

EXPERTS CORNER

**Digital Solicitation and Advertising: Everlasting
Legal Controversies**



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Digital Solicitation and Advertising: Everlasting Legal Controversies

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Introduction

The digital age has revolutionised operations across numerous professions, and the legal field is no exception to this phenomenon. The adaptation of technology in relation to what may otherwise be one of the strictly regulated “noble” professions often raises considerable ethical and regulatory challenges.

In a matter in *P.N. Vignesh v. BCI*¹, the High Court of Madras was faced with an important question pertaining to the regulation of legal services in the digital age. The core contention of the petitioner was that certain enterprises which fell under the category of “online service providers” were promoting/providing lawyer services wherein advocates were openly soliciting legal work. The petitioner contended that this open solicitation of work by advocates, promoted by online platforms, directly contravened the longstanding and well-established legal provisions regulating the legal profession and practice in India.

Before dealing with the facts and the decision in the matter, it would be helpful to refer to the legal position on practising law in India.

Advocates Act

The practice of law by advocates in India is governed by the provisions of the Advocates Act, 1961 (Advocates Act) — a law enacted to implement the recommendations of the All-

India Bar Committee made in 1953. The object of the Advocates Act, amongst other things, is to: (i) amend and consolidate the law relating to legal practitioners; and (ii) provide for the constitution of Bar Councils and an All-India Bar.² The All-India Bar or the Bar Council of India (BCI) is a common roll for advocates and an institution created to integrate the Bar into a single class of legal practitioners known as “advocates”.

The Advocates Act, in essence, serves as the bedrock for regulating legal practice, ensuring that advocates adhere to a structured legal framework that promotes professional integrity and accountability. Section 33 of the Advocates Act sets out the general rule that only advocates enrolled in terms of the Advocates Act shall be entitled to practise law in any court or before any authority. A plain reading of Section 33 would show that an advocate alone, in terms of the Advocates Act, is given a statutory right to practice before the courts, tribunals, and other authorities/persons.

In a catena of decisions³, it has been clarified that the right to practise law is a fundamental right which is subject to reasonable statutory restrictions imposed in terms of the provisions of the Advocates Act. On what constitutes the exercise of the right to practice law, the Supreme Court in *Pravin C. Shah v. K.A. Mohammed Ali*⁴, observed that practising law envelopes a host of acts such as providing counsel to clients, giving legal opinion when sought, drafting instruments, pleadings, affidavits, or other documents, and participating in conferences involving analysis or discussions on law. While speaking of the duty of advocates, the Supreme Court in *P.D. Gupta v. Ram Murti*⁵, observed that one of the many duties of an advocate is to be fair not only to his client but also to the courts as well as the opposite party while conducting a case.

The Bar Council of India, its functions and powers

In terms of the Advocates Act, the functions⁶ of the BCI include, inter alia, the following:

- (i) prescribing standards of professional conduct and etiquette for advocates;⁷
- (ii) prescribing the procedure to be followed by its Disciplinary Committee and the Disciplinary Committee of each State Bar Council;⁸
- (iii) safeguarding the rights, privileges, and interests of advocates;⁹
- (iv) promoting and supporting legal reforms;¹⁰
- (v) dealing with and disposing of any matter arising under the Advocates Act;¹¹
- (vi) exercising general supervision and control over State Bar Councils;¹²
- (vii) promoting legal education and prescribing standards of legal education;¹³ and
- (viii) managing and investing the funds of the Bar Council.¹⁴

As seen above, the BCI as the apex regulatory body for advocates, is tasked with the function of ensuring that practising advocates adhere to the highest standards of conduct, ethics, and competence. The BCI’s role transcends that of a mere regulator as it is also responsible for prescribing the standards of legal education and ensuring welfare

of the advocates in India.¹⁵

In addition to the above, Section 49 of the Advocates Act provides the BCI with the general power to make rules for discharging its functions under the Advocates Act. Such rules can prescribe, inter alia, the “conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a court”¹⁶.

Bar Council of India Rules and the restrictions on solicitation of work or advertising by advocates

In exercise of the powers vested in the BCI under Section 49 of the Advocates Act, the BCI has framed the “standards of professional conduct and etiquette” set out under Chapter II, Part VI of the BCI Rules¹⁷. In terms of the Rule 36 under Chapter II, Part VI of the BCI Rules (Rule 36), no advocate is permitted to solicit work or advertise their practice, be it directly or indirectly. The said rule reads as below:

36. An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. His sign board or name plate should be of a reasonable size. The sign board or name plate or stationery should not indicate that he is or has been 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 worker or that he has been a Judge or an Advocate General.

