Point: Lawyer Advertising

Enough is Enough

By M.H. (Mike) Gertler

There has been an onslaught recently of television lawyer advertisements. Many of these advertisements include testimonials, ostensibly by former clients, who boast that they "got" substantial amounts of money as a result of cases handled by the advertising lawyers. These individuals are, as a rule, young and healthy looking with no apparent injury. There generally is no information, or at best, very limited information, regarding the types of injuries sustained, and no indication as to what portion of the gross recovery they "got." To the average consumer, the most reasonable inference is that these clients simply won the lawsuit lottery by going to these lawyers.

Complaint at Issue

I filed a complaint with the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board (LADB) regarding these types of commercials. The complaint alleged that, without information about the nature of the injuries, the focus on young, healthy-looking people was misleading and deceptive to the public. Additionally, given that the amounts mentioned are generally well-rounded large numbers, there is a serious question as to whether the clients' statements that they received the claimed amount of money could also be deceptive because these figures appear to represent gross recoveries, not net recovery amounts after the fee and costs have been deducted.

The Office of Disciplinary Counsel responded to the complaint, stating that "[w]e have not found evidence of any violation of the Rules of Professional Conduct and thus no basis to open a disciplinary investigation. Please see the recent and relevant ruling of *Rubenstein v. Fla. Bar*, (S.D. Fla. 2014), enclosed."[1]

After further communications, the Office of Disciplinary Counsel filed an additional explanatory letter adding the following comment:

> Your complaint concerns "past results" in attorney advertisements, covered by Rule of Professional Conduct 7.2(c)(1)(D). In discussing the rule, the 5th Circuit in *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 221-222 (5 Cir. 2011), using as example the very type of language you claim is misleading, stated:

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Counterpoint: Lawyer Advertising

Enough with Enough

By Morris Bart III

Some lawyers are shouting the rallying cry, "Make lawyers great again,"[1] and seeking a return to the good old days in the first half of the 20th century when there was no legal advertising and the Bar was great for a small, non-diverse and powerful monopoly. It was a time when lawyers believed that clients served them, rather than vice versa. Unfortunately for lawyers, but fortunately for the general public, those times are gone, never to return.

Today's reality is that it is now a buyer's market for legal services. This reversal of fortunes for lawyers and boon for clients was foreseen and advanced by the United States Supreme Court in *Bates v. State Bar of Arizona*.[2] Specifically, the Court noted: "It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer."[3]

Some lawyers wish to reverse the change in fortunes and hope to flip the legal services market to a seller's market, restricting its availability to the public and, thus, raising the cost of legal services. The *Bates* Court anticipated this scenario, too. The Court noted that restricting attorney advertising "serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced."[4] Any practicing lawyer can confirm that we are no longer isolated from competition, and there is fierce competition for business which only benefits the clients.

As noted in *Bates*, lawyer advertising advances the public interest:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day.[5]

The Court found that the idea to restrict attorney advertising is "paternalistic" and "that people will perceive their own best interests if only they are well enough informed, and that the best

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> A statement that a lawyer has tried 50 cases to a verdict, obtained a $1 million settlement, or procured a settlement for 90% of his clients, for example, are objective, verifiable facts regarding the attorney's past professional work . . . It is well established that the inclusion of verifiable facts in attorney advertisements is protected by the First Amendment. *Zauderer*, 471 U.S. at 647-49, 105 S.Ct. 2265 (permitting the use of an accurate illustration in an attorney advertisement); *In re R.M.J.*, 455 U.S. at 205-06, 102 S.Ct. 929 (permitting disclosure, in capital letters, of admission to practice before the United States Supreme Court in advertisement). "[A] State [cannot] . . . prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in that area." *Zauderer*, 471 U.S. at 640 n. 9, 105 S.Ct. 2265. Even if, as LADB argues, the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a "fear that people would make bad decisions if given truthful information." *W. States Med. Ctr.*, 535 U.S. at 359, 122 S.Ct. 1497.

