similar to UK, the legal profession is considered to be an honourable one, which is why advertising by legal professionals is cynical and not widely accepted.

The prohibition of legal advertising is based on its adverse effects on professionalism as commercialisation of the legal professional was believed to undermine the lawyer's sense of dignity and self-worth.⁵ Other reasons for the prohibition include misleading nature of advertisements and the loss of quality in services. It is believed that advertising would lead to unhealthy competition whereby legal professionals would resort to practices such as fee

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¹ John Grimley, *India to lift restrictions on law firm websites*, ASIA LAW PORTAL, (March 26, 2014), <http://www.asialawportal.com/2014/03/26/india-to-lift-restrictions-on-law-firm-websites/>

² *Id.*

³ Shivam Gomber, *Right to Advertise for Lawyers*, UDGAM VIGYATI Vol. 3 1 (2016)

⁴ *Id.* at 7

⁵ Ted Schneyer, *"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 89 FORDHAM URBAN LAW JOURNAL Vol. 40 Issue 1 Article 15 (2013)

undercutting and focus less on the quality of the services provided by them, in addition to incurring advertisement expenditure.⁶

Even Justice Krishna Iyer has stated that “the canon of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is not a trade, briefs no merchandise and to the heaven of commercial competition or procurement should not vulgarise the legal profession”.⁷

Accordingly, the initial BCI Rules had placed a complete ban on advertisements by lawyers. Subsequently in 2008, the ban was relatively relaxed and legal professionals were permitted to organise websites, which specified only their contact information, area of specialization and qualifications.

In India, various forms of indirect advertisements by legal professionals have been taking place for several years, by way of visiting cards, directory listings, seminars and felicitation ceremonies and issuing circular letters or election manifestoes with name, address and profession printed on it, appealing to members of the Bar practicing in lower Courts, who can recommend to clients for the High Court level. All of these activities are in contravention of the BCI Rules and would attract Rule 36.⁸

Objectives of Study

This paper attempts to analyze the reasons for prohibiting advertisements by legal professionals, the nature and extent of the prohibition, the constitutional validity of the prohibition and the efficacy of banning advertisements by legal professions under the Bar Council of India Rules in the present day situation.

Research Methodology

The researcher has adopted the doctrinal research methodology in the compilation, organization, interpretation and systematization of the primary and secondary sources in order to carry out the study.

⁶ Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective*, CEELI Concept Paper Series 18 (2002)

⁷ *Bar Council of Maharashtra v. M. V. Dabholkar*, 1976 AIR 242

⁸ Gomber, *supra* note 3, at 3

Bar Council of India Rules

Under the Advocates Act, the Bar Council of India (BCI) has the power to make rules in order to discharge its functions under the Act, based on which, it has formulated the BCI Rules.⁹

As per the Rule 36 of the BCI Rules, an advocate is prohibited from soliciting work or advertising, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. Even the sign board, name plate or stationery of an advocate should not indicate that he is or has been the President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate General.

However, in 2008, the Rule was amended, pursuant to a resolution passed by the BCI on 30th April, 2008¹⁰ before a three-member bench of the Apex Court. According to the amended Rule, advocates are allowed to furnish information on their websites,¹¹ in conformity with the Schedule, as per which the following information can be furnished on the websites:

1. Name
2. Address, telephone numbers, e-mail id's
3. Enrolment number, date of enrolment, name of the State Bar Council where originally enrolled, name of the State Bar Council on whose roll they currently stand, name of the Bar Association of which the advocate is a member
4. Professional and academic qualifications
5. Areas of practice.

Legal professionals furnishing the above-mentioned information on their websites are also required to provide a declaration that the information provided by them is true.¹²

⁹ Section 49(1), Advocates Act, 1961

¹⁰ Resolution No. 50/2008 dated 24th March, 2008

¹¹ Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

¹² Declaration, Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

Judicial Approach

As explained by the Madras High Court in 1967,¹³ advertisements by lawyers is regarded as reprehensible conduct because the standards which lawyers jealously develop and set up for themselves are unbecoming to the honour, dignity and position of the noble profession. Further, in a country such as India, a large segment of the population is illiterate, which fosters a situation whereby unscrupulous lawyers may exploit the public, while law is traditionally a profession with the goal of public service.