This rule will not stand in the way of advocates furnishing website information as prescribed in the Schedule under intimation to and as approved by the Bar Council of India. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under Section 35 of the Advocates Act, 1961.

The proviso in the second paragraph was introduced by the BCI only in 2008 by way of a resolution.¹⁸ In terms of the said proviso, advocates are only permitted to furnish a limited set of information on a website which includes: (i) name; (ii) address; (iii) contact details; (iv) details of professional and academic qualifications; and (v) areas of practice. A failure to adhere to the above rule may lead to initiation of appropriate proceedings for professional misconduct in terms of Section 35 of the Advocates Act.

The 2008 Amendment brought with it a pivotal change in the interpretation of Rule 36. Since the amendment, there has been a notable evolution in how advocates engage in professional networking platforms and legal directories. The amendment introduced provisions allowing advocates to disclose their professional information on networking

platforms and legal directories. With the amendment, the previously clear distinction between what constituted advertisement and what did not got blurred. While the intention was to modernise the practice and allow advocates to present their credentials and areas of expertise online, it also raised questions about the boundaries of permissible self-promotion.

The decision of the Madras High Court and its consequences

Reverting to the case in *P.N. Vignesh case*¹⁹, the High Court, in this case, found that a simple search for an advocate or a field of law would show a list of advocates marked with labels such as “top advocate”, “top choice”, and “premium”, etc. One of the web platforms, which was arrayed as a respondent, sought to defend its actions by arguing that it was a mere online directory of services. Thus, the web platform did not indulge in either soliciting work for advocates or advertising their works. The High Court did not endorse this reasoning.

Speaking of the legal profession, the High Court held that it was rather agonising that some of the legal professionals today were trying to adopt a business-like model when practising law. As such, the High Court remarked that legal service is neither a job nor a business. It is a service to the society.

When adopting technology, the High Court opined that the tools employed in the profession could be upgraded or changed based on the changing circumstances, but the spirit and character, the “basic structure” in the words of the High Court, could never be altered.

Speaking of the rationale behind such stringent restrictions on direct or indirect solicitation and advertising, the High Court provided the following reasons:

- (i) The marketing of advocates could diminish the nobility of the profession and contradict the principle that lawyers serve the cause of justice. It is contradictory to suggest that a lawyer fights for justice with a profit motive.
- (ii) The Court expressed concerns about the susceptibility of gullible and illiterate individuals to misleading advertisements. It cautioned that such advertising could lead to misinformation and misguided decisions among the public, particularly those less equipped to discern the accuracy or reliability of claims made in advertisements.
- (iii) Lastly, the Court highlighted the importance of maintaining a level playing field in legal services. By prohibiting solicitation and marketing, the Court argued that it helps to prevent a scenario where wealthy or well-advertised lawyers garner disproportionate attention and business opportunities, potentially marginalising smaller or less affluent practitioners.

In view of the above, the High Court passed the following directions, whereby the BCI was

directed to:

- (i) Issue circulars/instructions/guidelines to the State Bar Councils to initiate disciplinary proceedings for misconduct against the advocates advertising, soliciting works directly or indirectly.
- (ii) Register complaints before the competent authorities under the relevant laws against online service providers/intermediaries that directly or indirectly facilitate unlawful advertising of the services of advocates.
- (iii) Take necessary action to remove unlawful advertisements and advise online intermediaries against publishing them, seeking governmental assistance if required.

On 6-7-2024, the Bar Council of India took the necessary steps and issued detailed letters, and cease and desist notices to comply with the directives of the High Court.

Judicial opinion on advocacy and the issue of solicitation of work or advertising by advocates

(i) On legal profession

In *Bar Council of Maharashtra v. M.V. Dabholkar*²⁰, Krishna Iyer, J., while speaking of the legal profession observed as below:

“The Bar is not a private guild, like that of ‘barbers, butchers and candlestick makers’ but, by bold contrast, a public institution committed to public justice and pro bono publico service. The grant of a monopoly licence to practise law is based on three assumptions: (1) there is a socially useful function for the lawyer to perform; (2) the lawyer is a professional who will perform that function; and (3) his performance as a professional is regulated by himself not more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice.”

(ii) On role played by BCI

On the role played by BCI, Iyer, J., opined²¹ that,

52. ... a glance at the functions of the Bar Council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order.....

Cautioning the readers on the consequences of rising cases of advocate’s misconduct, Iyer, J., observed²² that,

52. ... if pathological cases of member misbehaviour occur, the reputation and credibility of the Bar suffer a mayhem and who, but the Bar Council is more concerned with and sensitive to this potential disrepute the few black sheep bring about?

