

Memorandum

To: File
CC: David Wiggins
From: Trinity
Date: 2/1/2012
Re: CB Forum, January 27, 2012, Pott County Courthouse, Room 4D

Attendees

Committee Representation: David Wiggins, Trinity Braun-Arana, Marti Nerenstone, Palma Strand, Charles Harrington

Local Attorneys: Jim Daane, Randy Shanks, Bill Smits, Jon Narmi

Overview

The open forum commenced at 10:05 with introductory remarks by Justice Wiggins. Attendees were advised of the status of the Iowa advertising rules, the process and timeline for consideration of changes, and the likely effective date of the new rules.

Jim Daane, Vice President of the Iowa Association for Justice:

Jim Daane provided the panel with copies of a written statement (attached) and then spoke to the panel about the issue as the IAJ sees it. They acknowledge that the Court must make changes for the Rules to withstand 1st Amendment scrutiny, and agree that new attorney advertising Rules are necessary to level the playing field for Iowa lawyers. At the same time, they are particularly concerned with the disincentive that elimination of fields of specialization will have on CLE attendance. The IAJ believes “there is an immense public benefit to ensuring that lawyers who hold themselves out as specialist in given practice areas actually have experience and acumen in those areas”. They support maintaining the CLE requirements to advertise a field of specialty under 32:7.4(e). In the alternative, they would support Court recognition of specializations and/or other approaches that encourage attorneys to meet heightened educational requirements. There is frustration that the ability to advertise “general practice including but not limited to..” gives the same advertising benefit without requiring the CLE attendance needed to declare a specialty.

Comments from other attorneys:

- Iowa attorneys, particularly those on the east and west borders, are at a disadvantage under the current advertising rules. Davenport probably has a bigger problem with this than Council Bluffs, but Iowans on the western border are also inundated by phonebook, radio and TV advertisements from NE attorneys. NE attorneys are allowed to advertise anything to Iowans so long as it’s not false or misleading. There is a tremendous amount of business lost to NE lawyers who don’t carry an Iowa license, because 70% of cases are settled prior to lawsuit. Iowa attorneys don’t file ethics complaints against these NE attorneys because 1) they think it would be futile or 2) they believe Iowa should also adopt the false-or-misleading standard.

Attorneys want to be able to advertise in a way that attracts and informs clients of their services. Web advertising is where it’s at right now. An attorney can purchase a nicely done package for \$4,000-\$5,000.

If the Rules are aspirational rather than mandatory, as they probably must be, attorneys will probably wind up on both sides of the professionalism spectrum in their advertising. Studies have shown that you actually don't get quality clients by showing mangled bodies, and so even the worst advertisement under new Rules likely won't be that damaging to the profession.

There is value to the consumer in being able to identify attorneys who have met higher standards in terms of education. Even under an aspirational directive, attorneys will want to include their additional CLE attendance in their profile to show clients they are current and to differentiate themselves in the market, so they have incentive to continue attending more than the minimum 15 hours per year of CLE.

- The self-laudatory comments that aren't backed up by any kind of skill or expertise are troubling. When a person doesn't know what they're doing, it harms the profession. As for ads under the Model Rules, maybe marketing has gotten so sophisticated that we can step over the sleaziness.
- The chat function on lawyer web pages is going to raise conflict and unauthorized practice problems.
- Once the new Rules are in place, complaints will probably increase because people will know better where the line is.

The open forum concluded at 10:50.

Statement by IAJ Vice President Jim Daane

to the

Iowa Supreme Court Committee to Study Lawyer Advertising Rules

January 27, 2012

Good morning. My name is Jim Daane. I am vice president of the Iowa Association for Justice (IAJ). Thank you for your considerate attention to our point of view on Iowa's lawyer advertising rules. Our association is grateful for your service on this committee, and we hope our perspective will assist you as you weigh potential rules changes.

