

The Business of Law - Advertising and Publicity in Germany

Till 1987 all regulation and every judgement concerning advertisements of Lawyers did take as a basis that advertising was not allowed for Lawyers. There were only a very few exceptions like advertising for the establishment of a new Law Firm or the Expansion of a Law Firm. The ethical rules in those days did say that there should be no competition through advertising between Lawyers. But on the 14th of July 1987 the German Constitutional Court did decide that the Legal Profession could no longer be regulated on this basis. It was the beginning of a complete liberalisation till nowadays.

What did happen between 1987 and 2014?

In many judgements of the German Constitutional Court during the last 25 years the court did make clear, that restrictions can no longer be justified by ethical rules which are in conflict with the constitutional concept of freedom, especially with the freedom to exercise a profession. Restrictions of the right to advertise are restrictions to free exercise of the profession. Such restrictions can no longer be justified by reasons like the Lawyer's interest not to compete amongst each other, but only by reasons like interests of public welfare, especially the public interest of proper Administration of Justice and consumers interests.

The other constitutional basic point is the freedom of opinion and expression. It must be allowed that a Lawyer takes part in public discussions about political and legal issues. And it must be allowed that the Lawyer uses the media to foster the interests of his client in a certain case which is of public interest.

Another corner point is the freedom of competition between Lawyers. According to the ethical tradition this is not self-evident. For a Long time we did believe that the client should not choose the best competitor but a good Lawyer. But how to find a good Lawyer if he can not communicate about his competence. It is the consumer - the potential client who is looking for legal service in his case - who must have the information about the education, the specialisations and the personality of a Lawyer he wants to empower for his case. If he needs information he should have it.

Because of these tendencies in dozens of judgements of the German Constitutional Court and the Federal High Court a new wording in the law on Lawyers was found as follows:

generally a Lawyer is permitted to advertise his/her services,

but only as far as the advertising in question provides a matter of fact information. The Lawyer may give personal Information about his services provided the information is objective and relates to his professional activities,

and as long as it is not aimed at soliciting specific instructions or a specific brief, that means for instance that a Lawyer is not allowed to write directly to a potential client of whom he knows that he needs legal help,

and the advertisement does not contain publicity as to success-rates or turnover,

and as far as individual areas of professional practice is mentioned only on the condition that the Lawyer can prove that he has acquired special knowledge in the mentioned area through training, professional experience, through publications or in any other way.

Since this wording is from the 90ies of the last century you may imagine that further progress was made till that time with the help of several judgements concerning Lawyer's advertising. It was not the side of the consumers that did file actions against Lawyer's advertisement and it was not the side of the Lawyer's organisations. The most filings of a complaint concerning advertisement were made by competitors. That is why the cases so far were decided by the courts having jurisdiction in matters of unfair competition concerning all economic activities. Subsequently the rules on advertisement of Lawyers did more and more shrink to the level of the general rules on unfair competition. Specific ethical rules for Lawyers which do excel the Law on unfair competition did clear away like:

the ban on publicity of turnover is since 2004 declared as not according to freedom of profession. As soon as Law Firms were allowed to form capital companies with obligatory publicity of turnover it was no longer possible to forbid this publicity for other Law Firms,

the same constitutional objections are made concerning the publication of success rates. A court did allow the advertising, that nearly 100% of the clients did get a university place which were refused before.

the condition that Lawyer's advertising has to provide only a matter of fact information has been liberalised through many court judgements in the last 15 years. For instance did the Constitutional Court allow in 2008 the sale at auction of legal services on eBay.

the ban on writing letters to non-clients in which services are offered for a certain case must be regarded since a decision of the Federal High Court in 2013 as not according to the constitution. According to the European Directive on Commercial Communication total interdictions are not allowed in commercial communication. Instead of interdictions in every single case has to be checked whether the advertisement was able to give consumer somewhere information and whether the advertisement did not take the consumer by surprise. The only relevant interest to forbid an advertisement is the consumers protection.

The conclusion has to be drawn that nowadays there is no big difference between commercial communication in the general economic area and the commercial communication in the legal market. More and more voices in the juridical literature are heard, that we should restrict the rules on advertisement to the general rules of the Law on Unfair Competition. Only a very small sector is left for special ethical rules on advertisement for Lawyers : this is the ban on advertising in an emotional way that has no reference to the legal service; for instance sex should not sell in Lawyer's advertisements. But in this sector we head not a single complaint in the last 25 years. Concerning advetisements of our members the job of the Frankfurt Bar (which has to practise disciplinary power) is getting more and more easy.