The Indian judiciary has made significant contribution to uphold the dignity of the legal profession and ensure unimpeded performance of lawyers' duties towards the Court. In the case of *R. N. Sharma, Advocate v. State of Haryana*,¹⁴ it has been held that an advocate is an officer of the Court, and the legal profession is not a trade or a business; it is a noble profession and advocates have to strive to secure justice for their clients within legally permissible limits.

However, the considerable question is what constitutes advertisement in the legal profession. Apart from the BCI Rules, the same has been enunciated under various judgments of the Indian Courts.

In the case of *Government Pleader v. S. A Pleader*,¹⁵ it was held that a pleader sending a post card merely providing his address, name and description would amount to advertisement on his part and he would be deemed to have violated professional standards of conduct of advocates.

In the case of *In Re: (Thirteen) Advocates v. Unknown*,¹⁶ it was held that publishing articles in newspapers, where the writer describes himself as an advocate practicing in Courts is a cheap way of endorsing one's services.

The Madras High Court, in *S. K. Naicker v. Authorised Officer*,¹⁷ has held that a sign board or a name plate of an advocate should be of a moderate size and that writing articles for publication in newspaper under an advocate's signature is a breach of professional etiquette as both the actions amount to unauthorised legal advertising.

¹³ *CD Sekkizhar v. Secretary Bar Council*, AIR 1967 Mad. 35

¹⁴ 2003(3) RCR (Criminal) 166 (P&H)

¹⁵ AIR 1929 Bombay 335

¹⁶ AIR 1934 All 1067

¹⁷ (1967) 80 Mad. LW 153

In another case, the Madras High Court¹⁸ has held that even under the name of election manifestos, an advocate cannot propagate his name and advertise in the form of announcements and canvassing.

In the case of *J.N. Gupta v. D.C. Singhania & J.K. Gupta*,¹⁹ the respondent advocates had issued two advertisements in a newspaper; the first indicating a change of address on account of fire in the building where they were practicing, and the second time for shifting back to the building where their old office was located. Subsequently, they also published their name and address in the International Bar Directory under the headings "Singhania & Company", "Firms Major Cases" and "Representative Clients". The Court held that there was no violation of the rule against advertisement with respect to publication in the newspaper as the same was made on account of the fire, which required urgent notice of change in address to be given to existing clients. With regard to the publication in the International Bar Directory, it was held that publication in any manner, either in National or International Bar Directory would not constitute a violation of Rule 36 if it is done with the purpose of giving information of address or telephone numbers of advocates. However, in the instant case, it was found that the publication was made to give publicity to the fact that the law firm had dealt with important cases and had eminent clients; hence, was being used to advertise the firm itself.

Position in United Kingdom

Though initially, owing to the traditional Victorian notions, legal advertising was prohibited in the UK, subsequent to the review by the Monopolies and Mergers Commission in 1970 and the Office of Fair Trading in 1986, whereby the advantages of letting legal professionals advertise were highlighted, the ban in the UK was lifted.²⁰

In the UK, the law governing legal advertising is contained under the Solicitors' Publicity Code, 1990, which has been amended and published in 2016 according to the changing needs of the hour.