IAJ serves Iowa trial attorneys and, by extension, the clients they represent. Founded in 1973, the association's objectives (as stipulated in our by-laws) are:

- To uphold and defend the Constitutions of the United States and of the State of Iowa;
- To advance the science of jurisprudence;
- To train in all fields and phases of advocacy;
- To promote the administration of justice for the public good;
- To uphold the honor and dignity of the profession of law; and, especially,
- To advance the cause of those who are damaged in person or property and who must seek redress therefore;
- To encourage friendship among the members of the bar; and
- To uphold and improve the adversary system and the right of trial by jury.

IAJ members practice in a multitude of areas, but most of them have a trial practice for plaintiffs and claimants who are pursuing justice in our administrative and civil courts. Our members fight for justice everyday in courthouses and communities across this great state, and we have the utmost confidence that they will continue to thrive under whatever new rules may come their way. They are dutiful, hardworking, honest, intelligent, resilient, resolute and sincere, and they strive for the highest level of professional competency in their chosen areas of practice. In order to help them meet and surpass their professional obligations to the clients they serve -- through attainment of superior and sustained performance in litigation and trial advocacy -- we offer a variety of continuing legal education seminars each year in disparate fields and phases of advocacy. Hundreds of Iowa attorneys -- IAJ members and nonmembers alike -- attend our seminars throughout the year.

As noted, one of the association's core objectives is to uphold and defend the federal and state constitutions, so we read the constitutional issues survey by Knoll and Giudicessi with great interest. Thank you for providing this analysis to inform consideration of, and debate about, Iowa's lawyer advertising rules. It seems clear upon careful review that Iowa's current lawyer advertising rules are running afoul of evolving commercial speech doctrines and cannot withstand constitutional scrutiny. New rules are in order, and the ABA model rules are a reasonable platform for launching new advertising rules.

Knoll and Giudicesso state unambiguously that the *R.M.J.* decision of 1982 frustrates the Iowa regulations pertaining to lawyer communication of fields of practice and specialization (Rule 32:7.4) and would appear to render them constitutionally futile, at least in large part, if not in whole. Yet, there is an immense public benefit to ensuring that lawyers who are holding themselves out as "specialists" in given practice areas actually have prerequisite experience and acumen in those areas. Requiring lawyers to meet minimum annual hourly practice requirements and obtain a modicum of continuing legal education hours in their professed fields of specialty [as per 32:7.4(e)] is an effective way to guarantee this benefit. If these requirements are no longer available due to constitutional imperatives, then another way must be found.

We therefore encourage the committee to consider what can and should be done to at least cajole and entice all Iowa lawyers (in lieu of compelling them) to meet minimum practice and continuing education standards if they elect to hold themselves out as "specialists."

- ① • Can the Court require that any attorney who states a claim regarding an area of specialization include within such statement specific information as to the percentage of practice concentrated in the area, and/or the number of hours of CLE completed by the attorney in that area of law during the previous calendar year?
- Can the Court at least retain the right to define --- if not actually mandate --- "specialization" parameters, i.e., "specialist" means that an attorney is devoting a certain minimum percentage of practice hours to the specialty area and obtaining a certain minimum number of annual CLE hours in that area?
- ② • Should the court establish a voluntary "Good Advertising Seal of Approval" for lawyers who can demonstrate that they meet or exceed minimum experience and continuing education standards in their professed fields of practice?
- ③ • Should the Court retain its authority to approve specialty certification initiatives that may be administered by various bar organizations, instead of "outsourcing" this function, as the ABA rules would allow? (IAJ will urge the Court to retain this authority.)
- ④

Thank you again for your considerate attention to our point of view. IAJ is prepared to escalate our own continuing education initiatives to help ensure that Iowa trial lawyers are equipped to meet and surpass their professional obligations in various practice areas, for the sake of the clients they serve. In the meantime, we will continue to monitor and weigh in on these delicate issues at all stages of this process, and we hope you will consider us a partner in your deliberations.