The Office of Disciplinary Counsel's interpretation of the 5th Circuit's ruling in *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*[2] and the Florida District Court ruling in *Rubenstein v. Fla. Bar*[3] strips away the last vestiges of the regulatory role of the Louisiana State Bar Association (LSBA) and the Rules of Professional Conduct when it comes to lawyer advertising — but, enough is enough.

History

The rule at issue in *Public Citizen* pertained to the advertising of past results. The rule, then in effect, contained a blanket prohibition against communications "containing a reference or testimonial to past successes or results obtained."[4] In considering the issue of whether the rule was narrowly drawn to materially advance the asserted interests, the court explained as follows:

> "Given the state of this record — the failure of the Board to point to any harm that is potentially real, not purely hypothetical — we are satisfied that the Board's action is unjustified." *Ibanez v. Fl. Bd. of Accountancy*, 512 U.S. 136, 146, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994). The evidence is insufficient to show that unverifiable claims in the targeted speech are so likely to be misleading that a complete prohibition is appropriate. LADB has not met its burden under the second prong of *Central Hudson* to show that prohibiting all references or testimonials to past results in advertisements will materially advance the State's asserted interests in preventing consumer deception or setting standards for ethical conduct by Louisiana lawyers.[5]

The court in *Public Citizen* rejected the blanket prohibition of past results, but significantly went on to explain that a regulation that restricts only *potentially* misleading commercial speech will

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means to that end is to open the channels of communication rather than to close them."[6]

Further, lawyer advertising is a rational response to a buyer's market. It is necessary for lawyers to be able to inform the public of the services which they offer and why potential users of their services should select them rather than another firm. The ability to provide factual information to potential consumers is both beneficial to the public as well as to the advertising law firm. The public is entitled to be given *truthful* information in selecting lawyers to hire. The lawyer is able to explain to the community his level of experience and where his interests lie. In short, the public's ability to receive this information is a constitutional right. Our own Supreme Court tried to restrict the ability of lawyers to disclose past results — on the Bar's recommendation — and was found to have overreached the protections afforded by the Constitution. In *Public Citizen*, the U.S. 5th Circuit Court of Appeals stated:

> Even if, as LADB (Louisiana Attorney Disciplinary Board) argues, the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a "fear that people would make bad decisions if given truthful information." "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Bates*, 433 U.S. at 374-75, 97 S.Ct. 2691 (rejecting arguments that "the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information"). To the extent that Rule 7.2(c)(1)(D) prevents attorneys from presenting "truthful, non-deceptive information proposing a lawful commercial transaction," it violates the First Amendment.[7]

The fact that a lawyer advertises does not in any way imply that he/she is not competent and professional. It is now well established that it is ethically proper for a lawyer to advertise, and every major prestigious law firm — even those founded a century ago — now engage in marketing and have marketing departments which publicize their firm's experience and results to potential clients. Actually, the lineage of lawyer advertising can be traced to Abe Lincoln who advertised his ability for legal services in 1857[8] on the front page of his local newspaper. Lincoln continued to advertise his services as a lawyer until he stopped practicing law in order to serve as President.

While it is generally constitutionally impermissible to regulate the artistic and stylistic aspects of an ad, the market will self-regulate those choices by not responding to and, therefore, eliminating ineffective and obnoxious advertisements and advertisers. This is reflected in the Bar's own statistics. The Louisiana State Bar Association Consolidated State of Activities for Fiscal Years 2014 and 2015 indicates that the

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pass constitutional muster if "the regulation advances a substantial government interest" and, importantly, is not more extensive than is necessary to serve that interest.[6] The court made clear that, although prohibition of *all* references to past results without evidence of actual deception fails the constitutional test under the First Amendment, "a disclaimer may be an acceptable way to alleviate the consumer deception that could result from this type of advertising."[7]

The district court in *Rubenstein* essentially made the same point when it stated that the guidelines there at issue amounted to a blanket restriction on the use of past results in attorney advertising, which the Florida Bar did not demonstrate was necessary to achieve the interest advanced. And, most importantly, the Bar did not attempt lesser restrictions (*e.g.*, a disclaimer or other required language) that may have been sufficient to prevent deception.

