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Second Circuit Strikes Down Certain of New York's Attorney Advertising Rules; Upholds 30-Day Solicitation Moratorium in Personal Injury and Wrongful Death Matters

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Lawyers for the Profession® Alert

Alexander v. Cahill, --- F.3d ----, 2010 WL 842711 (2010)

Brief Summary
The U.S. Court of Appeals for the Second Circuit held that New York's categorical bans on certain types of lawyer advertising (e.g., client endorsements, portraying a judge, use of irrelevant attention-grabbing techniques, use of nicknames) were unconstitutional under the First Amendment. But the court upheld both New York's rule against implying an association between attorneys where none exists, and New York's 30-day moratorium on direct unsolicited communications to individuals and their families in personal injury and wrongful death matters.

Complete Summary
The Second Circuit, in an opinion by Judge Calabresi, addressed the constitutionality of two subsets of New York's lawyer marketing rules. The first involved content based restrictions on advertisements. The second involved a 30-day moratorium on unsolicited direct communications to persons or their families following incidents likely to result in personal injury or wrongful death claims.

Plaintiffs, a law firm and a public interest group, challenged the regulations under the First Amendment. The District Court granted summary judgment to the plaintiffs on the content based restrictions, and summary judgment for defendants on the 30-day moratorium. The Second Circuit affirmed, except as to one of the content based restrictions.

The content based restrictions at issue were adopted in 2006 and are contained in N.Y. Comp. Codes R. & Regs. title 22, § 1200.50(c):

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending . . .
(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or

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otherwise imply that lawyers are associated in a law firm if that is not the case . . .
(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence . . .
(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

The court applied the test from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557 (1980) to determine the constitutionality of these regulations. The court held that the law regulated protected commercial speech, despite pertaining to *potentially* misleading advertisements. The court clarified that speech must be *inherently* misleading before it loses First Amendment protection, and held that only the latter part of subsection (3)—following the first clause—fell into this category.

Next, the court applied an intermediate level of scrutiny and held the state had identified a substantial interest in support of the remaining provisions, including the state's interests in prohibiting deceptive or misleading advertising, and in protecting the legal profession's reputation and image. The court nonetheless found these provisions unconstitutional for failure to materially advance the state's interests. Indeed, the court noted that the New York State Bar Association's Task Force Report on Lawyer Advertising had not recommended the outright prohibitions contained in subsections (1), (5) and (7).

Further, the court held that subsection (1) failed because neither history, consensus, nor common sense suggested that client testimonials were inherently misleading. Similarly, the first clause of subsection (3) failed because common sense did not dictate that a portrayal of a judge would misleadingly imply the lawyer's ability to influence the court, as Defendants argued. Regarding subsection (5), the court noted that any interest of the state in factual and relevant attorney advertisements cannot be considered substantial absent evidence that irrelevant advertising techniques are somehow misleading. Regarding subsection (7), the court held defendants failed to adduce evidence that nicknames, monikers, mottos, and trade names were necessarily misleading. On this point, the court gave little weight to *Friedman v. Rogers,* 440 U.S. 1 (1979) (upholding a prohibition on use of trade names by optometrists) because its holding has been undermined by subsequent Supreme Court decisions, including Central Hudson. The court also noted that even if these provisions did materially advance the state's interests, they were not narrowly tailored to meet these interests.

By contrast, the court upheld New York's 30-day moratorium on direct unsolicited communication to individuals or their families in potential personal injury and wrongful death cases. First, the court held the state has a substantial interest in "removing a source of annoyance and offense to those already troubled by an accident or similar occurrence." *Id*. at *14. In determining that the rules at issue materially advance this interest, the court looked primarily to the adoption of similar rules in other jurisdictions. Finally, the court held that these rules were narrowly tailored despite applying to direct mail, television, radio, newspaper and website solicitations. In reaching this conclusion, the court focused on the fact that web-based advertising and solicitation has become increasingly invasive and targeted. The court also noted this rule was more narrowly tailored than a similar rule upheld by the Supreme Court because under New York's rule, the 30-day limitation is shortened to 15 days in the event an attorney must make a filing within 30 days of an incident.

Significance of Opinion
This opinion is likely to be an influential one nationally. It is authored by a highly respected judge and it is a thorough and measured analysis. The decision reflects an increasing trend casting serious doubt on the constitutionality of categorical bans on lawyer advertising unless they pertain to inherently misleading content, while at the same time not going so far as to authorize unlimited direct solicitation of injured persons and their families.

The opinion underscores on the one hand the comparative deference that the courts will give to the states in identifying the existence of state interests, while on the other hand the more exacting scrutiny that the courts will give to determining whether the state has met its burden to establish factually that the rule will actually and materially advance those interests. Accordingly, the case highlights the importance of the nature and content of the factual record in these cases.

Under the lone content based restriction the court upheld (regarding unassociated lawyers), it is clear that lawyers should not advertise associations where none exist.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.