

Certification: The Way to Controlled Advertising?

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Introduction

A great deal has been said and written in recent years about the introduction (or expansion in appropriate cases) of measures regulating the question of the advertising of legal services.

The trend has been to "open up" the various branches of the legal profession from an advertising point of view and it seems inevitable that the historical taboo¹ on advertising which the Bar has maintained thus far will not emerge unscathed either.

It may be that the system of certification² of the lawyer's field of specialization and the (controlled) advertising thereof will go a long way towards satisfying what I believe to be the two basic requirements for this type of professional advertising:

- The consumer (public) must have a meaningful way of distinguishing one lawyer from another and of finding out about the background and experience of the prospective lawyer so that a more educated choice can be made.³
- In line with free market principles the lawyer must be allowed to sell



his services by advertising them although "we should be able, as other professions are doing, adequately to control the content, taste and accuracy of advertising. The Bar is traditionally a highly disciplined profession".⁴

Recent developments locally and abroad

The English Bar

As from 31 March 1990 a new code

of conduct has been implemented which provides, *inter alia*, that barristers can now advertise their services.⁵

The following brief excerpts from an article which appeared in *The Times of London*⁶ make for informative, if not amusing, reading:

Advertising restrictions and other rules about how barristers practise and where they set up have been swept away under a new Bar code of conduct, which comes into force today.

A set of barristers has broken new ground by publishing the daily charging rates of its members in the chamber's brochure.

The guideline charging rates for a full day's paperwork (six chargeable hours) or for a day's refresher in a straightforward case range from £750 to £1 000 for Mr Nicholas Steward, QC, with 16 years in practice, to £150 to £250 for the newest qualified member of chambers.

The wind of change is blowing.

It would seem that the following is representative of the English Bar's view of the subject⁷:

Removal of prohibitions on the advertising and promotion of barristers' practices will shake the inertia

which has sometimes led established but stagnant chambers to retain work at the expense of go-ahead but less well-known sets. The Code of Conduct is being radically pruned and revised.

Indeed, one gets the impression that our colleagues otherside the ocean are really enjoying their newly found freedom because soon after the adoption of the new rule they even organised a "Chambers Brochure Competition"⁸. This saw the various chambers (groups of members) publishing information brochures containing details ranging from qualifications and admission dates of individual members of the group to the policy of the Chambers like that of the John Dyson QC group:

It is the policy and commitment of these chambers to act for all who require our services. Our client base ranges from the multinational corporations and major insurance companies through to the Labour Unions. We act for Government, both national and local, and the private citizen whether legally aided or not. It is a range and mix we aim to maintain.

Some of the more unusual examples include the brochure of the Chambers of Desmond Wright which displays the names and other details of the members in the form of a wine list and that of the Leicester Chambers of Philip C Brown which, according to the judges, "had a cover design that looked like a phallic letter-box"¹

The English solicitors

Under the heading "Advertising takes off" a legal publication⁹ states that a survey of 796 firms in England and Wales revealed that 45% advertised in the media or the yellow pages during a six month period. This compared with 31% of United States firms which had advertised in the ten years since 1977. Local weekly newspapers were the most popular form of media advertising followed by local free publications and regional dailies.

The attorneys in South Africa

Comprehensive "Guidelines For Attorneys' Advertising"¹⁰ were approved by the Association of Law Societies at the biannual meeting of the Council in September 1989 and was scheduled to come into effect

after the four provincial Law Societies had amended their rules to permit advertising.

Salient features of these guidelines include the following:

An attorney may at his discretion publicise his practice, or permit another person to do so, provided that the publicity complies with the provisions of the Guidelines and subject to other provisions.

All publicity must be in good taste with regard to content, prominence and medium.

Publicity may not be misleading in any respect.

Touting is not permitted.

Publicity may not refer to an attorney's success rate.

No reference may be made to the name of a client in any advertisement by the attorney of his practice.

Publicity about an attorney's practice may state or imply that he undertakes a particular category of work but only if the practice is in fact able and qualified to handle that work competently.

An attorney may not state in any publicity that he will undertake specific kinds of work for a specific charge.

New Zealand survey

Marketing lecturers conducted a survey of the changing orientation of professional practice and came up with certain interesting propositions with regard to the attitude of lawyers towards advertising:¹¹

- Competitive advertising – A greater percentage of lawyers than most other professional groups look favourably on professional advertising. However, almost 50% of lawyers believe such advertising to be undesirable.
- Advertising and superficiality – Almost 25% of lawyers believe that there is a danger that advertising could lead to deterioration in the quality of professional work. A similar proportion believe advertising would improve such work.

The Bar in South Africa

Reference has already been made to the traditional approach¹².

An interesting development is the granting by the Pretoria Bar of a request by the Pretoria attorneys to issue weekly lists of counsel who are available to appear in the opposed Motion Court for that particular week.

The United States of America

In America there is, for example, a private group known as the *National Board of Trial Advocacy* (NBTA) which has been endorsed by other respected groups such as the Association of Trial Lawyers of America.¹³

The NBTA offers a certification process (which nearly 1 200 trial lawyers have passed) consisting of an experience requirement setting minimum standards for years practised and numbers of cases conducted as well as a competence requirement in the form of successful completion of an examination. Successful candidates are then "certified" as such by the NBTA.

