

LEGAL ETHICS : ADVOCATE'S RIGHT TO ADVERTISE IN INDIA

*HARSH ARYA¹**Introduction**

India is home to over 1.2 million lawyers, exhibiting a large concentration of legal practitioners². Evolving constantly since colonial times, the legal profession in India has undergone a complete transformation since independence³. Advocates in India have achieved success in all spheres of practice, while dealing with novel challenges that come with technological advancement. Yet, Llyod Pearson, a London-based Legal Directories Consultant, is of the opinion that there is an inconsiderable amount of information about legal practice in India available globally⁴. This lack of information arises from a historic prohibition on advertising by legal professionals. This arises due to the common consensus that lawyers are the social engineers in society, responsible for upholding justice and bringing change⁵. Advertisement by legal professionals refers to lawyers publicizing the services offered to clients. Since an advocate is enrolled with the bar, their service is perceived as legitimate and trustworthy by potential clients. It is this commercialization of legal services that has been discouraged by the courts and the legislature. The prohibition arises from the fact that all advocates might not have the same capacity or monetary means to promote themselves. This would lead to clients choosing lawyers based on their advertisements and encourage unhealthy competition between lawyers. This unbalanced expenditure on advertisements and promotion among lawyers, would lead to professionals resorting to practices such as fee undercutting⁶. It would undermine a lawyer's sense of dignity and self-worth⁷. Eventually, a decline in quality of legal services offered would follow.

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²John Grimley, India to lift restrictions on law firm websites, ASIA LAW PORTAL, (March 26, 2014), <http://www.asialawportal.com/2014/03/26/india-to-liftrrestrictions-on-law-firm-websites/>, last visited 21 August, 2020

³ Amal Kumar Ganguli, "Overview of the Legal Profession in India" UIA, (April 27, 2018) <https://www.uianet.org/en/actions/overview-legal-profession-india>, last visted August 21, 2020

⁴ Llyod Pearson, "Will Indian lawyers embrace legal directories?" 393 *Communications*, (February 26, 2014) <https://393communications.com/will-indian-lawyers-embrace-legal-directories/>

⁵ Aadhyta Logeshen R, "Advertising by advocates in India: The right to advertise professional ethics" (2020) *Int. j. law* Volume 6; Issue 4; 2020; Page No. 01-03

⁶ Maya Goldstein Bolocan, Professional Legal Ethics: A Comparative Perspective, CEELI Concept Paper Series 18 (2002)

⁷ Ted Schneyer, "Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 89 *FORDHAM URBAN LAW JOURNAL* Vol. 40 Issue 1 Article 15 (2013)

The accumulative effect of the Advocates Act⁸ & the Bar Council of India Rules⁹ was that until recently there was a strict prohibition on the advertisement of legal services in India. In 2008, the bar council relaxed this prohibition by permitting legal professionals to set up websites subject to some restrictions.

Research Methodology

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.

Historical Perspective

India has a long and storied history with law. The perception of law as a "noble profession" has its roots in Rig Vedic values and Colonial British Common law.

This arises from the fact that in England advertising and solicitation were understood to be identical in nature, falling under the common law crime of champerty and common barratry¹⁰. With its classification as a "noble profession" it is historically subject to stringent guidelines or laws placing severe restriction justified on the grounds of "dignity of profession"¹¹.

Justice Krishna Iyer states "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 clumsy, for betterment of legal business. Law is not a trade, briefs no merchandise and to the heaven of commercial competition or procurement should not vulgarise the legal profession"¹².

The status of law as a noble profession has been reiterated by numerous judgements over the years. In *Indian Council of Legal Aid v. Bar Council of India*, the Supreme Court highlighted that the legal profession is empty without its morals and ethics, and the duty of the lawyer to abide by the code and conduct of the noble profession.¹³

⁸ The Advocates Act 1961, s 35

⁹ Bar Council of India Rules, Clause 36

¹⁰ Harris, M.C., 1985. Solicitors' Right to Advertise: A Historical and Comparative Analysis. (*Ga. J. Int'l & Comp. L.*, 15, p.317.