Under Chapter 8 of the Code, publicity by a legal professional ought not to be misleading, but should provide sufficient information to ensure that clients and others can make informed

¹⁸ *C.V. Sekkizhar v. Secretary, Bar Council, Madras*, AIR 1967 Mad 35

¹⁹ BCI TR. Case No. 38/1994

²⁰ Bolocan, *supra* note 6, at 22

choices,²¹ thus addressing the right to information of the clients. Further, every letterhead, website and e-mail of the legal professional should read “authorised and regulated by the Solicitors Regulation Authority (SRA)”, the name under which it is licensed and the number allocated to it by the SRA.²²

The restrictions on advertising are limited by the SRA. Unsolicited approaches in person or by telephone in order to publicise practice is prohibited.²³ Legal professionals are also allowed to publish their fees provided the same is not pitched at an unrealistically low level.²⁴ However, details of fees cannot be advertised without making it clear that additional charges may be payable.²⁵

Position in United States of America

The position in USA was similar to the position in India till 1977. Ordinance 27 of the Professional Ethics of American Bar Association²⁶ stated that it was unprofessional to solicit professional employment by advertisements. However, it has now become a constitutionally protected right following the decision of the US Supreme Court in *Bates v. State Bar of Arizona*²⁷.

In this case, two attorneys opened a law firm to offer legal services to those who did not qualify for legal aid, but could not otherwise afford legal services. The only viable manner for the attorneys to function was by way of advertisements. The attorneys admitted that the advertisement made by them was in violation of the law. However, the Court held that a blanket prohibition of advertising in the legal profession was unconstitutional and in violation of the First Amendment i.e. freedom of speech and expression. Hence, this was the first American case establishing the right of attorneys to advertise, allowing States to regulate and monitor advertising by legal professionals.

Advertising by legal professionals in USA is currently governed by the Model Rules of Professional Conduct, 1983. As per the Rules, a lawyer may advertise his services through written, recorded or

²¹ Rule 8.1, Solicitors' Publicity Code, 2016

²² Rule 8.5, Solicitors' Publicity Code, 2016

²³ Rule 8.2, Solicitors' Publicity Code, 2016

²⁴ Rule 8.7, Solicitors' Publicity Code, 2016

²⁵ Rule 8.9, Solicitors' Publicity Code, 2016

²⁶ Model Rules of Professional Conduct, 1969

²⁷ 433 U.S. 350

electronic communication, including public media,²⁸ subject to the following conditions:

1. No false or misleading communication should be made about the lawyer or the lawyer's services.²⁹
2. No lawyer shall solicit professional employment in person, live telephone or electronic contract when a significant motive is the lawyer's pecuniary gain.³⁰

Changing Face of the Legal Profession

In India, there are contradictory views with respect to allowing advertisements by legal professionals. According to some, law is a commercial activity; hence advertisements within specified boundaries should be permitted; however, according to others, law cannot be viewed as a commercial activity in light of the public policy goals of access to legal services.³¹

As seen in the study, though there is a strict prohibition on advertising by legal professionals with the exception of certain information published on websites, there is no clear judgment as to what constitutes advertisement and what does not.

As has been witnessed, though hoardings, sign boards and media advertisements are prohibited, these rules have been flouted by hanging huge flex boards with photographs, names and designation of lawyers. Newspapers often publish names of advocates representing high profile clients and the outcome of such cases, lawyers often appear for interviews on national television, some major law firms have glorified their past case records on their websites, published articles written by their partners and associates, provided information regarding their achievements, for which they have provided disclaimers to be accepted by the users before accessing the website; do such activities not constitute advertising? The answer is yes; all the above mentioned actions constitute advertisements.³² One needs to accept that the BCI cannot be a watchdog for every lawyer's website. However, it is also concurrently necessary to acknowledge the fact that the dynamics of the legal profession and

²⁸ Rule 7.2, Model Rules of Profession Conduct, 1983

²⁹ Rule 7.1, Model Rules of Profession Conduct, 1983

³⁰ Rule 7.3, Model Rules of Profession Conduct, 1983

³¹ Lawyers Collective, 4 (October, 2001)

³² Lalit Bhasin, *Law firms find loopholes to promote their services*, SOCIETY OF INDIAN LAW FIRMS, <http://www.livemint.com/Companies/vqsXsEeGYuqPII9I8TPL00/Law-firms-find-loopholes-to-promote-their-services.html> (last updated July 5, 2013)

consumer laws have undergone various developments, necessitating regulated advertisements by lawyers.

