the Marcus LETTER

THE CASE OF THE RIDICULOUS RULES IN A SUBLIME PROFESSION

The Ringing Of The Broken Advertising Rules Of New York State (And Other) Bar Associations

'Splain me something.

In 2006, the New York State Bar Association asked for comments on proposed new regulations regarding lawyer advertising. They seemed particularly concerned about blogs, and the potential excesses of such as personal injury advertising. Shocking, yes, but no great surprise.

For reasons I described in my letter to them, which appears below, their reasoning was ludicrous. And, I understand, they got many such letters.

A few weeks ago, Northern District Court Judge Frederick J. Scullin Jr. issued an injunction on enforcement of several provisions in the guidelines, which, unless a stay is obtained, eliminate several of the guidelines. A rational decision at the head of which might well be a slippery slope toward reason. The guidelines in question, said the judge, were unconstitutional.

Significantly, the judge also noted that the state submitted no *"statistical or anecdotal evidence of consumer problem with, or complaints about, misleading attorney advertising."*

Some of the rules still are in force, but they are, in my opinion and as described in my letter, either redundant or just plain foolish. Moreover, I believe they show absolutely no knowledge of law firm marketing, or the value that marketing has to both the practice of law and the needs of the clientele.

I am not a lawyer, although there are a few of us around who can read stuff like the U.S. Constitution, and legal decisions, like *Bates v. State Bar of Arizona*. So…

If I, and many others like me (including many lawyers), knew at the outset that the new advertising rules, both in their proposal stage and in final form, were unconstitutional, why didn't the wizards of the Bar Associations that promulgated or accepted those rules, not know it as well?

In fact, many of us, particularly those of us who understand law firm (and accounting firm) marketing knew that these regulations were at least ridiculous, and at most onerous. You might want to look at the following letter that I (among many others, writing in the same vein), sent to the New York State Bar.

LETTER TO NYS BAR ASSOCIATION

November 9, 2006

Michael Colodner, Esq.,

Counsel

Office of Court Administration

25 Beaver Street

New York, New York 10004

Re: Proposed Amendments to Rules

Governing Lawyer Advertising

Dear Mr. Colodner,

I am writing to oppose the proposed changes in the advertising code for lawyers.

My name is Bruce W. Marcus. I have been a consultant in marketing and firm management for law and accounting firms since well before *Bates*. I am the editor of *The Marcus Letter on Professional Services Management,* which is read internationally by more than 25,000 lawyers, accountants, and the marketers who serve them; the editor of the blog, *The Marcus Perspective*; and the author of some 15 books on marketing and hundreds of articles, most of which have appeared in professional journals for both lawyers and accountants. I am, in fact, a pioneer in the practices of marketing for professionals, and have served innumerable law and accounting firms in that practice.

I am opposed to the proposed changes as being irrelevant, anachronistic, and misguided. I am particularly opposed to the notion that law firm blogs may constitute unethical marketing.

I am opposed, as well, to misrepresentation or false claims in advertising, but that is a given, and its cause, I believe, will not be addressed or advanced one iota by the proposed rules. As one very bright and prominent lawyer and economist pointed out to me, we don't need a law to outlaw what is already illegal.

I am opposed to the proposed rules on three grounds -- a misunderstanding of the concept of ethics (see *Bates et. al. v State Bar of Arizona)*; the rules themselves will not likely be upheld at the first legal challenge to them; and there is clearly a misunderstanding of the meaning of marketing for lawyers and the long-term effects of *Bates* in serving both law firms and, most significantly, clients.

While I grant that it is the purpose and value of bar associations to protect integrity in the profession, it is incumbent on them, I believe, to protect the profession from overzealous regulation that goes beyond its stated purpose. For example, with or without ethical rules, to promise what it is impossible to guarantee or even to deliver (e.g. to guarantee litigation results), is a lie and an untenable claim, and is poor business practice – and all before the question of ethics enters the picture. Lawyers who lie or misrepresent will not long succeed or sustain. The acoustics of the marketplace will ultimately catch up to them. Moreover, there are laws aplenty to deal with this kind of chicanery.

At the same time, the proposed rules seem to lose sight of the ultimate objectives of ethical codes, which are not merely to protect the integrity and reputation of the profession, but to protect the clientele – the consumers of legal services. In reading the proposed rules, I get no sense that this aspect of regulation is adequately addressed, in which case the rules are inadequate to the needs of the 21st century practice. I suggest that integrity is not addressed by rules, but rather by behavior, which, unfortunately is too often too nuanced to regulate beyond empirical observations of right or wrong. Here, too, the marketplace (as well as existing criminal law) will do more to adjudicate behavior than will excessive regulation.