¹¹ Aadhitya Logeshen R, "Advertising by advocates in India: The right to advertise professional ethics" (2020) *Int. j. law* Volume 6; Issue 4; 2020; Page No. 01-03

¹² *Bar Council of Maharashtra v. M. V. Dabholkar* [1976], 1976 AIR 242

¹³ *Indian Council of Legal Aid and Advice v. Bar Council of India* [(1995) 1 SCC 732]

Bar Council of India Rules

Under the Advocates Act, the Bar Council of India (BCI) exercises its power and makes rules to discharge its functions under the Act, based on which, it has formulated the BCI Rules.¹⁴

Rule 36 prohibits advocates from soliciting work or advertisements, through circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. This can neither be done through offline methods or online methods. The rules go so far as to say that even the sign board, name plate or stationery of an advocate should not indicate that he is at present or has previously held the office of President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate General.¹⁵

In 2008, an amendment was brought about to the Rule 36, pursuant to the decision of the Supreme Court in the case of V.B. Joshi v. Union of India¹⁶, with a resolution passed by the BCI on 30th April¹⁷ according to which the lawyers are allowed to furnish the following information on their websites:¹⁸

1. Name
2. Address, telephone numbers, e-mail id's
3. Enrolment number, date of enrolment, name of the State Bar Council where originally enrolled, name of the State Bar Council on whose roll they currently stand, name of the Bar Association of which the advocate is a member
4. Professional and academic qualifications
5. Areas of practice.

Legal professionals furnishing the above-mentioned information on their websites are also required to provide a declaration that the information provided by them is true.¹⁹

¹⁴ The Advocates Act, 1961, s 49(1)

¹⁵ Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

¹⁶ Resolution No. 50/2008 dated 24th March, 2008

¹⁷ Resolution No., 50 / 2008 dated [24.03.2008]

¹⁸ Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

¹⁹ Declaration, Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

Purpose behind the Prohibition

Judicial Approach

An important consideration while enforcing the bar council rules is to identify what constitutes an advertisement. Various judgements of the courts in India aim to identify what constitutes an advertisement under the rules.

This question is common owing to the fact that it is common for lawyers to attempt to advertise despite these rules through numerous means such as, issuing visiting cards and attending seminars, workshops and felicitation ceremonies, appearing on election manifestoes with their name and contact details mentioned or through circulars, appealing to members of the bar to recommend them to clients. Attempts to advertise through such means proves to be in contravention of the BCI Rules.²⁰

Over the years, through judgements the courts have made attempts to define an advertisement so as to prevent lawyers from trying to circumvent the rules.

In the case of *Government Pleader v. S. A. Pleader*²¹, it was ruled that the advocate using their name, address, designation while posting a card, is said to be advertising and violating the rules of prescribed conduct.²²

Similarly, *In Re: (Thirteen) Advocates v. Unknown*²³, it was held that articles published in newspapers in which the writer is described as an advocate would go against the rules. The court was of the opinion that this was a cheap way for an advocate to advertise their services.²⁴

In *State of Uttar Pradesh and Anr. v. Johri Mal*²⁵, the question of whether or not, the submission of biodata pursuant to a notice would be in contravention to the rules prescribed.

²⁶This was answered in the case of *B. Rajeswar Reddy and Ors. V. K. Narasimhachari and*

²⁰ Shivam Gomber, *Right to Advertise for Lawyers – Udgam Vigyati* Vol. 3 (2016)

²¹ 5 AIR 1929 Bombay 335

²² 5 AIR 1929 Bombay 335

²³ AIR 1934 All 1067, 153 Ind Cas 667

²⁴ AIR 1934 All 1067, 153 Ind Cas 667

²⁵ Civil Appeal 963-64 of 2000

²⁶ Civil Appeal 963-64 of 2000

Ors.²⁷ in which the court ruled that submission of such data following a notice for the same, would not by itself be contrary to the rules.

A breach of professional etiquette occurs if the name plate of an advocate is too large, and not of moderate size, further articles published in newspapers must not be undersigned by the advocate. Both of these instances will amount to unauthorized legal advertising by the advocate says the Madras High Court in *S. K. Naicker v. Authorised Officer*.²⁸ the same court in *CD Sekkizhar v. Secretary Bar Council*²⁹ held that announcements and canvassing as part of election manifestos cannot be used to propagate the lawyers name and services.³⁰

In the landmark judgement of *J.N. Gupta v. D.C. Singhanian & J.K. Gupta*³¹ the court made clear the status of information furnished by lawyers in bar directories as public information. The issue of two advertisements in a newspaper was called into question. the first advertisement informed the public of a change in address owing to the fact that a fire broke out in the building in which their practice was located. The second was to inform the public of their move back to the building in which their old offices were located. Following these advertisements, they published their name and address along with the headings "Singhanian & Company", "Firms Major Cases", "Representative Clients" in an international bar directory. It was held that the first set of advertisements were permitted as they were necessary to inform the firms existing clients of a change in address. The second listing in international bar directory would have been deemed to not be in violation Rule 36, if it were done with the purpose of giving the address or telephone number of the firm. Since it was done to publicize the fact that the firm had dealt with major cases and had eminent clients it ran afoul of the Rule in force.³²

Ethical Approach

The evolution of laws in India has seen one constant, that of the thought that law is a noble profession, and lawyers are engaged in a noble pursuit. The bar and the bench call for advocates to conduct themselves honourably and have a dignified bearing. Law is held to be an ethical service devoted to public.

