Ethics Watch

Unconstitutional Advertising Rules

By Nathan M. Crystal

The modern era for lawyer advertising began with the Supreme Court's decision in *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). In *Bates* the Court held that truthful advertising in newspapers about the price and availability of certain routine legal services was entitled to constitutional protection under the First Amendment. Since *Bates* the Supreme Court has decided a number of lawyer advertising cases. With rare exceptions, the Court has invalidated state ethics rules that prohibited or restricted lawyer advertising. Despite these decisions, state supreme courts have generally been hostile to lawyer advertising and have continued to impose numerous restrictions on such communications. The recent decision of the Second Circuit in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010), provides further support for the view that advertising rules currently on the books in many states, including several of the South Carolina rules, are unconstitutional.

In 2007 the appellate divisions of the New York Supreme Court, which have the authority under New York law to issue rules of ethics governing the profession and to discipline attorneys, adopted substantial revisions to New York's disciplinary rules regulating lawyer advertisements and solicitations. The amendments that were the subject of the court's decision include prohibitions on:

- client endorsements or testimonials for law firms with respect to a matter that is still pending;
- portrayals of judges or fictitious law firms;
- attention-getting techniques that have no relationship to legal competence;
- use of trade names, nicknames, or symbols that imply an ability to obtain results in a matter;
- any form of lawyer-initiated communication seeking clients for personal injury or wrongful death arising out of a specific incident within 30 days after the incident occurs. *Id.* at 84-85.

Plaintiff Alexander & Catalano (A&C) is a personal injury law firm that employs various forms of advertisements in the broadcast and print media, including jingles, special effects (wisps of smoke and electrical currents around the firm's name), dramatizations, and comical scenes. The advertisements depicted firm attorneys towering above buildings, running to clients so fast that they appear to be blurs, and providing legal assistance to space aliens. The ads referred to the firm as "heavy hitters" and employed phrases such as "think big" and "we'll give you a big helping hand." *Id.* at 83-84.

The Court of Appeals, largely affirming the district court, found that New York's content-based rules limiting lawyer advertising were unconstitutional, with the exception of the rule prohibiting portrayals of fictitious law firms. Also affirming the lower court, the Court of Appeals found that the 30-day moratorium on lawyer-initiated communications seeking personal injury clients was constitutional. *Id.* at 83.

The State of New York argued that it could bar lawyer advertising that was "irrelevant, unverifiable, and noninformational," even if it did not meet the standard for regulation of commercial speech. *Id.* at 88. The court rejected this argument. Reviewing past Supreme Court decisions, the court found that commercial speech was entitled to First Amendment protection so long as it was not misleading or concerning unlawful activity. *Id.* at. 88.

Under this standard the court found that the prohibition on the portrayal of fictitious law firms was constitutional. *Id.* at 89-90. The court noted, however, that its decision was limited to portrayal of membership in a fictitious law firm, e.g. "The Dream Team." It would not necessarily preclude a portrayal of a lawyer in the firm arguing against a fictitious law firm. *Id.* at 90.

The court applied the test for constitutionality of regulation of commercial speech from the *Central Hudson* case:

> [1] 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 [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

Turning to the content-based restrictions, the court considered the state's argument that it had a substantial interest in these restrictions because they were designed to prohibit advertisements from containing deceptive or misleading content. *Id.* at 90. The court agreed with the state on this point, finding this to be a substantial interest. *Id.* at 91. The court also found a second substantial interest in protecting the legal profession's image and reputation. *Id.*

The third prong of the *Central Hudson* test requires the regulation to materially advance the state's interest. Here the state's burden cannot be satisfied by speculation or conjecture, but must be supported by evidence.

The evidence submitted by the state consisted of (1) history, consensus, and common sense, (2) existing unchallenged rules of the New York Code of Professional Responsibility, and (3) the New York State Bar Association's Task Force Report. The state failed to present any statistical or anecdotal evidence of consumer complaints of advertising that the rules sought to prohibit, nor did the state present evidence of studies from other jurisdictions. *Id.* at 92.

With regard to client testimonials, the court found that the Task Force Report did not support total prohibition of client testimonials, nor did common sense justify an absolute ban. *Id.* at 92.

