Comments

Trade Names: A New Technique in Lawyer Advertising

I. Introduction

When the United States Supreme Court decided in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[1] that professional commercial speech was protected by the First Amendment, it noted that this protection did not extend to advertising which was false, misleading or deceptive.[2]

The Court in *Bates v. State Bar of Arizona*,[3] held that this principle extended to the legal profession as well, while reassuring the states that they could protect the public by regulating the lawyers' commercial speech.[4]

An example of regulation under this early commercial speech doctrine is the absolute prohibition of the use of lawyer trade names by the Model Code of Professional Responsibility's DR 2-102(B).[5] The Model Code's EC 2-11 explains that lawyer trade names are considered misleading.[6] In *Friedman v. Rogers*,[7] the Supreme Court upheld DR 2-102(B) when it ruled that Texas could constitutionally prohibit the use of trade names by optometrists.[8] The Court found that trade names were a form of commercial

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1. 425 U.S. 748 (1976).
2. *See id.* at 771.
3. 433 U.S. 350 (1977).
4. *Id.* at 383.
5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (1980) [hereinafter cited as Model Code]. "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name. . . ."
6. MODEL CODE EC 2-11. "The use of a trade name or assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name. . . ."
7. 440 U.S. 1 (1979).
8. *See id.* at 15.

speech that had no intrinsic meaning;[9] that there was a significant possibility that they would be used to mislead the public;[10] and that the State of Texas had a substantial interest in protecting its citizens by preventing their use in professional advertising.[11]

Supported by this Supreme Court decision, DR 2-102(B) is currently on the books in 37 states.[12] However, the actual interpretation of the disciplinary rule has been varied. A survey of case law, ethics opinions and a random sampling of yellow pages indicates a division in belief of what the definition of a prohibited trade name actually is.

II. DR 2-102(B) As Applied

In *In re Oldtowne Legal Clinic*,[13] the Maryland Court of Appeals held that Oldtowne Legal Clinic was a trade name and, therefore, prohibited by Maryland's DR 2-102(A).[14] Relying heavily on *Friedman*, the court rejected a claim that the disciplinary rule interfered with a lawyer's protected commercial speech.[15] The court also indicated its conception of a trade name when it noted that it had previously disapproved of the name The Consumer Law Center of Jacob J. Shapiro.[16]

Ethics opinions in Mississippi, Alabama and Nebraska are in line with this on-its-face interpretation of the rule.[17] These opinions indicate that DR 2-102(B) applies to any name other than an attorney's actual name.

Although several ethics opinions generated in New York say that the disciplinary rule may not apply to a trade name if that

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9. *Id.* at 12.

10. *Id.* at 13.

11. *Id.* at 15.

12. *See* Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. J. 967, 1007, n.190.

13. *In re* Oldtowne Legal Clinic, P.A., 400 A.2d 1111 (Md. 1979).

14. *Id.* at 1115. Maryland has chosen to adopt DR 2-102(B) as DR 2-102(A).

15. 400 A.2d at 1115.

16. *Id.*

17. *See* [Index Annot.] LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) (1984). Miss. B. Op. 60 (1981) (trade names are misleading; an attorney should practice under his own name); Mobile (Ala.) B. Op. 2 (1982) (Family Legal Practice Center is a trade name and prohibited); Neb. B. Op. 80-4 (undated) (use of Legal Clinic, Law Center, or any other trade name is misleading and prohibited) [hereinafter cited as LAWYERS' MANUAL].

name also contains the name of an attorney,[18] a state court has disagreed with them.

In *In re Shephard*,[19] the New York court ruled that The People's Law Firm of Jan L. Shephard, Attorney, P.C., was both misleading[20] and a trade name, and that trade names were prohibited by DR 2-102(B).[21]

In this example of jurisdictions, the use of any name, other than an attorney's, is a trade name and prohibited by the rule. After a brief look at the yellow pages in these states, it is evident that the strict interpretation of DR 2-102(B) is being complied with.[22]

The intent behind the ban on trade names comes from the American Bar Association's prior Code of Professional Responsibility EC 2-11. This ethical consideration says that the use of such a name *could* mislead the public as to the "identity, responsibility, and status" of those practicing under it, therefore attorneys should not use them.[23] After *Bates*, many states departed from the facial interpretation of the rule which follows this ethical consideration.

