



Advertising by advocates in India: The right to advertise professional ethics

Aadhitya Logeshen R

O.P. Jindal Global University, Jindal Global Law School, BBA LLB 2015, Sonipat Narela Road, Near Jagdishpur Village, Sonipat, Haryana, India

Abstract

This paper attempts to analyze the reasons for prohibiting advertisements by legal professionals, the nature and scope of the prohibition, the constitutional validity of the prohibition and the efficacy of banning advertisements by legal professions under the Bar Council of India Rules in the present day situation while providing a comparative study with other legal systems around the world.

Keywords: advertising, ban on advertising, legal advertising, BCI rules, legal profession

1. Introduction

India is a country with more than a million practicing lawyers, certainly making it one of the biggest contributors to the global legal business. Nevertheless, the commercialization of the legal profession in India has always been discouraged by the legislature of the country, which includes the right to advertise. Hence, in India advertising in the legal profession is prohibited. This prohibition attempts to prevent any lawyer from influencing any prospective client seeking redressal within the legal system also while preventing any unhealthy competition between legal professionals, which might lead to a decline in the quality of legal services. Lawyers are considered as social engineers in society, who bring about social advancements and development. But unfortunately, such restrictions lead to an insufficiency of information on the market regarding India's legal practice.

This paper looks to critically analyze the current set of prohibitive Guidelines of Advertising for Lawyers set by the Bar Council of India and the general stance taken by the legislature towards the subject with comparative positions of law from across the globe. Conclusively, providing the advantages and disadvantages of the varied approaches taken on the subject.

Research Methods and Materials

The researcher has adopted the doctrinal research methodology in the compilation, organization, interpretation and systematization of the primary and secondary sources in order to carry out the study.

1. Historical Origins

India has an extensive and rich legal history. This prohibition of advertising stems from the old Colonial British Common law notion along with traditional Indian values of the Rig Vedic era that the legal profession is a "noble profession." Though historically the ban on advertising has been attributed to being originated in England, there are multiple debates surrounding its origins. It has been suggested since that advertising and solicitation were usually understood as identical, it is detailed that this practice of ban on advertising was derived from Common

law crimes of champerty, and common barratry. Though the conception of the legal profession being known as the "noble profession" ensued excessively stringent laws and restrictive guidelines while being justified on the grounds of "dignity of profession".

Justice Krishna Iyer has famously quoted, "...the canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices..." taking a strong stand against the practice of advertising for lawyers. There have been numerous judgements over the years emphasizing the nobility of the legal profession, such as the case of *Indian Council of Legal Aid v. Bar Council of India*, where the Supreme Court highlighted the duty of a lawyer ineffective administration of justice while abiding by the Code of Conduct of the noble profession. Also stating that the legal profession is empty without its ethics and moral ideals ^[1].

2. Bar Council of India

As given under Section 49 of the Advocates Act, the Bar Council of India (BCI) has the right to make new rules and amend pre-existing laws under the Act to discharge its duties as given under the BCI Rules ^[2]. Rule 36 of the Bar Council of India Rules specifically states that lawyers and law firms cannot directly or indirectly advertise their practice, either through online or offline methods ^[3]. It further lays down certain guidelines to be followed and certain exceptions available to lawyers under the rule. There are even restrictions on the display of the person's title or designation on their signboard/nameplate.

Earlier to the 2008 amendment of the Bar Council of India Rules, there was a strict and complete ban on any form of advertising for lawyers and law firms. Soon after the passing of the 2008 amendment, the rule on advertising was mildly liberalized. The rule under section IV of the BCI Rules was amended after a resolution ^[4] was passed in front

¹ Indian Council of Legal Aid and Advice v. Bar Council of India [(1995) 1 SCC 732]

² Section 49, Advocates Act, 1961

³ Rule 36, Section IV, Chapter II - Part IV, Bar Council of India Rules, 2008

⁴ Resolution No., 50 / 2008 dated [24.03.2008]

of a three-judge panel of the Supreme Court. Hence, according to the newly amended rule 36 along with the relevant schedule, the furnishing of certain information by advocates and law firms on their website were allowed. As per rule 36 of the BCI Rules, the following information^[5] can be allowed to be displayed on a legal professional's website along with a written legal declaration that the information stated is indeed true,

1. Name
2. Address
3. Contact Details [Telephone Numbers, Email]
4. Enrolment Details [Enrolment Number, Date of Enrolment, Name of the enrolled State Bar Council, Name of the relevant Bar Association]
5. Professional and Academic Qualification
6. Areas of Practice

Rule 36 also further goes on to state that such information provided cannot be used in any form to aid or to make available any illegal practice of law by any legal authority.