As to portrayals of judges, the court agreed that a portrayal showing or implying an ability to influence the judge would be constitutional because such an advertisement would be misleading and would involve illegal activity. However, A&C's portrayal of a judge stated that the judge was there to make sure the trial was fair. This type of advertisement was not misleading and might well be informative. *Id.* at 93.

The state argued that the prohibition on irrelevant techniques was constitutional because it materially advanced the state's interest in factual, relevant attorney advertisements. The court disagreed. It noted that irrelevant and misleading were not the same, and the state had not introduced any evidence to show that the advertising techniques in question were misleading. In fact, the Task Force Report did not include recommendations to prohibit this form of advertising. Moreover, the court noted that common sense did not support the conclusion that ordinary consumers would be misled into thinking that attorneys in A&C were taller than buildings or could run so fast that they became blurs. *Id.* at 93-94.

The prohibition on nicknames, mottos, or trade names suffered a similar fate. While the opinion recognized that names that implied an ability to achieve a result were usually misleading, the court nonetheless struck down the statute because of lack of evidence. In particular, the Task Force Report failed to recommend outright prohibition of all trade names or mottos. *Id.* at 94.

Under the fourth prong of the *Central Hudson* test there must be a reasonable "fit" between the state's interest and the means chosen to advance the interest. *Id.* at 95. Under this prong, even if the regulations involved in the case had passed the third prong, the court would still have found them to be unconstitutional because they wholly prohibited communications that were only potentially misleading. *Id.* at 96. As the court stated, "the categorical nature of New York's prohibitions would alone be enough to render the prohibitions invalid." *Id.* at 96. In addition, the state failed to show how any potential abuses could not be avoided through less restrictive means, such as disclaimers. *Id.* at 96.

The court then turned to the moratorium provision. In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court upheld the constitutionality of a Florida rule prohibiting direct mail solicitations of accident victims and their families in personal injury cases for 30 days after the accident occurred. The New York statute went further because it applied to all media through which a lawyer might communicate with victims or their family members, including television, newspaper, and Internet advertisements. Based on concessions of the state, the court construed the rule not to apply to broad generalized mailings, generalized advertisements that referred to an attorney's past experience even when they appeared near news stories about the particular occurrence, and advertisements informing readers of the attorney's past experiences with the particular product where the product has caused repeated personal injury problems. *Id.* at 97. In essence, the rule as interpreted only applies when the communication mentions the specific occurrence giving rise to the claim. Indirect references to the attorney's ability to handle cases involving the occurrence would be permissible. For example, an advertisement about the lawyer's experience in handling past airline disaster cases would be permitted under the statute as presented to the court.

As so construed, the court upheld the constitutionality of the statute prohibiting communications within 30 days after the occurrence. The court found that the state had a substantial interest in protecting the privacy of victims and their families and the reputation of lawyers. The focus of its analysis was on whether the statute was narrowly tailored. Unlike the rule in *Went for It*, the statute applied to any form of communication. Nonetheless, the court found a reasonable fit between the state's interest and the scope of the regulation. The court found that a technologically specific restriction was not constitutionally required. The impact on privacy of victims and their families was essentially the same, whether the affirmative act of the recipient involved walking to the mailbox and opening a letter or picking up a paper or turning on a radio or television. *Id.* at 99. While the Internet may have once required more affirmative conduct than these other forms of communication, this is no longer true. Thus, the court concluded that for the purpose of analyzing the validity of this regulation, a distinction among media was not significant. *Id.* at 100.

Alexander v. Cahill is the most significant case on lawyer advertising since the Supreme Court decided *Went for It* in 1995. The news for opponents of lawyer advertising is not good. Under *Alexander* any restriction must be supported by significant evidence. Even if regulators produce evidence to support the restriction, categorical bans are likely to be found to be unconstitutional. Finally, a state may be able to extend the moratorium on direct mail communications with accident victims and their families to the media in general, but only to communications that specifically refer to the occurrence giving rise to the claim. With regard to South Carolina, the reasoning of *Alexander* calls into question a number of South Carolina Rules of Professional Conduct. ■