The Oregon Supreme Court decided that advertising under the name Shannon and John's Hollywood Law Center was not a violation of DR 2-102(B).[24]

The court read the word "could" out of EC 2-11 and found that the purpose of the disciplinary rule was "to protect the public by prohibiting the use of trade names which '*would* mislead laymen concerning the identity, responsibility, and status' of those who use [trade] names."[25]

Shannon and Johnson's trade name was found permissible because it did not mislead the public.[26] This indicates that the Ore-

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18. *See id.* at N.Y. City B. Op. 82-20 (undated) (The Personal Injury Law Store of *John Doe*, P.C. constitutes a trade name and is prohibited. However, The Personal Injury Law Clinic of *John Doe*, P.C. is permissible); N.Y. City B. Op. 81-7 (undated) (Immigration Law Clinic of *John Doe* is permissible because it contains an attorney's name).

19. 92 A.D.2d 978, 459 N.Y.S.2d 632 (1983).

20. *Id.* at ____, 459 N.Y.S.2d at 633 (citing Friedman v. Rogers, 440 U.S. 1 (1979) and *In re* Oldtowne Legal Clinic, P.A., 285 Md. 132, 400 A.2d 1111 (1979)).

21. *See id.*

22. The yellow pages also indicate a strict interpretation of DR 2-102(B) in Arkansas, Connecticut, Nevada, Ohio and Oklahoma.

23. *See* MODEL CODE, *supra* note 6.

24. *See In re* Shannon, 292 Or. 339, 638 P.2d 482 (1981).

25. *Id.* at ____, 638 P.2d at 484 (citing EC 2-11) (emphasis added).

26. *Id.*

gon Supreme Court believes that a trade name is not prohibited by DR 2-102(B) if it identifies the lawyer using one and it is not otherwise misleading.

Florida Bar v. Fetterman[27] announces a similar view. Florida's disciplinary rule was not violated by the use of The Law Team, Fetterman and Associates, because the attached attorney's name prevented the trade name from being inherently misleading.[28]

Ethics opinions in other states indicates that the identity factor of EC 2-11 has played an important role in the decision to loosen the prohibitive mandate of DR 2-102(B).[29]

Although an acceptance towards the use of trade names is emerging, it is difficult to determine the extent of this acceptability. There is concern over the experimentation with trade names[30] and over certain items of content, like geographical names.[31] Some states have amended DR 2-102(B) to allow trade names but their bar associations continue to deem their use unethical.[32] Other states have simply diluted,[33] ignored,[34] or refused to enforce the

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27. 439 So. 2d 835 (Fla. 1983).

28. *Id.* at 838.

29. *See* LAWYERS MANUAL, *supra* note 17, at Fla. B. Op. 81-4 (undated) (it is potentially misleading to use John Doe and Associates because identity, responsibility and status is not clear); Philadelphia B. Op. 80-111 (undated) (Legal Credit Services of Attorney, ____, P.C. is permissible); S.C. B. Op. 81-23 (1982) (a trade name which does not identify the lawyer could be misleading); Dallas B. Op. 1981-4(1981) (Lawyers' Writ Service is impersonal and misleading as to identity).

30. The Florida Supreme Court noted that approval of the use of the words Law Team should not "be taken as an invitation to lawyers to experiment with other terminology to attract the public's attention. [The Law Team] appears to be the outer limit allowable." Fetterman, 439 So. 2d at 840.

31. *Compare* LAWYERS' MANUAL, *supra* note 17, at Ind. B. Op. 4 (1981) (geographical names are prohibited) *with* Tenn. B. Op. 82-F-37 (*City* Legal Clinic of *John Doe*, P.C. is permitted by DR 2-102(B)).

32. *See* KANSAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (1979); LAWYERS' MANUAL, *supra* note 17, at Kansas B. Op. 81-29 (1981) (trade names are prohibited by the disciplinary rule). *See also* Ill. B. Op. 741, 70 ILL. B.J. 195, 196 (1981) (although *John Doe*'s Any County Law Clinic did not violate the code of professional responsibility, the ethics committee found the name was improper and did not comport with the ethical standards of the legal profession).

33. *See* LAWYERS' MANUAL, *supra* note 17, at Mich. B. Op. CI-788 (1982) (a trade name will not be considered misleading if an attorney's name appears somewhere in the advertisement).