In the case of *K. Vishnu v. National Consumer Disputes Redressal Commission & Anr.*,³³ it was settled that the legal profession is an administration with the end goal of the Consumer Protection Act, 1986. The Report of the High Level Committee on Competition Policy and Law, under the Chairmanship of S.V.S. Raghavan stated that “the legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth of professional law firms, restricting their desire and ability to compete globally, preventing the country from obtaining advantage of India’s considerable expertise and precluding consumers of free and informed choice”³⁴.

Furthermore, even the Supreme Court has held the legal profession to be covered under the definition of “industry” under the Industrial Disputes Act, 1947.³⁵

From these decisions, we can conclude that legal services are becoming subject to consumer protection and trade laws of India, moving towards the inevitable path of commercialisation.

Constitutional Validity of Rules 36, Bar Council of India Rules

Article 19(1)(a) of the Constitution of India guarantees the freedom of speech and expression, the only exceptions being in the interest of sovereignty, integrity and security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence³⁶. In the case of *Tata Yellow Pages*,³⁷ the Supreme Court of India extended protection under Article 19(1)(a) to commercial speech i.e. advertising³⁸. Subsequently, it has been held that rendering professional legal services is a business proposition, and advertisement of the same as such comes within the definition of commercial speech.³⁹ The Supreme Court further strengthened the argument by observing that the right to freedom

³³ (2000) ALD (5) 367

³⁴ 8.2.5, Chapter VII, Competition Policy and Professional Services, Report of High Level Committee on Competition Policy and Law- S.V.S. Raghavan Committee, 2000

³⁵ *Bangalore Water Supply & Sewerage Board v. A Rajappa*, 1978 AIR SC 548

³⁶ Article 19(2), Constitution of India, 1950

³⁷ *Tata Yellow Pages v. MTNL*, 1995 AIR 2438

³⁸ P.S. Khurana, Legal Eye, Article 5, <http://www.legaleye.co.in/index.php/e-articles/213-e-articles/2566-article-5>

³⁹ *Dharam Vir Singh v. Vinod Majahan*, AIR 1985 P&H 169

of speech cannot be taken away by placing restrictions on the business of citizens.⁴⁰

The researcher submits that on a critical analysis of Rule 36, it does not satisfy any of the conditions specified in Article 19(2). The ban on advertisements by lawyers is not constitutionally permissible, even on the ground of "public order" under Article 19(2) as the public order has been held to be synonymous with public peace, safety, tranquillity and the like.⁴¹

Further, Article 19(1)(g) of the Constitution of India confers every citizen the right to choose his own employment, trade or calling, having the same reasonable restrictions as Article 19(1)(a),⁴² which is often impregnated with an implied right for availing all the mechanisms and resources for effectively carrying on the trade or occupation, including advertisement, provided it is not contrary to public interest.⁴³

Rule 36, in essence is also violative of Article 19(1)(g) as a reasonable restriction on prohibiting advertisement would only exist where the advertisement is against public interest i.e. when it is immoral, obscene or presents something which goes against public morality.⁴⁴

Hence, the researcher is of the opinion that the ban on legal advertising under Rule 36 is excessive in nature and unconstitutional, as the same is not consistent with reasonable restrictions under Article 19(2).

Advantages of Permitting Regulated Legal Advertisements

The researcher is of the opinion that permitting advertisements regulated by an appropriate authority would be more advantageous to upholding the dignity and nobility of the profession, than prohibiting advertisements altogether for the following reasons:

1. Opportunities to novice lawyers

It is a general observation that big firms have the power and resources to publicise their services through means other than direct advertisements, such as sponsoring events, hosting

⁴⁰ *Sakpal Papers v. Union of India*, AIR 1962 SC 305

⁴¹ *O.K. Ghosh v. E.X. Joseph*, AIR 1963 SC 812, *Dalbir Singh v. State of Punjab*, AIR 1962 SC 1106

⁴² Article 19(2), Constitution of India, 1950

⁴³ *Sakpal Papers v. Union of India*, 1962 SC 305

⁴⁴ *Chintaman Rao v. State of M.P.* AIR 1951 SC 118

seminars and conferences, etc. However, it is imperative to take cognizance of the fact that smaller firms do not have the resources to publicise in this manner, placing them in a position of disadvantage. Permitting advertisements would prevent monopolising the market and provide medium and small sized firms a platform to disseminate information about their services.

