

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
DENNIS E. MOFFETT,
Respondent/Appellant.

File No. DP 103/84

Decided: October 4, 1985

BOARD OPINION

By Majority: Patrick J. Keating
Martin M. Doctoroff
Charles C. Vincent

The Respondent, Dennis E. Moffett, was charged with publicizing advertisements which were misleading in violation of GCR 1963, 953(2),(3)and(4), DR 1-102(A)(4)(6), DR 2-102(B) and Michigan Supreme Court Administrative Order 1978-4, as extended by Administrative Order 1979-7. The Hearing Panel found that the Grievance Administrator failed to meet the burden of proof and dismissed the complaint. We reverse the panel's finding that the ad was not misleading or deceptive and conclude that use of a trade name, without identification of at least one responsible attorney associated with the law firm, is per se misleading and deceptive. However, discipline will not be imposed in light of the uncertainty and ambiguity surrounding the rules.

FACTS

Respondent published an ad which stated:

Lawyer Screw Up?
The Malpractice Group, P.C.
We only sue lawyers.

The Malpractice Group, P.C. is incorporated pursuant to state law, with Respondent as sole shareholder and sole legal practitioner. Respondent claims that he spends approximately 20% of his time in his capacity as attorney for this corporate entity. In addition to his practice of law under this corporate title, Respondent is sole attorney and shareholder for a second corporation. Under "Dennis E. Moffett, P.C.", Respondent works as a general practitioner and does not handle attorney malpractice claims. The Hearing Panel Report addressed the use of trade names in advertisements, specifically Respondent's use of "the Malpractice Group, P.C.". It is undisputed that, based upon Bates v. State Bar of Arizona, 433 U.S. 350 (1977), attorney advertising is entitled to First Amendment protection as commercial speech. Yet, there is a heretofore unresolved tension between a state's need to impose regulations which shield the public from deception and abuse and the need to facilitate unhampered access to information about services rendered by attorneys. To implement the necessary regulation, the Supreme Court, subsequent to Bates, promulgated Administrative Order

1978-4 which provided that, except for any publication which is false, fraudulent, misleading or deceptive, all public communication by an attorney is permissible. Furthermore, the Administrative Order mandated that “except for DR 2-103 and DR 2-104, disciplinary rules in conflict with this order are suspended for a period of one year.”

The Hearing Panel sought to reconcile the Administrative Order with the pre-existing DR 2-102(B). On its face, the first clause of DR 2-102(B) which proscribes a lawyer’s use of a trade name, conflicts with the broader language of the Administrative Order. The Panel determined that the Administrative Order modified DR 2-102(B) to the extent that use of a trade name is permissible so long as it is not false, fraudulent, misleading, or deceptive. The Panel applied this construction to the case at hand and vindicated the Respondent of any wrongdoing. They reasoned that the slogan, “The Malpractice Group, P.C.” had acquired no prior identity and therefore did not mislead or deceive anyone.

We agree with the Panel’s position that the use of a trade name in legal advertising is permitted by Bates, supra, and the Michigan Supreme Court’s Administrative Order. However, we find that advertising under a trade name can only be permitted where at least one responsible attorney is identified in the ad. This conclusion is derived from DR 2-102(B) which states:

"A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain “P.C.” or “P.A.” or similar symbols indicating the nature of the organization and if otherwise lawful a firm may use as, or continue to include in, its name the name or names or one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

Hence, the rule itself clearly establishes that use of a trade name not in conjunction with the name of at least one responsible attorney is inherently misleading. Furthermore, it would contravene the purpose of state regulation, which seeks to promote protection of prospective clients and the public in general, to allow use of a trade name not in conjunction with a responsible attorney. This conclusion also finds support in Formal Opinion C-231 issued by the State Bar, and adopted in July 1984, which declares in part: “It is unethical to suggest in an advertisement that the entity identified by an assured or trade name is an entity separate and apart from the attorney.”

The clause “we only sue lawyers” is also misleading in two respects: it implies that a group of attorneys is available and works together and it leads the public to believe that this purported group of attorneys are specialists who confine their professional activity to one limited area of tort law.

Engaging in one area of practice under the name of a separate Professional entity and advertising as a professional corporation may have legitimate tax or organizational advantages.

However, attorneys may not assert claims of expertise and circumvent the purpose of the disciplinary rules by practicing law under separate and distinct titles. The respondent--(the only attorney responsible for the advertising in question)-- is not de facto engaged solely in legal malpractice litigation, nor is he part of a group of lawyers so engaged. The advertisement clearly suggests otherwise and is, therefore, misleading in this respect in addition to the omission of the name of a responsible attorney or attorneys.

Therefore, applying the Administrative Order to the case at hand, we reverse the Panel's conclusion and find that use of "The Attorney Malpractice Group, P.C." without identification of a responsible attorney or attorneys was inherently misleading. The phrase "we only sue lawyers" is also misleading to the public at-large.

We recognize that the courts and the legal profession have been struggling for some time in an effort to resolve the constitutional and evolving commercial issues of professional advertising. The relevant rules have been the subject of considerable debate and uncertainty in every jurisdiction. In light of the lack of definitive guidelines and authoritative interpretation of the rules, we find that disciplinary action is not warranted and would serve no purpose in this case. However, we issue herewith a prospective [warning prohibiting language which is misleading to the public at large and the use of a trade name without the identity of at least one member of the advertised law firm. Future advertisements not in conformity with this decision may be the basis for disciplinary action.

(Board Chairman, William G. Reamon did not participate in the hearing and deliberation of this matter).

DISSENT

(By Board Members John L. Coté and Robert S. Harrison)

We also would affirm the conclusion of the Hearing Panel. There is no dispute with regard to the propriety of using trade names and we agree that the Administrative Order operates to preempt the first clause of DR 2-102(B). However, we do not construe from the surviving portion of the rule a requirement that one responsible attorney must be identified in an advertisement; such a finding, we respectfully suggest, implies rule-making authority which the Board does not possess. Hence, use of a trade name is permissible unless it is false, fraudulent, misleading, or deceptive. Furthermore, the clause "we only sue lawyers" should be permitted simply because The Malpractice Group, PC is a distinct entity recognized as such under the laws of this state and would be treated as such for purposes of general civil liability and taxation. Therefore, we conclude that Respondent's ad is permissible.