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Attorney advertising regs struck down

I suspect that our Founding Fathers, when drafting the First Amendment, probably never envisioned its language would be held to preserve an attorney's right to promote himself by giving advice to space aliens, appearing as a giant towering above urban buildings and drawing attention with wisps of smoke and blue electrical currents.

As it turns out, the First Amendment protects even tasteless attorney advertising, according to a March 12 decision handed down by the Second Circuit.

The decision in *Alexander v. Cahill* was written by Judge Calabresi, joined by Judge Walker. Supreme Court Justice Sonia Sotomayor had been the third member of the panel that heard oral arguments on the matter, but in view of her elevation to the Supreme Court she did not participate in the decision.

The Second Circuit affirmed, for the most part, the decision of Northern District of New York Judge Scullin, who determined that many of the new attorney advertising rules adopted by the four departments of the state's Appellate Division, were unconstitutional. Specifically, the content-based restrictions sought to prevent the portrayal of fictitious law firms, client testimonials, the portrayal of judges, the use of irrelevant techniques — or gimmicks — to attract attention, as well as the use of nicknames, mottos and trade names.

The content-based attorney advertising restrictions were promulgated at 22 NYCRR §1200.50(c). Also at issue was the 30-day moratorium on contacting victims, found at 22 NYCRR §§ 1200.52 and 1200.36.

The issues before the Second Circuit involved the protection of commercial speech under the First Amendment. Perhaps in a message to former colleague Justice Sotomayor, the Second Circuit spent some time addressing the Supreme Court's "differing, and not always fully consistent, descriptions as to what constitutes protected commercial speech, particularly with respect to attorney advertising."

Yet, the Second Circuit concluded the Appellate Division's restrictions constituted the unlawful regulation of commercial speech, with one exception. The Second Circuit held that the prohibition on the portrayal of fictitious law firms did not constitute protected commercial speech as, by its very nature, the advertisement would be misleading, as when lawyers from different firms give the misleading impression they are from the same firm, such as "The Dream Team."

Using the test adopted by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Second Circuit explained attorney advertising constituted commercial speech protected by the First Amendment.

The court recognized that only when commercial speech is "false, deceptive, or misleading, and speech that concerns unlawful activities" will it fall outside of the First Amendment's protections. Thus, while the Appellate Division's rules attempted to regulate potentially misleading speech that was "irrelevant, unverifiable, and non-informational," that apparently is not the same as "false, deceptive, or misleading" so as to take it outside of the scope of protected commercial speech.

That is not to say commercial speech cannot be regulated. Indeed, the U.S. Supreme Court recognized as much in setting forth its test in *Central Hudson*. Protected commercial speech "may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest."

The four-part *Central Hudson* test determines "whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

The Second Circuit determined the disputed regulations involving protected commercial speech involved a substantial governmental interest. The disputed regulations did not similarly directly advance the state interests involved, however. The Second Circuit noted that failure to survive a Constitutional challenge on that basis does not foreclose a similar regulation from being enacted validly in the future. Yet, based on the record before the court, the content-based restrictions at issue did not pass muster. Thus, the Second Circuit determined that the restrictions did not survive the test set forth by *Central Hudson*.

Similarly, the court held that even if the regulations directly advanced a state interest, they would still be struck down because they were not narrowly tailored. Rather, the regulations

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wholly prohibited a category of advertising speech that is potentially misleading, but is not inherently or actually misleading in all cases.

Separate and apart from the content-based restrictions, the court also considered the moratorium on solicitation of accident victims or their families, which applies to all media through which an attorney might initiate communication. The rule apparently is not applicable to broad generalized mailings, general advertisements conveying an attorney's experience in handling personal-injury suits (even when appearing near news stories in a newspaper the attorney knows will be filled with coverage of a particular accident), or advertisements informing readers of an attorney's past experience with a particular product when that

product has caused repeated personal-injury problems.

Unlike the court's determination with respect to the advertising restrictions, the court upheld the constitutionality of New York's moratorium on the solicitation of accident victims and their families, even though the rule is applicable to more than just direct solicitations.

Is this the end of attempts to regulate attorney advertising? Only time will tell, but at the very least the Second Circuit's decision provides a thorough roadmap for any future efforts and helps to ensure they will pass constitutional muster.

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