²⁷ [2001 (6) ALT 104]

²⁸ (1967) 80 Mad. LW 153

²⁹ AIR 1967 Mad. 35

³⁰ AIR 1967 Mad. 35

³¹ BCI TR, Case No. 38/ [1994]

³² BCI TR, Case No. 38/ [1994]

The Madras High Court in 1967, ruled that lawyers advertising their services would be conducting themselves reprehensively, in a manner unbecoming of their profession. Permitting advocates to issue advertisements could lead to jealousy and setting of unrealistic standards. Large swathes of the people could be exploited by immoral advocates due to their illiteracy. The traditional purpose of law is to serve the public, so allowing advertisements would make it a commercial service.³³

In the landmark case of Bar Council of Maharashtra v. M.V. Dabholkar and Others. Justice Krishna Iyer 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"³⁴ this judgement states that the reasoning behind Rule 36 is sound. Canons of professional ethic have been in existence before the implementation of the rule. This means that professionals ethics were not born from Rule 36, but developed along with the bar as it developed. Ethics are connected to morality which is a pillar of civilized society.

Law is not a trade, business or commercial venture. An advocate is an officer of the court and must make all attempts to secure justice for their clients, while practising the noble profession.³⁵

Constitutional validity of Rule 36

Owing to its restrictive nature, the merits and demerits of Rule 36 are often debated. There have been many calls for the rule to be scrapped. This is due to the view that an advertisement aids in promoting the services that an advocate offers. It can be easily recognized as a form of speech and expression.³⁶ Thus, it is argued that advocates are being denied the opportunity to exercise fundamental rights guaranteed by the constitution.

India guarantees the freedom of speech and expression under article 19(1)(a) of the constitution. This freedom is not absolute and is subject to reasonable restrictions. Any

³³ CD Sekkizhar v. Secretary Bar Council, AIR 1967 Mad. 35

³⁴ Bar Council of Maharashtra v. M.V. Dabholkar (1976) 2 SCC 291

³⁵ R.N. Sharma Advocate v. state of Haryana, 2003 (3) RCR (Cri) 166 (P&H).

³⁶ Teacher, Law. (November 2013). Advertising Done by the Attorneys for the Services They Provide. <https://www.lawteacher.net/free-lawessays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1>

danger to the sovereignty, integrity and security of the state, friendly relations with foreign states, public order, decency or morality in relation to contempt of court, defamation or incitement of an offence, will see these rights put into question by a competent court.³⁷

The protection awarded by the aforementioned article was extended to advertisements as a part of "commercial speech" in the *Tata Yellow Pages*³⁸ case by the Supreme Court. Following this in subsequent cases, legal services have been termed as business proposition and the advertisement of the same as falling under the aegis of commercial speech³⁹.

The landmark *Hamdard Dawakhana*⁴⁰ case led to the ruling that advertisements not in public interest won't be admissible under Article 19(1)(a). With advertisements by advocates being of a commercial nature, they were held to be against public interest.⁴¹

Examining Rule 36 and its scope as explored in various judgements, the researcher submits that the ban on advertising imposed on advocates is not permissible. Rule 36 does not satisfy any of the conditions under Article 19(2). Not even "public order" under Article 19(2) which refers to disturbance of public peace, security, tranquillity and the like.⁴²

The Indian citizen's right to conduct free trade and commerce is enshrined in Article 19(1)(g), which confers upon each citizen to take up any form of employment, trade or calling. This is subject to the same reasonable restrictions under Article 19(1)(a).⁴³ Invariably the right to take up any trade and occupation also includes within its ambit the right to avail all resources and mechanisms to carry out this trade or occupation, including advertisements.⁴⁴

Further, the *Hamdard* judgement⁴⁵ appears to be violative of Article 19(1)(g), as a reasonable restriction on prohibiting advertising would only arise if the advertisement is against public interest by being immoral or obscene.⁴⁶ A blanket ban on advertising would also disturb their right to conduct free trade and commerce.