2. Right to information and awareness

Due to the ban on advertisements, in order to avail appropriate legal aid, one can only rely on “friend of friend” or word of mouth, thereby denying the consumers and potential clients of a standardised criteria for determining a “good lawyer”. Advertising is necessary for the recipient public, as it plays a vital role in aiding the consumers in the process of selecting an appropriate lawyer. Litigants have no way to shortlist practitioners specialising in a particular field of law. For these reasons, no reasonable interpretation can justify that the ban on advertising is serving any social or public purpose. The restrictions on advertising denies the public at large of proper and effective guidance in availing the appropriate kind of legal service for their purpose, thus acting contrary to social or public purpose.

3. Global Recognition

Rule 36 places Indian legal professionals in a position of disadvantage as compared to foreign legal professionals, because legal advertising is permitted in many other countries, making information of foreign legal professionals largely available. This is one of the primary reasons why the BCI is not interested in accessing international markets or allowing entry of foreign law firms in India.⁴⁵ Further, India is actively participating in globalisation, for which other countries trading or establishing themselves in India would require relevant information on potential lawyers available to their service. Owing to the prohibition of legal advertising, Indian lawyers are losing out on potential clients at an international level,⁴⁶ a situation against which protective measures can be taken by permitting legal advertising.

⁴⁵ CHRISTOPHER FINDLAY, PRIORITIES AND PATHWAYS IN SERVICES REFORM- PART II: POLITICAL ECONOMY STUDIES 89 (World Scientific Publishing Co. Pte. Ltd. ed.) (2013)

⁴⁶ RUPA CHAND, PRALOK GUPTA, GLOBALISATION OF LEGAL SERVICES AND REGULATORY REFORMS: PERSPECTIVES AND DYNAMICS FROM INDIA 81 (1st ed. 2015)

4. Awareness and Education

Advocates often write articles, treatises, research papers, monographs, etc. on various aspects of law, which not only provide recognition to their services, but are also beneficial in disseminating information about a particular aspect or interpretation of the law and for educational purposes. Though the same can be published in law journals or law reports, such resources are seldom available to the public at large, enjoying sparse circulation amongst non-lawyers.⁴⁷

5. Lack of internet access

The *proviso* whereby legal professionals are permitted to furnish certain information on their official websites is of no utility to majority of the Indian population as only 34.8% of the population has access to internet services.⁴⁸

Disadvantages of Regulated Legal Advertising

Despite the benefits, the disadvantages in permitting legal advertising are as follows:

1. Gross misuse

In the opinion of the researcher, permitting advertisements would most likely be exploited by unscrupulous advocates and firms by furnishing dishonest information. Further, there is persistently a threat that the consumers would be swayed away by graphics or punch lines, leading them to base their decision, not on grounds of the reputation and fair evaluation of the advocate, but on insubstantial grounds.

2. Shifting focus

Another detriment of permitting advertisements would be that instead of focusing on improving their skills and legal acumen, legal professionals would also have to focus on publicising themselves to play fair in the newly developed competition. This could adversely affect the quality of services provided by legal professionals.