1. Judicial Standing on the ban of advertising

Over the years, the Indian Judiciary has always maintained its stand that the legal profession is one of utmost nobility. The lawyers must act in accordance with the honour and dignity the profession carries. Many High Court and Supreme Court judgements^[6] over the years have maintained that the objective of the legal profession is public service and since a majority of the Indian population is illiterate about the machinery of the courts, the lawyers must act in a responsible manner. Further stating that allowing advertising for advocates could lead to exploitation of the public in certain situations.

One of the biggest landmark judgements based on Rule 36 of the BCI Rules is the Supreme Court case of *Bar Council of Maharashtra v. M.V. Dabholkar and Others*. It basically stated that Rule 36 has fairly set out rules of professional conduct for the lawyers to follow, though canons of ethics existed prior to the implementation of the rule. Professional ethics weren't just born out of Rule 36 but were indeed bought up along with the organized Bar, while morality was born with the civilized society. Justice Krishna Iyer in the case stated that "*the canon of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsiness, for the betterment of the legal business. The law is not a trade, briefs no merchandise and to the heaven of commercial competition or procurement should not vulgarise the legal profession*"^[7]. Though as stated before post 2008, certain restrictions were relaxed. There have been certain cases such as *Bar Council of India v. A.K. Balaji and Others* which have clearly stated that advertising directly or indirectly is a serious breach of misconduct by the advocate^[8].

Nevertheless, the constant question that arises is that of, 'what constitutes as an advertisement' by a lawyer or a law firm. Over time many lawyers have advertised or tried to circumvent the BCI Rules by advertising through visiting

cards, pro bono work, seminars, and circular letters, etc^[9].

There have been various judgements by the Indian Courts trying to define an advertisement and to prevent lawyers from exploiting loopholes under the BCI Rule for many years now. In the case of *State of Uttar Pradesh and Anr. v. Johri Mal*, the court had to answer the question of whether the submission of biodata pursuant of notice would amount to advertising or soliciting under Rule 36 of the BCI Rules^[10]. This was answered in the case of *B. Rajeswar Reddy and Ors. V. K. Narasimhachari and Ors*, the court stated that "...filing of application, pursuant to a notification issued by the Metropolitan Sessions Judge, by the advocates offering their services for the post of Public Prosecutor and Additional Public Prosecutor would not by itself amount to solicitation of work within the meaning of Rule 36 of the Rules"^[11].

Whereas in the case of *Government Pleader v. S. A. Pleader*, it was stated that an advocate posting a card providing his name, address and designation would be considered as an advertisement, thus violating professional conduct^[12]. Newspaper articles and advertisements where the writer labels himself as an advocate practicing in the courts have also been banned^[13]. Another landmark judgement of *J.N. Gupta v. D.C. Singhania & J.K. Gupta* it was stated that publications made in the National or International Bar directory would not violate Rule 36 of the BCI rules as it is used as public information. But any publication on a newspaper made for publicity is in clear breach of the rule and is deemed to be professional misconduct^[14].

2. Constitutional Validity of Rule 36 of the BCI Rules

Since the inception of Rule 36 under the BCI Rules, it remains a fiercely debated subject filled with many protests and controversies from within the legal community.

The fundamental objective of any advertisement is to promote one's services and bring it to the notice of the public. In many ways, an advertisement is a form of speech or expression of oneself^[15], and according to the Indian Constitution, under Article 19 the right to freedom of speech and expression is a fundamental right available to every citizen of India. Thus, it has been debated that lawyers are restricted from exercising their fundamental rights guaranteed under the Constitution of India. However, in the landmark case of *Hamdard Dawakhana*, the court ruled that advertisements that are not in the interest of the public do not fall under the protection of Article 19(1)(a). In the present scenario, it was held the advertisements by advocates are commercial in nature and not in the interest of the public^[16].

This judgement has been scrutinised saying that the advocates would then be protected under Article 19(1)(g) as such a blanket ban on advertising would disturb their right

⁵ Rule 36, Section IV, Chapter II - Part IV, Bar Council of India Rules, 2008

⁶ AIR 1984 Mad. 35

⁷ Bar Council of Maharashtra v. M.V. Dabholkar (1976) 2 SCC 291

⁸ Bar Council of India v. A.K. Balaji and Others (2018) 5 SCC 379

⁹ Shivam Gomber, *Right to Advertise for Lawyers* – Udgam Vigyati Vol. 3 (2016)

¹⁰ Civil Appeal 963-64 of 2000

¹¹ [2001 (6) ALT 104]

¹² AIR 1929 Bombay 335

¹³ Re: (Thirteen) Advocates v. Unknown – [AIR 1934 All 1067]

¹⁴ BCI TR, Case No. 38/ [1994]

¹⁵ Teacher, Law. (November 2013). *Advertising Done by the Attorneys for the Services They Provide*. <https://www.lawteacher.net/free-law-essays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1>

¹⁶ [SCR 1960 (2) 671]

to conduct free trade and commerce. In the case of *Tata Yellow Pages v. MTNL*, the Supreme Court held that commercial speech falls within the ambit of freedom of speech and expression^[17]. Also, the argument that such a ban would fall under reasonable restrictions would be irrational as it is not against public policy or immoral. The right to advertise for advocates would just provide the public with more options to make an informed decision. Though there is no judgement which explicitly states Rule 36 to be unconstitutional in nature, there have been recent petitions in the Supreme Court challenging its validity. One of which lead to the 2008 amendment by the Supreme Court allowing advocates and law firms to display certain information as specified on their websites.