Apart from the NBTA there is a wide-ranging group of such certifying organisations which are not limited to legal organisations but include trade and advertising bodies. Other legal certifying groups include the *Association of Trial Lawyers of America* and the *International Academy of Trial Lawyers*.¹⁴

Advertising of certification

- Each state in America has the authority to govern the practice of law in that state and to regulate the information provided to the public about lawyers' specialties. This fact was recognised by a resolution passed by the American Bar Association (ABA) in 1978 according to a member of the ABA Standing Committee on Specialization.¹⁵

It appears that each state also varies in its regulation of lawyer-advertising of certification. Broadly speaking, the policies adopted by various groups of states include the following.¹⁶

- An absolute ban on advertising, except for the exempted areas of Patent, Trade Mark and Admiralty Law (28 states plus the District of Columbia).
- No ban on advertising certification, except for the requirement that all statements be truthful (7 States).
- State certification of legal specialties (11 States).
- State approval of certifying organizations (4 States).

*Peel v Attorney Registration and Disciplinary Commission of Illinois*¹⁷

This case centers around the question whether lawyers can truthfully advertise legal specialities, just as doctors do who are board-certified to practise in specific areas.

What happened was that a trial lawyer, Peel, included on his letterhead the printed statement: "Certified Civil Trial Specialist by the National Board of Trial Advocacy". His state disciplinary body took him to the Illinois Supreme Court which found that his conduct was "misleading as our Supreme Court has never recognized or approved any certification process".

Peel is challenging this finding before the US Supreme Court and many certifying groups are supporting him. On the one side the battle involves the right of States to regulate the legal profession to protect the public from being misled by self-promoting attorneys and on the other side it focuses on free speech right of lawyers to tell the public that they have been certified in an area of the law by a professional group.

As far as could be ascertained this judgment is still pending but whatever the outcome, it seems that it will give some direction on the question of advertising of certification. In the present climate of "opening up" it seems unlikely that such advertising will be banned altogether. [*The US Supreme Court held in favour of Peel (ABA Journal, August 1990) - Ed*]

A System of Certification for the Bar in South Africa

If there is going to be a form of advertising (and this seems to be on the cards) the idea of certification, and the advertisement thereof, is an attractive one - If the speciality first has to be *certified* before it can be advertised, it must make for more balanced and accurate advertising.

However, in South Africa with its present system and traditions the logistical problems which come to mind are overwhelming:

- In what fields will there be certification groups?
- Who will the groups consist of?
- Who will convene them?
- Who will decide whether they are competent to do the job?
- Will the groups have jurisdiction

on a national, provincial or regional level?

- Shouldn't one in any event wait for the constitution of the new South Africa to be thrashed out to see how the country is to be divided up - eg into states, provinces or regions?
- Isn't the present pupillage and admission system good enough?
- In the event, it appears that an elaborate system of certification such as one may find in some states of America cannot become a practical reality at this stage. (Moreover the idea is at present still banned in the majority of states.)¹⁸

Conclusion: A possible arrangement for the South African Bar

Recognizing the fact that some form of certification remains attractive and bearing in mind the traditional role played by the Bar Council of each independent society I suggest that the following may satisfy the basic requirements of advertising:¹⁹

- Each Bar Council appoints a Standing Committee on Specialization and Advertising (standing committees in any case form an integral part of the Bar Council's day to day functioning).
- The standing committee, in consultation with each member, compiles the entries for publication in a suitable "Who's Who".
- The entry may contain details of:
 - (i) The experience of the member (eg date of admission, date when senior status was conferred, time spent at the side bar, time spent as a prosecutor and time spent as an academic).
 - (ii) The specialization of the member (eg patent and trade mark work, admiralty law, tax law, labour law, criminal work, insurance law, insolvency work and aviation law).
 - (iii) Personal snippets about the member (eg school and university attended, academic achievements and academic awards or prizes).
- The Standing Committee must then regularly update the entries and stay in touch with the publishing house. Of course, the

Standing Committee must ensure, as far as possible, that the information is truthful and presented in good taste.

- The publication should be placed at the disposal of each attorney who can then use it to assist his client to make an educated choice (without detracting from the traditional word of mouth method of advertising which will probably continue to reign supreme).
- At the same time each counsel will enjoy the benefit of having at least his existence at the Bar and some relevant details of his career published more widely amongst the legal fraternity. One would imagine that our more junior members in particular may benefit from such a system.

FOOTNOTES

- 1 "Counsel must not engage in any activity amounting directly or indirectly to advertising, and must not tout in any way. It follows that he may not send notices to attorneys and others notifying his intention to practise in any particular branch of law" - *Lawsa*, Vol 14, 251.
- 2 See *infra*.
- 3 "As far back as 1973, then US Chief Justice Warren Burger warned that not all lawyers are created equal. To help the public find the best attorneys, he said, some system of certification was an imperative and long overdue step especially for trial advocacy" - *The Right to Specialize* by Thomas F Gibbons, *American Bar Association Journal* ("ABAJ"), May 1990, p57.
- 4 Peter Scott QC - *Counsel*, The Journal of the Bar of England and Wales, Vol 2/4 September, 1987.
- 5 *A Profession in Turmoil - De Rebus* May, 1990, p314-315.
- 6 Saturday, 31 March 1990 "Barristers advertise Counsel at up to £1 000 per day" by Frances Gibb.
- 7 Editorial of *Counsel* (op cit) March, 1990, p3.
- 8 *Counsel* March, 1990, p18.
- 9 *Law Talk* March, 1989, p301.
- 10 *De Rebus* November, 1989, p795.
- 11 *Law Talk* October, 1988, p294.
- 12 Note 1.
- 13 ABAJ (op cit) May, 1990, p58.
- 14 ABAJ (op cit) p59-60.
- 15 Christel Marquardt, *Implications of Peel*, ABAJ (op cit) p60.
- 16 Table headed "Advertising of Certification" ABAJ (op cit) p59.
- 17 US Supreme Court Case No 88/1775.
- 18 Note 16.
- 19 Notes 3 & 4.