⁴⁷ M. L. Sarin, Harpreet Giani, *Prohibition of Advertisement in the Legal Services Sector*, INDIAN LAW JOURNAL, http://indialawjournal.com/volume1/issue_1/legal_articles_sarin.html (last updated 2007)

⁴⁸ Internet Live Stats, India Internet Users, <http://www.internetlivestats.com/internet-users/india/> (last updated July 1, 2016)

Conclusion

Though the law prohibiting legal advertising in India is founded on the British Victorian system, our law shows a trend of resisting change as we have not developed the same in light of the changing nature of legal services. A critical analysis of the consequences of Rule 36 would lead to absolutely absurd conclusions as it does not permit business cards, seminars, conferences, ceremonies, directory listings, issuance of circulars, election manifestoes, address and court of practice and even oral communication of the fact that a person is an advocate.

Though there are certain drawbacks of permitting advertising by legal professionals, we need to consider the fact that the indirect methods of advertising are presently taking place at a large scale, due to which the profession is already subject to the disadvantages of legal advertising even when advertising has not been permitted. However, due to the restriction on direct advertising, we are unable to benefit from the positives of legal advertising.

In the age of information and commercialisation, the reasons based on the ground that law is a “noble” profession cannot be sustained because consumers of legal services are entitled to obtain the best value for their investment, similar to any other service. Every litigant ought to be provided with a platform from where he can identify the most suitable legal professional.

Recommendations

In the opinion of the researcher, advertising *per se* ought not to be barred. Instead, as long as an advertisement promotes legal awareness and gives consumers i.e. clients and potential clients, an opportunity to evaluate the competence of a legal professional, it should be permitted by way of regulating it.

The BCI should lay down specific rules as to the subject matter and kind of advertising that may be permitted. This fulfils the need for advertising, while at the same time, sufficient checks and balances are provided for in order to prevent unscrupulous advertising. The advantage of such a mechanism is that it would enable the BCI to retain a regulatory role in preserving the high standards of the profession, and simultaneously provide a fair ground for advocates to publicise their services and for consumers to exercise their right to information.

After much research and study on the issue, the researcher is of the opinion that the mechanism by way of which the BCI can modify the Rules and regulate legal advertising is as follows:

1. Permitting other modes of legal advertising

Since information furnished on websites alone is ineffectual to the segment of the population lacking access to internet, the researcher is of the opinion that besides websites, legal professionals should also be permitted to advertise in newspapers, pamphlet, legal digests, magazines, and the like, subject to the reasonable restrictions which would be discussed subsequently. Such a practice would have two-fold benefit by enabling those lacking access to internet the right to information and legal awareness, and aiding novice lawyers who lack the technical skill to function websites to gain recognition amongst potential consumers.

2. Information that should be permitted

In addition to the information already provided for under the Schedule, legal professionals should also be permitted to furnish the following information

- i. Whether the legal practitioner is or has been the President or a Member of any Association or has been associated with any person or organisation or socially relevant issue.
- ii. Whether the legal practitioner is or has been the President or a Member of the Bar Council of any State.
- iii. Awards and achievements of the legal practitioner, with relevant proof to be uploaded on the website and provided whenever asked for by the BCI.
- iv. Whether the legal practitioner has provided or is providing any legal aid or *pro bono* services.
- v. Details of events conducted and sponsored.
- vi. Publications, such as books, articles, monographs, etc. of the legal practitioner

However, the law must also expressly provide that:

- i. No advertisement by a legal professional should claim for superiority of their practice over the practice of others in the profession. This measure prohibits negative publicity.
- ii. The advertisement should be accurate and not misleading.
- iii. Use of slogans and punch-lines should be prohibited.
- iv. No information must be furnished with respect to any particular case or client, including the name or any other

personal information which would enable a reasonable person to draw assumptions of the same.

3. Monitoring mechanism

The researcher also recommends that a Committee should be set up by the BCI to monitor advertisements by legal professionals and take action against those who act in breach of the Rules.

4. Penal consequences

In order to enforce compliance with the Rules, the Section 36 of the Advocates Act, 1961, which deals with disciplinary powers of the BCI, should be amended to attract penal consequences in case of violation of the legal advertising rules by any legal practitioner. The legal practitioners should be fined or sentenced to imprisonment for a particular period of time. Such a measure would act as a deterrent to violate the Rules.

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