Clearly, the lawyer advertisements at issue in my complaint before the LADB were potentially misleading in the context of the portrayal of the young, healthy-looking people and their "I got" language. And, just as clearly, requiring a disclaimer regarding the type of injuries suffered and explaining the "got" money language would avoid actual deception.

Ironically, in October/November 2008 before the decision in *Public Citizen*, the *Louisiana Bar Journal* published a "Handbook on Lawyer Advertising and Solicitation," which contained a "Quick Reference Checklist."[8] While Rule 7.2(c)(1)(d) was still in effect, the handbook made clear that not only were statements made directly by a lawyer subject to regulation but also testimonials to past results and "visual or verbal descriptions, depictions, illustrations (including photographs) or portrayals or persons, things or events that are false, misleading or deceptive."[9]

Lawyer Advertising that Provides No Information at All

In *Bates v. State Bar of Arizona*,[10] the United States Supreme Court case that changed everything from the standpoint of advertising, the Court did not contemplate an "anything goes" approach to lawyer advertising. The Court held that commercial speech by lawyers is entitled to a limited but meaningful level of protection under the First Amendment. The *Bates* Court concluded that "[a] rule allowing restrained advertising would be in accord with the bar's obligation . . . ."[11]

The *Bates* Court emphasized that the advertisement therein at issue was the most basic one possible — listing various services, the prices charged, and an address and telephone number.[12] In describing the commercial speech at issue, the Court stated that it informed the public of the availability, nature and prices of services.[13]

It would be difficult to argue that the type of information advertised in *Bates* was not useful to the public in deciding whether to seek the services of those attorneys. However, advertising through using healthy, young clients who claim that they received money in connection with their claim provides no useful information to the public, at all. There is simply no way for an injured person to compare his/her potential claim to the spokesperson's claims in these advertisements, particularly without a description of the

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Bar collected about 15 percent less filing fees for approval of new advertisements in 2015 compared to fees collected in 2014.[9] This could lead to the conclusion that fewer ads are being offered.

Perhaps the author of the article, "Enough Is Enough," should consider the adage, "People who live in glass houses should not throw stones." His firm's website boasts that its lawyers "achieved the $591 million verdict in the tobacco litigation," without disclosing what the firm's actual role was in the litigation or how much each client netted out of the litigation!

So, the Bar should look forward to the 21st century by encouraging the dissemination of truthful, factual information to potential legal consumers so that consumers can make informed decisions on lawyer hiring. This approach is not only beneficial to the consumers, but also to the law firms which are competently, professionally and efficiently providing services which are needed by the consumers. A return to the good old days is not only constitutionally prohibited but also not in the best interests of the consumer, and any such ideas should be rejected.

FOOTNOTES

1. With apologies to Donald Trump for potentially infringing on his trademark slogan.
2. 433 U.S. 350, 359, 97 S.Ct. L.Ed.2d 810 (1977).
3. *Id*. at 377.
4. *Id*.
5. *Id.* at 364.
6. *Id.* at 365.
7. Public Citizen, Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212, 222 (5 Cir. 2011) (some internal citations omitted).
8. April 30, 1857, Volume IX, Number 264, Daily Illinois State Journal.
9. The Bar collected advertisement filing fees of $172,025 in 2014 and $148,775 in 2015.

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injuries. The public could readily be misled into believing that any injury will justify recovering similar large amounts, which is simply not true.

My colleague (in his counterpoint article) points out that my own website lists at least one significant result, specifically, a verdict rendered in connection with the well-publicized tobacco litigation. In this author's view, a brief mention of the tobacco litigation on a passive website is markedly different from the types of advertisements that led me to file the above-referenced complaint. First, the website listing contains a full citation to the Southern Reporter, which in turn contains a decision discussing the facts of the case and the verdict in full. Secondly, and most importantly, it is unlikely that the typical consumer would be inclined to draw a comparison between their injuries and the injuries and damages at issue in the tobacco litigation, any more so than hearing news that the latest tech company has just settled a multi-billion-dollar patent infringement suit. In contrast, the advertisements that led me to file a complaint generally seem to target individuals who have been injured in auto accidents, as opposed to complex multi-year class action suits or commercial disputes. Whether my website's discussion of the tobacco litigation is truly useful or not is up for debate, but it is most certainly not misleading, potentially or otherwise.