34. *See id.* at Ariz. B. Op. 81-1 (1981) (the majority of an Arizona ethics committee chose to ignore DR 2-102(B) and found that Automobile Legal Services was an improper designation of an area of practice).

rule.[35]

This overview has identified two groups of states operating under DR 2-102(B). One group has remained in the traditional anti-advertising camp, while the other group has created a great deal of confusion by interpreting the rule to allow what it forbids on its face.

The liberal view has created problems of practical application and questions of constitutionality are raised by the conservative interpretation.

III. The Constitutional Status of the Rule

Since *Bates*, the Supreme Court has refined the commercial speech doctrine. In *Central Hudson Gas & Electric Co. v. Public Service Commission*,[36] the Court identified a four-part analysis concerning this type of speech and its regulation.[37]

Commercial speech receives First Amendment protection if it concerns a lawful activity and is not misleading. However, a state may regulate the speech if it has a substantial interest in doing so, but only if the regulation directly advances the interest and is no more restrictive than necessary to advance that interest.[38]

In a later case on lawyer advertising, *In re R.M.J.*,[39] the Court determined that a state has a substantial interest in regulation "where the particular advertising is inherently likely to deceive[40] or where the record indicates that a particular form of advertising has *in fact* been deceptive."[41]

The *R.M.J.* Court continued by citing *Friedman* as an example of the second justification for regulation.[42] Indeed, the *Friedman* Court found a long standing abuse of trade names used by

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35. *See id.* at Wisc. B. Op. E-80-16 (1981) (although this opinion indicates trade names are prohibited, a look in the Milwaukee yellow pages reveals such names as A Very Fine Lawyer, P.C. and Drunk Driving and Speeding Defense Center).

36. 447 U.S. 557 (1980).

37. *Id.* at 566.

38. *Id.*

39. 455 U.S. 191 (1982).

40. As for this justification, it is becoming apparent that a trade name is not considered inherently misleading if it contains an attorney's name. *See, e.g.*, Fetterman, 439 So. 2d at 838.

41. 455 U.S. at 202 (emphasis added).

42. *Id.*

optometrists to mislead the public.[43] In *Friedman*, it was clear that the state's interest was "substantial and well demonstrated."[44]

Lawyers, however, have not been given the chance to develop a long standing misuse of trade names, which would warrant regulation under *R.M.J.* The potential exists, but the Supreme Court has warned that states may not place absolute prohibitions on types of information that simply have the potential to mislead.[45]

If DR 2-102(B) comes up for review, the court might be reminded that it has an affirmative duty, in proper cases, to review the evidence to make sure that constitutional principles have been constitutionally applied.[46]

The ban on trade names appears to be a proper case. *Friedman* cannot be used to justify DR 2-102(B) under the *R.M.J.* professional commercial speech doctrine. The use of trade names by lawyers has not "in fact" been proved to mislead the public. There is no record, yet, to support a substantial state interest.

Even if the states employing the disciplinary rule could cite the misuse displayed in *Friedman* as justification, a total prohibition does not comply with *Central Hudson*'s demand for the use of the least restrictive means to prevent public deception.[47]

Although *Friedman* was decided on substantial and narrow facts, the Supreme Court complicated this simple constitutional analysis by saying that trade names have no intrinsic meaning.[48] States have relied on this dicta to support DR 2-102(B)[49] and it appears that those words can be used to take trade names completely out from under First Amendment protection.[50]

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43. 440 U.S. at 13-15.

44. *Id.* at 15.

45. *See* R.M.J., 455 U.S. at 203.

46. *See In re* Primus, 436 U.S. 412, 434 (1978) (*citing* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284-85 (1964)). "We must 'make an independent examination of the record' so as to assure ourselves that [a] judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285.

47. *Cf.* R.M.J., 455 U.S. at 203 ("Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.").

48. 440 U.S. at 12.

49. *See, e.g., In re* Oldtowne Legal Clinic, 400 A.2d at 1116.

50. If trade names have no intrinsic meaning, they do not impart useful information to the public. If they do not inform the public, trade names do not rise to the level of commercial speech demanding protection. *Cf.* Virginia Bd. of Phar-

Notwithstanding dicta, there are those who think that trade names do have a useful meaning to the public. The *Friedman* dissent contains the opinion that trade names are a valuable tool which today's mobile society uses to locate the services and prices it desires.[51] This train of thought asserts that the profit incentive will help maintain the integrity of services offered under such a name.[52]

The idea that trade names advertise important information to the public has been adopted by the Federal Trade Commission (FTC)[53] and the Commission has recently urged the Nebraska Bar Association to support the use of lawyer trade names.[54]

In a statement to that bar association, the FTC said " 'unnecessary prohibitions on the use of non-deceptive trade names can seriously impair the utility of advertising and diminish consumer welfare.' "[55] If a lawyer cannot distinguish himself by the use of trade names, he may advertise less and " '[c]onsumers will then be forced to either employ more costly methods of information acquisition or to forego the purchase of certain legal services.' "[56]

Faced with a divergent view on the value of trade names to the public and the questionable constitutional status of its prohibition, DR 2-102(B) is beginning to crumble.