3. Position of Law in the United Kingdom

Historically, due to the old Victorian rules of England, all forms of advertisements for legal practitioners were banned. Though, towards the 1970s, because of the threat of competition and subsequent fallouts the restrictions on advertising were relaxed. After a review by the Monopolies and Mergers Commission in 1970 along with the Office of Fair Trading in 1986, where the advantages of legal advertisements were highlighted, and the ban was lifted^[18]. From the rigid standards of advertising, a new regime for advertising was born. The current law governing advertising for all legal practitioners is the Solicitors' Publicity Code, 1990 which was recently amended to modernize in 2016. Also, the Solicitors Regulation Authority (SRA) should authorize all information furnished by advocates publicly and all restrictions on advertising are governed by the SRA. The Courts have also held that no advertisement should impair the integrity and disgrace the legal community^[19].

4. Position of Law in the United States of America

The United States and India had comparable restrictions on equal terms with a complete ban on advertising. Canon 27 of the Profession Ethics of American Bar Association (ABA), similar to the modern-day Rule 36 in India, stated advertising by legal practitioners was unprofessional and illegal^[20]. This stand was subsequently changed in 1977 after the judgement of the US Supreme Court in *Bates v. State of Arizona*. In this case, two lawyers started pro bono legal services for people who could not afford legal aid. The only feasible manner of operation was through advertising their services, which they admitted was against the law at the time. Subsequently, the Court, in this case, held that such a blanket ban on advertising would be unconstitutional and an infringement of the First Amendment allowing freedom of speech and expression. Hence, the US Supreme Court made the right to advertise a constitutionally protected right^[21].

Currently, advertising in the United States is administered by the Model Rules of Professional Conduct, 1983. All forms of advertisements are allowed subject to the conditions that there is no false or misleading information

about the lawyer's services^[22] or advertising professional employment for any pecuniary gain^[23].

5. Changing Face of the Legal Profession

With regards to permitting advertisements by legal professions, opinions stand ambiguous, wherein one set of people believe in permitting the use of advertisements. Others believe that this commercial outlook may tamper the ideals of public policy's access to legal services. An added ambiguity that exists in the system deals with defining an advertisement and what its' adjuncts.

With the country's judgement on advertisements being obscure, it has been seen that services provided by lawyers have been divulged onto hoardings and posters, with their names and designation. Cases reported by media often portray the outcome and judgements of eminent clients and these are broadcasted in media channels, in the form of interviews and recordings, and these become a source of advertisement. Various established law firms also use names of deep-rooted lawyers as a source of ennobling their firm. Yet other forms of advertisement include publicizing articles written by associates, flamboyancy of firms through achievements gained by their members and providing users with various disclaimers before choosing a firm. This then constitutes advertisement, and the public needs to accept the fact that not all activities can be controlled^[24]. However, one must acknowledge the mere fact that the rapid changes in the legal profession and laws relating to consumerism have borne several reforms, which keep a check on synchronized advertising.

Considering the case of *K. Vishnu v. National Consumer Disputes Redressal Commission & Anr.*, the judgement revealed that the legal profession was a product of the Consumer Protection Act, 1986. The report presented under the leadership of S.V.S Raghavan concluded that it was inevitable to curb legislative restrictions and that these have implications on the growth and opportunities of law firms, preventing them from competing globally and procuring a global stance to represent India's expertise, affecting the choice and freedom of consumers^[25]. In light of this case, the Supreme Court demarcated legal services under the umbrella of an industry under the Industrial Disputes Act, 1947.

To conclude, it can be said that legal services have been under the vision of consumer protection and trade laws, adopting a path of commercialization, which in all means is unavoidable.

6. Advantages of permitting Legal Advertising

1. Greater opportunities for novice lawyers and independent councils

Allowing advertising would allow for beginner lawyers to advertise their services and claim an equal opportunity in the legal market.

