

Disciplinary Rules and Awards of Attorney Fees

by Philip D. Brent

Who pays the Attorney's fees if an Attorney or CPA is improperly accused of violating a disciplinary rule of an Accountancy Board or Bar Association? Is the practitioner entitled to an award of Attorney fees from the errant agency? Would an Attorney-CPA, who is told to stop holding out as both, be entitled to Attorney fees from the agency improperly seeking to limit this right? The answer may well be "yes," if an action is brought in Federal or State Court under 42 United States Code 1988 or an applicable State private Attorney-General provision.

Commercial free speech, which is truthful, not deceptive and not misleading, is protected under the First and Fourteenth Amendments to the United States Constitution! Advertising which includes holding out a professional status is a form of permissible commercial free speech.²

The recent Gekas Case³ in Illinois permitted an award of legal fees to an Attorney who successfully challenged the Bar's attempt to limit Attorney advertising. Gekas, wanting to send a direct mail advertising limited to a target group, the commodities industry, sought advisory opinions from the Illinois and Chicago Bar Associations. At that time, March, 1984, Illinois Disciplinary Rule 2-103 would not allow the type of direct mail advertising con-

templated by the Attorney. The Bar informed Gekas they would recommend to the Illinois Supreme Court that the Rule be changed to comply with United States Supreme Court decisions (such as in *Re RMJ*⁴). However, Bar Counsel refused to provide the lawyer with the requested advisory opinion or a copy of the proposed revision.

On March 26, 1984, Gekas filed an action under 42 USC 1983.⁵ The suit sought both a declaratory judgment that Rule 2-103 was unconstitutional and an injunction barring its enforcement. The State Bar's counsel informed the Attorney that a Rule change had been adopted by the Illinois Supreme Court allowing the form of the advertising contemplated by the Attorney. The amendment was to become effective July 1, 1984. The Attorney then offered to dismiss his suit if the old Rule would not be applied to his advertising campaign, which was to begin before July 1, 1984. The Bar Counsel stated that a mailing before July 1 would subject the Attorney to contempt proceedings. The Attorney then petitioned the Illinois Supreme Court to advance the new Rule's effective date to May 1, 1984 and on April 16, 1984, the Court did so.

The Attorney then made a motion in the pending Federal action under 42 USC 1988⁶ for \$11,682 in Attorney fees. The District Court awarded only \$5,000, stating, "Attorneys should not make their normal profit on their time in cases of this sort." On appeal to the Seventh Circuit Court of Appeals, the Court held:

- The Attorney's lawsuit was casually linked to advancement of the new Rule's effective date,
- The suit was not frivolous,
- The prevailing party is entitled to Attorney fees,
- The fee award should be based on the number of hours reasonably expended at the going market rate.

Whenever individual civil rights are violated, 42 USC 1988 authorizes awards of legal fees. Example are legion. Even a State Supreme Court, its Chief Justice and the State Bar Association can be held responsible for fees, as absolute immunity is not available when civil rights are violated.⁷ In a case brought by Consumers Union to invalidate advertising provisions of the Virginia Bar Code of Professional Responsibility Section DR 2-102(A)(6), Attorney fees were so granted. Additional examples where fee awards were granted include:

- Actions to invalidate New York State Educational Law Section 681, governing advertising of health devices.⁸

ABOUT THE AUTHOR

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Brent has written extensively on questions relating to dual practice and the rights of Attorney-CPAs. In recent years he has monitored for the Association the developments in the area of commercial free speech and advertising as it affects professionals with special reference to dually licensed individuals. This article is an outgrowth of his continuing research in behalf of the interest of Attorney-CPAs. Mr. Brent practices law from his office in Encino, California.

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