Conservative states are skirting claims that the rule is unconstitutional[57] and liberalized states are considering the abandonment of the regulation proscribing the use of trade names by adopting the permissive rules set forth by the American Bar Association (ABA).[58]

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macy, 425 U.S. 748.

51. *See* Friedman, 440 U.S. at 22 (Blackman, J., concurring in part, dissenting in part).

52. *Id.* (quoting deposition of Lee Kenneth Benham, professor and economist).

53. *Id.* at 22 n.4.

54. [CURRENT REPORTS] LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) No. 15, at 352 (Aug. 8, 1984)..

55. *Id.*

56. *Id.*

57. *See* Mezrano v. Alabama State Bar, 434 So. 2d 732, 736 (Ala. 1983) (finding that "University Legal Center" was misleading and deserving of no constitutional protection).

58. *See, e.g.*, Committee Report, 57 WISC. B. BULL., No. 11, Nov. 1984, at 60. "Although Wisconsin Bar Opinions have stated that all trade names are forbidden by DR 2-102(B), the rule has not been enforced due to its doubtful constitutional

IV. The Model Rules of Professional Conduct

The Model Rules of Professional Conduct were promulgated by the ABA in 1983.[59] Included in these rules are several sections intended to alleviate some of the problems arising under the restrictive advertising provisions of the Model Code.[60]

Rule 7.1 sets forth the simplified standard that lawyer communications shall not be false or misleading concerning the lawyer or his services.[61] Rule 7.5(a) allows the use of trade names if they do not imply a nexus with a public or government institution, and do not otherwise violate Rule 7.1.[62] The only technical aspect of these rules is the requirement that a lawyer's name appear somewhere in every advertisement.[63]

The new rules set forth a policy that tracks current constitutional standards, and provide the states with an alternative to the impractical interpretations generated by the Model Code's restrictive provisions. These rules also take regulatory power out of the hands of the legal profession and replace it with the power to enforce a well established body of advertising law.

Inferences as to the characteristics of the legal profession can be drawn from this new code[64] as it brings life to the prediction that advertising would have a profound effect on the profession of law.[65] One inference is that the rules exhibit a rejection of the old tenet that commercialism is detrimental to a profession.

V. The Effect of Advertising

From a traditional viewpoint, a professional class is occupied

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status. It looks like the new ABA rules will be adopted by this summer." Rick Packward, Wisconson Bar Association, in telephone conversation with the author (Jan. 30, 1985).

59. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES].

60. MODEL RULES 7.1, 7.2, 7.4, 7.5.

61. *See id.* at 7.1.

62. *See id.* at 7.5(a).

63. *See id.* at 7.2(d).

64. *Cf.* A. Hazard, *Conscience and Circumstances in Legal Ethics*, 1 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 36, 39 (1975). (Hazard reminds us that ethical self-definition can be found in what a code does not say, as well as what it does say).

65. *See* Bates, 433 U.S. at 389 (Powell, J., concurring in part, dissenting in part).

by persons who consider public service of primary importance and personal profit the simple result of their effort.[66] Restated, this is the notion of service before profit. The idea that commercialization of the law would be harmful to the profession, and society, flows in a similar vein.[67]

When Justice Powell recognized that advertising would cause drastic change in the notions of professionalism,[68] the premise upon which lawyer advertising was based was the need to inform the public of the availability of legal services.[69]

The inevitable by-product of advertising is public acknowledgment that lawyers are also interested in pecuniary gain. The Supreme Court recognized this in *R.M.J.* when it said that defendant attorney's sole purpose was to encourage the public to engage him for personal profit.[70]

It is 1985 and the legal profession is faced with the fact that it no longer has a legal basis to deflect the onslaught of commercialism in American society. With dignity no longer recognized as a legitimate basis for professional regulation,[71] the true characteristic of commercial enterprise has a chance to reveal itself as it makes its home in the legal profession.