³⁷ Article 19(2), Constitution of India, 1950

³⁸ *Tata Yellow Pages v. MTNL*, 1995 AIR 2438

³⁹ *Dharam Vir Singh v. Vinod Majahan*, AIR 1985 P&H 169

⁴⁰ 6 [SCR 1960 (2) 671]

⁴¹ 6 [SCR 1960 (2) 671]

⁴² *O.K. Ghosh v. E.X. Joseph*, AIR 1963 SC 812, *Dalbir Singh v. State of Punjab*, AIR 1962 SC 1106

⁴³ Article 19(2), Constitution of India, 1950

⁴⁴ *Sakpal Papers v. Union of India*, 1962 SC 305

⁴⁵ 6 [SCR 1960 (2) 671]

⁴⁶ *Chintaman Rao v. State of M.P.* AIR 1951 SC 118

Hence, the researcher is of the opinion that the ban on advertising of legal services by advocates not only exceeds its scope but is also unconstitutional. It is subject to no restrictions under Article 19(2).

Comparative analysis of different jurisdictions

Position in the United Kingdom

The traditional Victorian notions of honour and nobility prohibit advocates from publishing advertisements. With the passage of time a review set up by the Monopolies and Mergers Commission in 1970 and the Office of Fair Trading in 1986 expressed the importance of advertising for legal practitioners and the ban was lifted.⁴⁷ Legal advertising is subject to the Solicitors Publicity Code, 1990 which was last amended in 2016. Chapter 8 of the code says that publicity by a legal professional must not be misleading, provide sufficient information for their clients to make informed decisions.⁴⁸ Every letterhead, website and e-mail of the legal professional should read "authorised and regulated by the Solicitors Regulation Authority (SRA)", along with the name and license number allocated to the professional under their own name.⁴⁹ The SRA places limitations on advertising by prohibiting any unsolicited approach. Any attempt to approach a potential client by telephone or in person with an intent to publicise legal services is forbidden.⁵⁰

The restrictions on advertising are limited by the SRA. Unsolicited approaches in person or by telephone in order to publicise practice is prohibited.²³ Legal professionals are also allowed to publish their fees provided the same is not pitched at an unrealistically low level.²⁴ However, details of fees cannot be advertised without making it clear that additional charges may be payable.²⁵ Professionals are allowed to publish the fees they charge provided they are not shown as being unrealistically low.⁵¹ Any additional charges must be mentioned upfront.⁵² An advertisement must not disgrace or bring into question the integrity of the legal community in the United Kingdom.⁵³

⁴⁷ Maya Goldstein Bolocan, Professional Legal Ethics: A Comparative Perspective, CEELI Concept Paper Series 18 (2002)

⁴⁸ Rule 8.1, Solicitors' Publicity Code, 2016

⁴⁹ Rule 8.5, Solicitors' Publicity Code, 2016

⁵⁰ Rule 8.2, Solicitors' Publicity Code, 2016

⁵¹ Rule 8.7, Solicitors' Publicity Code, 2016

⁵² Rule 8.9, Solicitors' Publicity Code, 2016

⁵³ Teacher, Law. (November 2013). Advertising Done by the Attorneys for the Services They Provide. <https://www.lawteacher.net/free-lawessays/constitutional-law/advertising-done-by-the-attorneys-for-the-services-they-provide-constitutional-law-essay.php?vref=1>

Position in the United States

The professional ethics of the American bar Association (ABA) was firmly of the view that advertising by advocates was unprofessional. Soliciting professional employment through advertisements was banned under Ordinance 27 till 1977.⁵⁴ it came to be protected as a fundamental right following the decision of the US Supreme Court in *Bates v. State Bar of Arizona*.⁵⁵

The case follows two attorneys who decided to start a law firm for the less privileged. Their goal was to offer pro bono legal services to those who did not qualify for legal aid. The only viable way to begin this endeavour was to advertise their services. They admitted their actions were in contravention to Ordinance 27. However, the court held that a blanket ban on advertisement would be in contravention to the American First Amendment i.e. freedom of speech and expression. It was this ruling that established a right to advertise for attorneys, and allowed various state bar associations to monitor and set guidelines for the same. Following this judgement, the right to advertise was recognised as a constitutionally protected right.⁵⁶

Legal professionals in the United States may furnish advertisements of their services as long as they are constant with the Model rules of Professional Conduct, 1983. Advertisements in all forms are allowed unless they provide misleading information about the services offered.⁵⁷, or advertising professional employment for pecuniary gains.⁵⁸

The changing face of the legal profession

The general consensus on permitting advocates to publish advertisements to solicit clients remains unclear. Some are of the opinion that legal services are of a commercial nature, and hence their advertisement is justified. Others believe that the goal of legal services is to be of benefit to the public at large, and beneficial to society. In light of this the idea of commercialising legal services for profit is abhorrent.⁵⁹

A blanket ban on advertisements is not maintainable. As seen in the study, what constitutes an advertisement under the rules remains ambiguous despite several judgements on the same.