Sadly, the Supreme Court in *Bates* predicted that there was no reason to believe that allowing lawyers to advertise would result in a tidal wave of disingenuous claims, and that recognition of First Amendment protection did not mean that states were powerless to regulate lawyer advertising at all. But that is, precisely, the current state of affairs in Louisiana.

FOOTNOTES

1. Letter from Office of the Disciplinary Counsel to Meyer H. Gertler (June 15, 2015) (on file with author).
2. 632 F.3d 212 (5 Cir. 2011).
3. 72 F.Supp.3d 1298 (S.D. Fla. 2014).
4. La. Code of Prof'l Conduct R. Rule 7.2 (c)(1)(D).
5. Public Citizen, 632 F.3d at 223.
6. *Id.* at 219 (*citing* Central Hudson Gas & Elec. Corp. v. Pub. Serv., 447 U.S. 551, 566, 100 S.Ct. 2343, 65 L. Ed. 2d 341 (1980)).
7. *Id.* at 223.
8. *Handbook on Lawyer Advertising and Solicitation*, First Edition, October/November 2008, Supplement to the *Louisiana Bar Journal*.
9. *Id.*
10. 433 U.S. 350, 359, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).
11. *Id.* at 377.
12. *Id.* at 354.
13. *Id.* at 370-72.

M.H. (Mike) Gertler is a managing partner of the Gertler Law Firm. He earned his JD degree from Tulane Law School and has been practicing in the areas of civil litigation, products liability and toxic tort for more than 40 years. His firm has been honored by U.S. News and World Report *in its 2016 publication for its first-tier ranking of "Best Law Firms." (mhgertler@gertlerfirm.com; Ste. 1900, 935 Gravier St., New Orleans, LA 70112)*

Lawyer Advertising Rules: "No Risk/No Doubt Filing Policy" in Force

Under Rule 7.7 (effective Oct. 1, 2009), lawyers are obligated to file ALL non-exempt advertisements or unsolicited written communications with the Louisiana State Bar Association (LSBA) prior to or concurrent with first use or dissemination of the advertisement or communication. A list of advertisements and communications exempt from the filing requirement can be found in new Rule 7.8. It should be noted that "exempt" does not necessarily mean "compliant" with the Rules — "exempt" means merely that the Rules leave the evaluation of compliance with the Rules to the individual lawyer. In short, ALL advertisements and unsolicited written communications — exempt and non-exempt — must be compliant with the Rules, or the lawyer risks potential professional discipline.

The Rules policies prohibit evaluation of an actual or proposed specific advertisement or communication unless and until properly filed under the established procedure; as such, LSBA Ethics Counsel is unable to offer any form of informal or "off-the-record" pre screening of specific advertisements and communications. However, the LSBA is offering a "No Risk/No Doubt Filing Policy." Any lawyer who is uncertain or unclear about whether an advertisement or communication is exempt from the filing requirement is strongly encouraged to file the item properly with LSBA Ethics Counsel, who will, in turn, offer to terminate the filing, with full refund of the filing fee submitted, if the advertisement or communication is, in fact, exempt from filing. There is no risk of needlessly paying a filing fee for an exempt advertisement and no doubt left regarding whether something is required to be filed under the new Rules.

For more information on the policy, filing procedures and filing forms, go to:*https://www.lsba.org/Members/LawyerAdvertising.aspx*.

All inquiries regarding the lawyer advertising rules (whether for lawyer advertising within LSBA publications or for lawyer advertising in outside media outlets) should be directed to LSBA Ethics Counsel Richard P. Lemmler, Jr., by phone (504)619-0144, by fax (504)598-6753, by email RLemmler@lsba.org, or by mail to Louisiana State Bar Association, Rules of Professional Conduct Committee, c/o LSBA Ethics Counsel, 601 St. Charles Ave., New Orleans, LA 70130-3404.