My second point is conjecture on my part (because, despite my many years of experience in the field, I am not a lawyer). Having lived through the three decades since *Bates*, and having seen the successful and unsuccessful assaults on law firm outreach, I suspect that the new rules will be challenged successfully, making the promulgation of the regulations an exercise in futility. There is also the obvious fact that, in today's communications media, it would be impossible to preclude advertising activity from other states. This, I think, is a fairly obvious problem.

I perceive an anxiety on the part of the profession about the overzealous pursuit of clients by the trial lawyers – *ambulance chasing.* I grant that this kind of behavior is reprehensible. It erodes trust

in the profession, and subverts the purpose of the law. But here, too, caution is necessary to avoid overzealous regulation, which only gives support to those who would weaken the whole personal injury and malpractice branch of the profession. In representing malpractice firms in the past, I came to the conclusion that the reason there is so much malpractice litigation is that there is so much malpractice. There is indeed a need by the public for this kind of practice, and for checks against its abuse, but too much regulation ultimately serves neither the profession nor the public.

My last point is that I am struck by the notion that the restrictions on law firm blogs as improper marketing is done with not only ignorance of the real meaning of marketing, but of the benefits of lawyer marketing for both the profession and, more significantly, the clientele, over the three decades since *Bates*.

It should be understood that while a good product marketer can conceivably persuade a consumer to buy a product that the consumer didn't know existed before, and can even make specific claims of product superiority. it's not rational for law firms to do so. It's not regulation that prevents a lawyer from claiming that he or she writes better briefs, or is a greater silver tongued devil in the courtroom. It's that these claims are patently unprovable, and too outlandish to be expected to be believed.

At the same time, it should be understood that unlike the tube of toothpaste, which will be consistent in quality from one tube to the next, the nature of legal matters precludes that kind of consistency. I may be able, through marketing, to persuade you that my brand of toothpaste is better than that other brand. But I can't, even by dint of superior marketing, persuade you, as a happily married individual, to get a divorce, no matter how good a marketer I am. In other words, professional services marketing is distinguished , not by persuading a prospective client to do something not dictated by external needs, but rather, to demonstrate that an attorney is distinctly qualified, to a point that might imply – but can never validly demonstrate – the potential for superior performance.

What is most significant here, and what is most dangerously threatened by the proposed rules, is the positive effect on client service by the modernization of the profession.

In my 2005 book, *Client at the Core*, (with coauthor August Aquila) I pointed out that the nature of the practice of the present and future is dictated not by the traditions of chambers, but by the needs of the clientele. Today's clients – as a result of the ability to compete brought about by *Bates* – is a better educated client, and demands better communication, better information, better explanation. As a result, you have an evolving new fee structure, demanded by clients. You have new, relevant services. You have two tier law firms, designed to make better use of a firm's talents. You have client service teams. All of these and more to enhance the competitiveness of a firm in a realm in which a firm can't say, "We write better briefs." Will clients, I wonder, allow the profession to go back to the pre-*Bates* days? Who then benefits?

What, then, is marketing for lawyers? It is not blatant and outrageous claims. It is, instead, the blog that delineates and explains. That educates. That demonstrates, but not claims, expertise. In that sense, the blog may be the best thing to happen to there profession since the loss of the wig and the robes.

Marketing is the advertisement that demonstrates the expertise of lawyers, or a firm's specialties, or a firm's philosophy. Marketing is the news report that describes an outcome in court or in the boardroom. It is the report to the public of new law or regulation, and its meaning. All of these are neither blatant or misleading. All are invaluable to the consumers of legal services.

And if, in the course of educating and informing the public, blogs and other forms of marketing persuade a prospective client that firm A has a better grasp of a problem than firm B, then it is not only good marketing, but good client education. If the law firm benefits from this kind of activity, then so too does the client -- and that's not a diminution of law firm integrity – that's a positive force for the practice itself.

We live in a dynamic era, with the traditions of the past altered by technology, by globalization, by new access to information, by new kinds of laws and regulation (*e.g. Sarbanes-Oxley*). In promulgating rules by which the profession must function, these changes must be taken into account. And again, the ultimate consideration should be not just protecting the reputation of the profession, but rather by the benefits to the consumer of legal services.

If a rising tide raises all boats, so too, then, does sound marketing serve the profession.

May I suggest, as well, that organizations that promulgate regulations that will ultimately be ignored or overturned are on a path to irrelevance and obsolescence. Bar associations are too important to the profession to be allowed to become anachronistic.

I suggest, then, that the proposed regulations be reexamined in the light of the reality of 21st century practice, and its role in servicing both the practice and the public – the consumer of legal services. I believe, then, that the proposed rules are unwarranted, and detrimental to the purposes of the practice.

Respectfully submitted by

Bruce W. Marcus

Somebody, please, 'Splain it to me.