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Second Circuit Strikes Down Two Aspects of New York's Attorney Advertising Rule

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Lawyers for the Profession® Alert

Hayes v. State of N.Y. Atty. Grievance Committee, 10-1587-cv (2d Cir., Mar. 5, 2012)

Brief Summary

The U.S. Court of Appeals for the Second Circuit held two aspects of New York's attorney advertising rule unconstitutional. Both aspects related to the disclaimer requirement that must accompany claims of specialization.

Complete Summary

The Second Circuit addressed the propriety of New York's attorney advertising rule. The issue on appeal was whether the requirement of a prominent disclaimer accompanying any claims of attorney specialization was constitutional as applied to a lawyer who held a certification from the National Board of Trial Advocacy (NBTA). Reversing the U.S. District Court for the Western District of New York, the Second Circuit held part of the disclaimer requirement unconstitutional. The court addressed two aspects of the disclaimer rule. Namely, the required text of the disclaimer and the mandate that it be "prominently made."

The required text of the disclaimer rule involved three components: "[1] The [NBTA] is not affiliated with any governmental authority[,] [2] Certification is not a requirement for the practice of law in the State of New York [,] and [3] does not necessarily indicate greater competence than other attorneys experienced in this field of law."

Guided by Supreme Court precedent almost directly on point, the court found no infirmity in the first component because, absent such an assertion, there would be a risk that some members of the public would believe that the NBTA was affiliated with the state. The second component, however, could not be deemed constitutional because, absent some support for it in the record, the harm targeted by such language (i.e., confusion over what is or is not required to practice law) was too speculative. The court found the third component most problematic because it had the capacity to create as much confusion as it remedied. Specifically, the court noted that that component might lead some members of the public to erroneously believe that an NBTA-certified attorney had no greater qualification than a non-NBTA-certified attorney. The court's conclusion regarding the third component was informed by the relatively

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extensive and rigorous requirements that underlie NBTA certification.

The court then held that the requirement that such disclaimers must be “prominently made” was unconstitutionally vague as applied to the lawyer. The disclaimer at issue was placed on a billboard with lettering six inches high. The court held that a lawyer of average intelligence could not anticipate that lettering of that size could be construed as not “prominently made.”

Significance of Opinion

While attorney advertising has been heavily regulated for over a century, such strictures have increasingly come under attack since the mid 1970s when the U.S. Supreme Court first weighed in on their constitutionality. This opinion helps further delineate the extent to which state agencies may control attorney advertising. Additionally, unlike many prior opinions in this arena, this opinion addresses the extent to which such agencies can compel speech, rather than the extent to which they can restrict speech.

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