2. Right to information and awareness

¹⁷ 1995 AIR 2438

¹⁸ Bolcan, supra note 6, at 22

¹⁹ Teacher, Law. (November 2013). *Advertising Done by the Attorneys for the Services They Provide*. <https://www.lawteacher.net/free-law-essays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1>

²⁰ Model Rules of Professional Conduct, 1969

²¹ *Bates v. State of Arizona* 433 U.S. 350

²² Rule 7.1, Model Rules of Professional Conduct, 1983

²³ Rule 7.3, Model Rules of Professional Conduct, 1983

²⁴ Lalit Bhasin, *Law firms find loopholes to promote their services - SOCIETY OF INDIAN LAW FIRMS*

<http://www.livemint.com/Companies/vqsXsEeGYuqPli9I8TPL00/Law-firmsfind-loopholes-to-promote-their-services.html> (last updated July 5, 2013)

²⁵ (2000) ALD (5) 367

Due to the ban on advertising, potential clients are not provided access to the right lawyer. Advertising plays a vital role in aiding the decision making of the public.

3. Recognition

Whether nationally or internationally, Indian lawyers are disadvantaged compared to foreign legal professionals as exposure in the international market is almost non-existent. Advertising would allow Indian lawyers and law firms to attract potential foreign clientele in this age of globalization.

4. Lack of internet access in rural areas

India is not a very technologically advanced country with much of the rural population lacking vital internet resources. Hence, Rule 36, which allows lawyers to display relevant information, is not adequate as other forms of advertising are not available to the public.

7. Disadvantages of permitting Legal Advertising

1. Misuse

If Legal Advertising is not regulated properly by the adequate authorities, this will allow the big law firms and lawyers with deep pockets to misuse this rule grossly.

2. Shifting priorities

The BCI and the Indian Courts are hesitant in allowing legal advertising as it could shift the focus of lawyers into an unhealthy competition rather than improving their quality of services.

8. Conclusion

This rule on the ban of advertising in the legal profession came about through the British Victorian Colonial times in India, and our laws have refrained from adapting to the changing nature of legal services in the country. The legal profession is, no doubt, one of the oldest and a very respectable profession. Hence, in a culture-oriented country like India, with its safeguarded values and morals, it is difficult to adapt these norms quickly. The Indian Constitution states that any restriction must be reasonable and in the interest of the public. A total ban on advertising is not the solution and even with the 2008 amendments to Rule 36 it is still excessive in nature. The rule on ban of advertised was perceived during colonial times. With countries like United Kingdom and the United States updating their laws, the Indian legal system is left behind. With rapid globalization and an exponential increase in global law firms, certain restrictions must be relaxed. If not for complete freedom of advertising, but a properly regulated system with a suitable code of conduct keeping in mind the dignity and integrity of the profession in a medium available to the majority of the population which would give the people a choice to make an informed decision. The restrictions on advertising are good neither for the lawyers nor for the clients. It is time for the Bar Council of India along with the relevant authorities realize it soon and end this archaic practice.

9. References

1. Indian Council of Legal Aid and Advice v. Bar Council of India [(1995) 1 SCC 732] Section 49, Advocates Act, 1961.
2. Rule 36, Section IV, Chapter II - Part IV, Bar Council of India Rules, 2008. Resolution No., 50 / 2008 dated [24.03.2008]
3. Rule 36, Section IV, Chapter II - Part IV, Bar Council of India Rules, 2008 AIR Mad. 35, 1984
4. Bar Council of Maharashtra v. M.V. Dabholkar. 2 SCC 291, 1976.
5. Bar Council of India v. A.K. Balaji and Others 5 SCC 379, 2018.
6. Shivam Gomber, *Right to Advertise for Lawyers* – Udgam Vigyati Vol. 3 Civil Appeal 963-64 of 2000 [2001 (6) ALT 104], 2016.
7. AIR Bombay 335, 1929.
8. Re: (Thirteen) Advocates v. Unknown – [AIR 1934 All 1067]
9. BCI TR, Case No. 38, 1994.
10. Teacher, Law. Advertising Done by the Attorneys for the Services They Provide, 2013. <https://www.lawteacher.net/free-law-essays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1> [SCR 1960 (2) 671]
11. AIR 2438, 1995.
12. Bolocan, supra note 6, at 22 Teacher, Law. (November). *Advertising Done by the Attorneys for the Services They Provide*, 2013. <https://www.lawteacher.net/free-law-essays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1>
13. Model Rules of Professional Conduct, 1969.
14. *Bates v. State of Arizona* 433 U.S. 350
15. Rule 7.1, Model Rules of Professional Conduct, 1983.
16. Rule 7.3, Model Rules of Professional Conduct, 1983.
17. Lalit Bhasin, *Law firms find loopholes to promote their services* - SOCIETY OF INDIAN LAW FIRMS
18. <http://www.livemint.com/Companies/vqsXsEeGYuqPli9I8TPL00/Law-firmsfind-loopholes-to-promote-their-services.html> (last updated July 5, 2013).
19. *loopholes-to-promote-their-services.html* (last updated July 5, 2013).
20. ALD (5) 367, 2000.