A BRIEF EARLY HISTORY of LAWYER ADVERTISING IN THE UNITED STATES

Throughout most of the history of the legal profession beginning in England and then later moving to America, the practice of advertising by lawyers to obtain clients has been held in general disfavor by the majority of attorneys. Originally, the English common law even recognized a number of specific offenses that were directed against any third parties who became involved in **stirring up** litigation for their own gain. A few of these offenses, referred to by legal names such as “champerty,” “maintenance,” and “barratry,” had a significant impact upon the behavior of the legal profession. Indeed, by the nineteenth century it had become the well-recognized custom of English *barristers* to refrain from almost any form of advertising.

In America some of these same English common law offenses were initially codified directly into law. For example, as early as 1645 the Virginia legislature enacted a statute that simply prohibited altogether the practice of law for a fee. The rationale given by the Virginia legislature for doing so was that “*many troublesome lawsuits were caused by the covetousness of attorneys*.” Taking a slightly less radical approach, many early American Colonial legislatures simply codified strict schedules whereby specific attorney fees were taxed as part of the court costs in various specified types of litigation. Of course, most of these statutes were fairly short-lived, since, over time, legislatures simply were unable to revise these statutory fee schedules to keep pace with the ever-expanding new American economy. Eventually, in the absence of these legislative restrictions, lawyers in America became free to negotiate their own fees with their own individual clients. Ironically, what had begun as a mechanism intended to *prevent* lawyers from over-charging clients for their legal services, became the basis for what is now referred to as the “American Rule” with respect to attorneys fees, whereby each party remains solely responsible to bear the entire cost of his or her own attorney in any litigation. Interestingly, however, the original “custom” of English barristers to refrain from all types of advertising, nevertheless continued to prevail among most American attorneys as well, but with one significant exception. Like their English counterparts, American attorneys also refused to “tout” the quality of their services by comparing them to similar services provided by other attorneys, but they *did* engage in some limited forms of advertising when it came to publicizing certain basic information about themselves and their legal services.

For the most part, American attorneys typically limited their "advertising" materials to simple business cards listing the name(s) and address(es) of the lawyer(s) and rarely anything more. Even when these cards were included in printed law journals, and later also in newspaper classified advertisements, they seldom contained much, if any, additional information. By the latter part of the nineteenth century many (though certainly not most) American attorneys routinely did *publicize* their legal services in such a manner by placing small advertisements in sections of local newspapers that were not generally devoted to ads for commercial goods of the type typically supplied by merchants. Attorneys wishing to attract special attention to themselves or their particular legal services may have occasionally listed their *practice specialties* or printed their names in **boldface type**, but most did little else to "taut" their legal services. You can see

some typical examples of early American lawyer newspaper advertisements and business cards displayed on this page.

Even though by the nineteenth century no American state had yet attempted to formalize any specific rules to govern the professional conduct of attorneys with regard to activities such as advertising and solicitation, most lawyers understood (and generally adhered to) the existence of certain, at least implicit, standards of professional conduct when it came to the *active* solicitation of clients. Interestingly, it was not until 1875 that any American attorney was actually disbarred for "advertising" for clients, and even then the offense that brought about the attorney's disbarment was not so much the advertisements themselves, but their *misleading* nature. You can read a fascinating account about this historical case of *People v. Goodrich* in the excerpt by Professor Hylton that accompanies this Lesson.

In 1887 the State of Alabama became the very first state bar association to formally adopt its own Code of Ethics governing the professional conduct of attorneys. Interestingly, the Alabama Code of Ethics expressly DID allow attorneys to publish "*newspaper advertisements, circulars and business cards, tendering professional services to the general public*," but it shunned any "*special solicitation of particular individuals to become clients*...." You can follow the link provided on this page if you would like to read more from the actual text of this early ethics Code.

Alabama's adoption of a special Code of Ethics for attorneys prompted many other states to adopt similar codes to govern the conduct of attorneys in their practice of law. In many respects these early ethics codes eventually became the basis for the American Bar Association Canons of Ethics which was first adopted in 1908. Of particular importance in these Canons of Ethics was **Canon 27** which explained the general consensus at that time among many members of the legal profession that the most effective means of advertising a lawyer's services was for the lawyer to develop "*a well-merited reputation for professional capacity and fidelity to trust*." The solicitation of legal business by various commercial means such as advertisements was simply regarded as "*unprofessional*." You can read this Canon in its entirety on page 16 of the excerpt from Professor Hylton's book.

With the adoption of an increasing number of state ethics codes attempting, among other things, to regulate and restrict solicitation and advertising by attorneys, many bar associations also began to elicit the aid of the courts to enforce these restrictions, and by the early part of the *twentieth century*, significant numbers of attorneys had been disbarred or otherwise disciplined for various instances of "unethical conduct." Most of these disciplinary actions, however, *still* did not involve unethical advertising. Moreover, even though many state bar associations by this time had adopted ethical standards similar to the ones articulated in these early codes, they did not all agree as to the proper interpretation of such standards, particularly as they related to advertising and solicitation by attorneys.

With the majority of its ethical concerns about advertising focused on *misleading* advertisements and the *outright solicitation* of clients, in 1922 the American Bar Association began issuing "**advisory opinions**" that explained what it considered to be a "proper" interpretation as to the meaning of its 1908 Canons of Ethics. Even though these opinions were merely "advisory" in nature, many courts accepted them readily, treating such "opinions" as a form of legal precedent in disciplinary cases brought by state bar associations against attorneys.

Gradually, the ABA's "advisory opinions" imposed greater and greater restrictions on the manner in which attorneys could "ethically" publicize their services by advertising. By the 1930s, attorneys were pretty much limited to the use of plain "professional cards" containing only the lawyer (and any associates)'s names, as well as their profession, address, telephone number, and any special branch of professional practice in which the attorney was engaged. Even newspaper advertisements containing such information (which had formerly been permitted) became more restricted, as well as many other advertising practices that had previously been considered customary by many members of the legal profession.

By 1940, Canon 27 of the ABA Canons of Ethics had been revised so as to *virtually eliminate* all forms of advertising by lawyers, and from that time until the mid-1970s the vast majority of the American bar simply regarded *any* form of advertising and solicitation by lawyers as utterly unprofessional and unethical. Indeed, prior to this time few courts even challenged the legal authority of organized bar associations to regulate the conduct of attorneys by imposing restrictions that prohibited advertising by lawyers altogether. **Question No. 2** of this Lesson examines some of the specific practices by lawyers during this period which various courts found to constitute unethical advertising.

It was during this period (i.e., in the mid-1970s) that the United States Justice Department began to challenge certain other bar association restrictions, namely those mandating the use by attorneys of *fixed fee schedules* for their legal services. Ultimately, the United States Supreme Court in 1975 struck down a state bar mandatory fee schedule as violating the Sherman Antitrust Act. Soon afterwards, various consumer groups began challenging other provisions in various state bar ethics codes (such as those prohibiting advertising) despite the fact that the ABA had already begun to loosen some of the more prohibitive restrictions as to lawyer advertising by its adoption in 1969 of the Model Code of Professional Responsibility. It was against this background that the United States Supreme Court in the 1977 case of *Bates v. State Bar of Arizona* finally addressed the issue of lawyer advertising.

That is the issue that we will examine in greater detail in **PART II** of this Lesson.