⁵⁴ Model Rules of Professional Conduct, 1969

⁵⁵ 433 U.S. 350

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

⁵⁷ Rule 7.1, Model Rules of Professional Conduct, 1983

⁵⁸ Rule 7.3, Model Rules of Professional Conduct, 1983

⁵⁹ *Lawyers Collective*, 4 (October, 2001)

This has led to the prescribed rules being flaunted and advocates advertising their services through signboards, with photographs, names, designations.

Cases that are sensationalised by the media, act as advertisements when they report interviews and recordings of advocates that appear in court for high profile cases.

Using the guise of disclaimers law firms publish records of past achievements, research by their advocates, records of past hearings on their websites.⁶⁰

Over the years the legal profession has undergone many changes and evolved to adapt to modern challenges. It is not tenable for the Bar Council to prohibit all forms of advertisements, or keep a watch over all the advocates and firms that flaunt Rule 36.

The bar council must recognize that the dynamics of the legal profession and consumer focused practices has evolved in such a manner so as to necessitate the need for regulated advertisements that promote legal services.

The case of *K. Vishnu v. National Consumer Disputes Redressal Commission & Anr.*,⁶¹ led to the conclusion that the legal profession is an administration, and hence a product under the Consumer Protection Act, 1986. The Report of the High Level Committee on Competition Policy and Law, under the Chairmanship of S.V.S. Raghavan stated that "the legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth of professional law firms, restricting their desire and ability to compete globally, preventing the country from obtaining advantage of India's considerable expertise and precluding consumers of free and informed choice"⁶²

It was this judgement that brought legal services under the ambit of the Industrial Disputes Act, 1947, by classifying legal services under "industry".⁶³

In conclusion, it is found that legal services have been found to be subject to both consumer protection and trade laws. This points towards an unavoidable path of commercialisation.

⁶⁰ 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)

⁶¹ (2000) ALD (5) 367

⁶² 4 8.2.5, Chapter VII, Competition Policy and Professional Services, Report of High Level Committee on Competition Policy and Law- S.V.S. Raghavan Committee, 2000

⁶³ *Bangalore Water Supply & Sewerage Board v. A Rajappa*, 1978 AIR SC 548

Advantages of Permitting advertising

1. Boon to novice advocates

Novice advocates do not have the resources of large firms that publicize their services by sponsoring events, holding conferences and seminars. Permitting advertisements would allow small and medium size firms as well as individuals to disseminate information about their practice. It would prevent the creation of a monopoly in the legal market.

2. Right to Information

The general public cannot be expected to make an informed decision without all the facts and information. Potential clients are unaware of many small practices or boutique firms that might cater to them.

3. International Recognition

Indian legal practice loses out on international clients yearly due to a lack of exposure its non-commercial nature. Advertising could assist in attracting foreign clientele.

4. Network Coverage

The 2008 amendment allows for furnishing of information online. Yet, large sections of Indian society have no access to the internet. Advertising would allow more people to be exposed to legal services.

Disadvantages of permitting advertising

1. Monopolies

Law firms with greater resources and capital may misuse this permission to create a monopoly and deny a chance of representation to others.

2. Unhealthy Competition

There is a chance that advertisements being permitted could lead to an unhealthy competition in which advocates may resort to tactics such as price cutting to ensure that the client chooses them for representation.

Conclusion

The legal profession in India is age old and is held to in high esteem by the people. The prohibition on advertisement of legal services serves from age old Victorian notions prevalent during colonial times. Yet, even with the evolution of the legal sphere, laws and rules have remained the same. The constitution of India is of the opinion that restrictions placed on citizens must be reasonable in nature. The complete prohibition on advertisements stands in contravention to this. The 2008 amendment provides some relief, yet the ban remains excessive in nature. Keeping in mind the globalization of the economy and the commercial nature of legal services worldwide, India must keep up.

This research calls for a regulated system to be put in place, with a well-defined code of conduct. This will be responsible for maintaining the dignity and integrity of the profession.

These restrictions prove to be a hinderance to both advocates and potential clients. The bar council must address the issue soon.