The general purpose of advertising is to provide information that will induce the public to choose the advertiser's service over that of another.[72] In the context of lawyer advertising, the purpose is couched in terms of maximizing consumer welfare[73] and it is on

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66. *See* H. DRINKER, LEGAL ETHICS 5 (1983).

67. "Take away the conception of the practice of law as a profession—make it a business—and at once you destroy the very basis of professional discipline." JULIAS H. COHEN, THE LAW: BUSINESS OR PROFESSION 22-23 (1924).

68. *See* Bates, 433 U.S. at 389 (Powell, J., concurring in part, dissenting in part).

69. *See id.* at 364.

70. *See* R.M.J., 455 U.S. at 204 n.17. The Supreme Court has noted previously that it believes few attorneys are engaged in the self-deceptive belief that the practice of law is a non-commercial activity. Bates, 433 U.S. at 368.

71. *See* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 81:205 (citing R.M.J., 455 U.S. 191; Bates, 433 U.S. at 366-372); *see also* MODEL RULES 7.2 comment ("Questions as to effectiveness and taste in advertising are matters of speculation and subjective judgment."); Andrews, *supra* note 12, at 1010 (1981) (Dignity is an antiquated notion of professional etiquette that hinders a lawyer's use of effective advertising techniques).

72. R. POSNER, REGULATION OF ADVERTISING BY THE FTC 4 (1973).

73. *See* CURRENT REPORTS, *supra* note 54 and accompanying text.

this basis that the restrictive disciplines are being attached.

Traditional marketing strategies, such as the use of trade names, are considered a beneficial means of getting needed information to the public.[74] The FTC deems DR 2-102(B), and its constitutional support, undesirable social policy because trade names provide " 'a very useful way of reducing consumer search costs.' "[75]

Even though the purported purpose of advertising is to provide information that increases the welfare of society, there are those who disagree. These people believe that advertising is used strictly for business.[76] With such a profit-oriented goal, advertisers are tempted to seduce the consumer with motivations and sensations created by a slick combination of technology and Madison Avenue ingenuity.[77]

VI. Conclusion

Advertising by lawyers does provide the public with the valuable information that legal services are available. However, the scramble to induce a consumer to come to one particular lawyer throws a wrench in an attempt to define true professionalism.

The *Bates* court felt that advertising would not erode true professionalism[78] and that lawyers would continue to "abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system."[79] However, when the legal profession begins to use such terms as *advertising tactics* and *target audiences*,[80] one may wonder what has become of the professional notion of service before profit.

Advertising is here to stay and it is being actively promoted for purely economic reasons. Its use is considered proper because it benefits society by reducing something called consumer search costs.[81] It is also being sold as an economic necessity for the young

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74. *See* L. ANDREWS, BIRTH OF A SALESMAN 52 (1981).

75. *Id.* at 54-55 (quoting Albert H. Kramer, Director of the FTC Bureau of Consumer Protection).

76. AMERICAN ENTERPRISE INSTITUTE, ADVERTISING & THE PUBLIC INTEREST 3 (1976) (quoting U.S. Representative (N.Y.) Benjamin S. Rosenthal).

77. *Id.*

78. Bates, 433 U.S. at 368.

79. *Id.* at 379.

80. *See generally* ANDREWS, *supra* note 74, at 27-42.

81. *See* CURRENT REPORTS, *supra* note 54 and accompanying text.

lawyer.[82]

With such promotion, it is becoming harder for an idealistic young lawyer to live the ancient professional axiom that the best advertising possible is the development of a reputation for professional capacity and fidelity to trust.[83]

It does not appear that advertising will have a negative effect on an attorney's professional capacity or his fidelity to trust, and the fact that an attorney chooses to advertise does not reflect on the mainstay of legal professionalism, his moral fitness to practice law.

What this author fears is that promotion of sophisticated advertising techniques, like trade names, will smother a notion that an attorney has a duty to society beyond providing service *for* profit.[84]

Marsh Acker

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82. *See* Andrews, *The Selling of a Precedent*, STUDENT LAWYER, at 12 (Mar. 1982).

83. ABA CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

84. "The progress in the development of codes of legal ethics—good things in themselves—have tended to encourage the notion that the minimum is the maximum of the lawyer's responsibility." JAMES A. PIKE, BEYOND THE LAW 11 (1963).