

Moving the Goalposts

With a Lack of Enforcement of its Current Rules of Professional Conduct, Should Pennsylvania Adopt an Even More Lax Set of Rules?

If you know that you won't get a ticket for speeding when you're going 80 on the Turnpike, you're more likely to speed. That analogy has applied for decades to the advertising portions of the Pennsylvania Rules of Professional Conduct. Do a search to discover how many attorneys have been publicly disciplined for violating the advertising rules. The answer is zero.

Why?

Because the Disciplinary Board has either never prosecuted a case that far or, as is anecdotally believed to be the case, the Disciplinary Board has simply declined to investigate and prosecute attorneys whose advertising (or marketing as some firms call it) disregards Pennsylvania's detailed rules.

Examination of the published disciplinary decisions on the Pennsylvania Supreme Court website confirms the absence of any public discipline for advertising rules violations. Thus, the chances of a Pennsylvania-licensed attorney receiving a "speeding ticket" for advertising will go from zero to absolute zero if the Supreme Court of Pennsylvania adopts the amendments to the Model Rules of Professional Conduct that were adopted by the American Bar Association in August 2018.

Under Pennsylvania's current advertising rules, which differ dramatically from the current Model Rules, lawyers violate the rules by:

- Making a false or misleading statement about a lawyer or the lawyer's services;
- Having a celebrity endorsement;
- Giving something of value to a person for recommending a lawyer's services (with certain exceptions);
- Failing to disclose that an endorser is being paid for the endorsement;
- Permitting a non-lawyer to portray or



- imply that he or she is a lawyer;
- Portraying a fictitious entity as a law firm;
- Implying lawyers are associated in a firm when they are not;
- Reenacting or dramatizing events without disclosing that the events are not actual or authentic;
- Failing to disclose the geographic location, by city or town, of the office in which the lawyer who will actually perform the services advertised principally practices law;
- Certifying that the lawyer is a specialist without meeting certain criteria; or
- Advertising, directly or indirectly, that the lawyer or his or her firm will only accept, or has a practice limited to, particular types of cases unless the

lawyer or his or her law firm handles, as a principal part of his or her or its practice, all aspects of the cases so advertised from intake through trial.

Despite these rules, Pennsylvania's roads are filled with billboards advertising lawyers and firms in ways that are noncompliant. Similarly, if you turn on your TV or radio, you will see ads that contain endorsements, reenactments and other information that violate the rules.

Should Pennsylvania adopt the revised rules adopted by the ABA, lawyers will violate the rules by:

- Making a false or misleading statement about a lawyer or the lawyer's services;
- Giving something of value to a person for recommending a lawyer's

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- Certifying that the lawyer is a specialist without meeting certain criteria.

The report accompanying the proposed Model Rules amendments admits that it has become difficult, if not impossible, to regulate lawyer advertising, and that “trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful.”

The executive summary accompanying the proposed amendments asserts that, “As amended the rules will provide lawyers and regulators nationwide with models that protect clients from

false and misleading advertising, free lawyers to use expanding and innovative technologies for advertising, and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.”

The executive summary then offers this explanation of how the amended rules will address the issue: “At least three policies inform the Resolution. First, lawyers and clients should be free to use advancing technology to provide the public with greater access to legal services. Second, lawyer advertising rules should focus on truly harmful

conduct: false, deceptive, and misleading statements, harassment, coercion, and invasions of privacy, freeing lawyers of unnecessary restrictions. Finally, bar regulators should be able to concentrate their limited enforcement resources on truly harmful conduct.”

It is difficult to understand how eliminating the specifics in the prior Rules will accomplish this goal. Rather, these amendments appear to be a white flag of surrender that recognizes the reality that lawyers are not being disciplined for violations of the Rules, no matter how flagrant; and that disciplinary authorities have chosen to focus their energies elsewhere.

As of the time this column has been written, neither the Disciplinary Board nor the Supreme Court of Pennsylvania has made any public statements about the revised rules, nor has either proposed adopting or rejecting them. So their fate in Pennsylvania is still in doubt.

So, what should lawyers take from the current state of affairs, and from the revised Model Rules? Rule of Professional Conduct 3.3 requires lawyers to use “Candor Toward the Tribunal” and prohibits them from making a false statement of material fact to a tribunal. But with regard to the advertising rules, to paraphrase Star Trek, “compliance is futile.” ■

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