

Court Rejects Motion To Void Specialization Disclaimer Rule

BY LAZAR EMANUEL

In 1995, attorney J. Michael Hayes (Buffalo, NY) was certified in "Civil Trial Advocacy" by the National Board of Trial Advocacy, an organization accredited by the American Bar Association. Over the next several years, Hayes engaged in a series of skirmishes with the Attorney Grievance Committee of the Eighth Judicial District to define the limits upon Hayes' advertisement of his specialty. The skirmishes involved inquiries by the Committee into Hayes' letterhead, advertisements in telephone books, and highway billboards. In each case, the Committee's inquiry was resolved after concessions by Hayes.

On June 30, 1999, New York adopted DR 2-105(C) [22 NYCRR § 1200.10], which now controls the manner in which a New York lawyer may identify himself as a specialist in a particular area of law and, further, the manner in which he may advertise his specialty. [See, NYPRR, November 2002, page 7.] The Rule requires that any claim or statement of specialization be accompanied by the following disclaimer "prominently made":

The [insert name of private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in New York and does not necessarily indicate greater competence than other attorneys experienced in the field.

In 2001, the Grievance Committee advised Hayes that his letterhead, which contained the legend "Board Certified Civil Trial Advocate National Board of Trial Advocacy," also required the DR 2-105(C) disclaimer. Hayes' response was to advise the Committee that he had dropped the claim of certification from his letterhead and, then, to commence an action in federal court seeking declaratory and injunctive relief against the Committee on the grounds that DR 2-105(C) is both facially unconstitutional and unconstitutional as applied to the use in his advertisements of the terms "Board Certified by the National Board of Trial Advocacy as a Civil Trial Specialist" and "Board Certified Civil Trial Advocate." Hayes moved for a preliminary injunction against the Grievance Committee.

Judge John T. Elfin denied Hayes' motion because Hayes had not satisfied the burden of demonstrating a "clear" or "substantial" likelihood of succeeding on the merits "inasmuch as he is asking for a mandatory injunction that would alter the status quo." *Hayes v. Zakia*, W.D.N.Y. No. 01- CV-0907E(Sr) (September 17, 2002).

Judge Elfin reviewed the circumstances which compelled the Supreme Court in *Peel v. Attorney Registration and Disciplinary Comm'n. of Ill.*, 496 U.S. 91 (1990) to strike down as unconstitutional under the First Amendment an Illinois disciplinary rule which prohibited an attorney from advertising his certification by the National Board of Trial Advocacy. Although the Court sustained use of the advertisement, it nevertheless found that the mere statement of certification by a private organization was potentially misleading and that the states could impose reasonable forms of regulation. "To the extent that potentially misleading statements of private certification or specialization could confuse

consumers, a State might consider...requiring a disclaimer about the certifying organization or the standards of a specialty." Peel, 496 U.S. at 110. Justice Marshall went on to suggest regulatory language which clearly formed the basis for New York's DR 2-105(C).

Rule Satisfies *Central Hudson* Test

Judge Elfin applied the four-prong test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), in judging Hayes' claim of First Amendment protection. As in Peel, Hayes' statement of certification without an accompanying disclaimer was potentially misleading to consumers. Although New York could not impose a blanket prohibition of the statement, it could justify "a less restricted form of regulation, such as a required disclaimer."

New York has a substantial state interest in protecting consumers and regulating lawyer advertising. "In addition, there is evidence that Rule 2-105(C)(1) is narrowly drawn to directly advance the interests of New York State in regulating potentially misleading advertisements by licensed attorneys in accordance with *Central Hudson*."

Judge Elfin was satisfied that the State had conformed to the second and third prongs of *Central Hudson* by conducting an extensive study of the ways in which a mere statement of certification would cause confusion without an accompanying disclaimer; *i.e.*, 1) the misimpression that the National Board of Trial Advocacy, a private organization, was a government agency; 2) the potential misimpression that the certification was "recognized" by the State; and 3) the misimpression that certification meant that the lawyer was a better lawyer than other lawyers.

Judge Elfin rejected Hayes' argument that the Rule was unconstitutionally vague both facially and as applied to him. Hayes argued that a person of ordinary intelligence could not determine when a disclaimer was "prominently made," as required by the Rule. The court held that while the term is subject to interpretation, "it is sufficiently plain and adequate to put attorneys on notice that the disclaimer cannot be presented in an obscure fashion." Lawyers may look to case law and to the interpretations of the Grievance Committees to determine how prominent the disclaimer must be.

In rejecting Hayes' motion for a temporary restraining order for failure to satisfy "the heightened burden of demonstrating a substantial and clear likelihood of success on the merits," Judge Elfin nevertheless suggested that Hayes had raised a serious question about the application of the Rule. "...the Court notes the somewhat arbitrary and inconsistent manner in which the Grievance Committee has issued guidelines...In addition, it is unclear whether defendant, as Chairman of the...Grievance Committee has the authority to issue guidelines...Such arguments make them fair ground for litigation..."