(iii) On the rising tendency to gain publicity

In another decision in *Prashant Bhushan, In re*²³, the Supreme Court, speaking of one of the facets of advertising reiterated its earlier observations in another decision²⁴ as culled out below:

83. ...The hunger for cheap publicity is increasing which is not permitted by the noble ideals cherished by the great doyens of the Bar, they have set by their conduct what should be in fact the professional etiquettes and ethics which are not capable of being defined in a narrow compass. The statutory rules prohibit advocates from advertising and in fact to cater to the press/media, distorted versions of court proceedings is sheer misconduct and contempt of court which has become very common. It is making it more difficult to render justice in a fair, impartial, and fearless manner....

While the overall theme and discussion in the aforesaid decision pertained to instances of contempt of court, the judgment indicates a broader concern regarding the professional conduct of lawyers. The Supreme Court's observation indicates that engaging in public debates and reporting on ongoing legal matters, especially in a manner that distorts the proceedings for publicity, may also be seen as a form of advertising.

(iv) On the fundamental issue with advocates advertising their services

The High Court of Madras in *P.N. Vignesh case*²⁵, speaking of the ill-effects of advertising, observed as below:

22. ... These advertisements not only interfere with the ethics of the profession but also misguides the public. There is a high chance whereby people can get misguided through these advertisements and it will also serve as a platform for miscreants.

* * *

27. Lawyers with more money power can place advertisements across different websites and economically disadvantaged lawyers will be unable to approach these sites. Moreover, a lawyer profession is not a race to the top, it is about service to the downtrodden. Today there are innumerable lawyers who are working pro bono for different public causes. Excellence is not an accident. It is always the result of sincere effort and intellect execution. In no way can their services be measured monetarily or otherwise. They pragmatically work towards progress of both the judiciary and the society. Therefore, the advertisements of lawyers in websites covertly and overtly stands against elements of fairness and justice.

Conclusion

In the rapidly evolving intersection of technology and the legal profession, advocates encounter unprecedented opportunities to contribute to justice alongside significant ethical challenges. The proliferation of digital platforms has created avenues that may

tempt advocates to engage in practices that could potentially violate the provisions of the Advocates Act and the BCI Rules.

While digital platforms offer tools to enhance visibility and engage clients, legal professionals must exercise vigilance to steer clear of practices that could be construed as direct or indirect solicitation or unlawful advertising. The foundation of a reputable professional identity should be rooted in genuine achievements, ethical conduct, and a steadfast dedication to meeting society's legal needs.

To fortify ethical standards within the legal community, the BCI and State Bar Councils need to take proactive measures. This includes implementing robust educational initiatives that emphasise best practices and issuing detailed guidelines that clearly define acceptable and unacceptable facets of advocacy. Such initiatives will empower advocates with the knowledge and clarity needed to responsibly navigate the complexities of the rapid integration of technology in the legal profession.

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1. 2024 SCC OnLine Mad 2770.
2. Advocates Act, 1961, Preamble.
3. *N.K. Bajpai v. Union of India*, (2012) 4 SCC 653; and *Jamshed Ansari v. High Court of Allahabad*, (2016) 10 SCC 554.
4. (2001) 8 SCC 650.
5. (1997) 7 SCC 147.
6. Advocates Act, 1961, S. 7.
7. Advocates Act, 1961, S. 7(b).
8. Advocates Act, 1961, S. 7(c).
9. Advocates Act, 1961, S. 7(d)
10. Advocates Act, 1961, S. 7(e)
11. Advocates Act, 1961, S. 7(f)
12. Advocates Act, 1961, S. 7(g)
13. Advocates Act, 1961, S. 7(h)
14. Advocates Act, 1961, S. 7(j)
15. Advocates Act, 1961, Ss. 7(d) and (h).
16. Advocates Act, 1961, S. 49(1)(ah).
17. Bar Council of India Rules, available at: <http://www.sconline.com/DocumentLink/>

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18. Res. No. 50/2008, dated 24-3-2008.
19. 2024 SCC OnLine Mad 2770.
20. (1976) 2 SCC 291.
21. *Bar Council of Maharashtra v. M.V. Dabholkar*, (1975) 2 SCC 702, 718.
22. *M.V. Dabholkar case*, (1975) 2 SCC 702, 718.
23. (2021) 3 SCC 160.
24. *R. Muthukrishnan v. High Court of Madras*, (2019) 16 SCC 407, 475-476.
25. 2024 SCC OnLine Mad 2770.