



Alerts

South Carolina Attorney Ad Tests Bounds of Advertising Rule

March 9, 2010

Lawyers for the Profession® Alert

In re Anonymous, 385 S.C. 263, 684 S.E.2d 560 (2009)

Brief Summary

A lawyer advertisement that promised the lawyer would “work to protect” clients’ interests and “we’ll get you the benefits you deserve” did not improperly guarantee results and was not misleading.

Complete Summary

The South Carolina Office of Disciplinary Counsel (ODC) brought charges against an unnamed lawyer (“Respondent”) alleging his television advertisement was actually or inherently misleading and that it created an unjustified expectation regarding results, in violation of Rule of Professional Conduct (RPC) 7.1. The advertisement stated:

It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim. You're afraid your boss won't believe you're really hurt-or worse, that you'll be fired. We'll protect you against these threats-these accusations-and work to protect your job. I'm not an actor, I'm a lawyer. I'm [Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.

Id. at 265. The ODC argued that this advertisement improperly gave the impression that Respondent could guarantee job protection. A hearing panel found for the lawyer, and the ODC appealed.

The South Carolina Supreme Court dismissed the charges against Respondent. The court held that neither the plain text of the advertisement, nor the evidence submitted to the Hearing Panel warranted finding the advertisement misleading. The parties below had agreed that expert testimony would not be proper with respect to the question of law as to whether the ad was misleading. The ODC relied instead on a “market study” focus group testing five different ads for layperson reactions.

Recognizing the constitutional protections for lawyer advertising and commercial speech more generally, the court noted that an advertisement is misleading and can be prohibited when it contains a material misrepresentation or creates an unjustified expectation. The court held that the phrase “work to protect” did not imply that Respondent could guarantee results and was therefore not actually or inherently misleading.

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The court noted that there was no credible evidence that anyone in the public actually was misled by the ad, and that the Bar complaint was filed by an anonymous member of the South Carolina Bar. The court also held that the results of the market survey conducted on behalf of the ODC did not contain clear and convincing evidence that the advertisement was misleading. The participants in the survey had indicated that, out of five advertisements shown, Respondent's advertisement most strongly conveyed that clients would be protected from getting threatened or fired. Without commenting on whether such a finding could support a conclusion that the ad was misleading, the court found that the survey itself was not reliable because, *inter alia*, the sample group was too small (30 people), the margin of error was too large (20 percent), the Respondent's advertisement was the only one that referenced clients' jobs, and the questions were worded in a way that would elicit the ODC's desired response.

Significance of Opinion

Courts nationwide arguably have been trending toward less restrictive interpretations of lawyer advertising rules, and this case is no exception. The opinion provides some clear guidance and solid reasoning respecting the statements at issue here, which may well translate to similar statements and in other jurisdictions. This opinion also is notable for the court's detailed critique of the market survey evidence submitted by the ODC

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.