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Lawyer Attacks Vagueness Of Specialization Rule

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In a lawsuit between a Buffalo trial lawyer and the Attorney Grievance Committee of the Eighth Judicial District, district court Judge John T. Elfvin has ordered a trial to determine whether New York's DR 2-105(C)1, the Rule controlling specialization claims in lawyer advertising, is unconstitutionally vague. *Hayes v. Zakia,* W.D.N.Y., No. 01CV0907E(Sr), 7/26/04.

Attorney J. Michael Hayes has been engaged in an ongoing dispute with the Grievance Committee concerning both his billboard advertising and notices of his specialization on his letterhead and business card. Hayes was awarded Board Certification in Civil Trial Advocacy by the National Board of Trial Advocacy, an organization accredited by the American Bar Association. He began to use the term "Board Certified Civil Trial Specialist" in various billboard advertisements and on his letterhead. In response to a letter from the Grievance Committee, he changed this designation to "Board Certified Trial Specialist/National Board of Trial Advocacy."

Subsequent disputes between Hayes and the Committee concerned the disclaimer which is required by DR 2105(C)1 and which reads as follows:

C. A lawyer may state that the lawyer has been certified as a specialist only as follows:

1. A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the 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 lawyers experienced in this field of law."

The disputes concerned two distinct issued relating to the Rule's disclaimer:

1. Whether the disclaimer notice on billboards used by Hayes was prominent enough to satisfy the Rule; and
2. Whether Hayes' letterhead and business cards required the disclaimer at all if Hayes dropped the word "Specialist" and limited his designation to "Board Certified Civil Trial Advocate National Board of Trial Advocates."

The parties were unable to resolve the first dispute. The second dispute was resolved when Hayes agreed to drop the term "Certified Civil Trial Advocate" from his letterhead.

Hayes brought an action for declaratory judgment which was dismissed on jurisdictional grounds. Hayes then brought this action complaining (1) that DR 2105(C)1 is unconstitutional both facially and as applied to him; and (2) that the Rule is unconstitutionally vague.

Rule Is Constitutional

Hayes attacked DR 2105(C)1 as a violation of the freedom of expression guaranteed under the First and Fourteenth Amendments. The Court reviewed the law dealing with lawyer advertising. In 1995, the Supreme Court decided that lawyer advertising is commercial speech protected by the First Amendment. *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995).

However, as in the case of all commercial speech, reasonable restrictions may be imposed. Whether a particular restriction is valid requires a four part analysis:

> First, for commercial speech to merit any First Amendment protection, it 'must concern lawful activity and not be misleading.' Next, the government must assert a substantial interest to be achieved by the restriction. If both these conditions are met, the third and fourth parts are 'whether the regulation directly advances the governmental interest asserted' and whether the regulation 'is not more extensive than is necessary to serve that interest.' *Anderson v. Treadwell,* 294 F.3d, 453, 461 (2d Cir. 2002) (quoting *Central Hudson Gas and Electric Corp.* v. *Pub. Ser. Comm'n of N.Y.,* 447 U.S. 557, 56366 (1980).

In *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U.S. 91 (1990), the Supreme Court struck down as too broad on its face an Illinois disciplinary rule which prevented a lawyer from stating that he was a "Certified Civil Trial Specialist by the National Board of Trial Advocacy." But a majority of the Court found that other forms of regulation than the total ban imposed by Illinois might be allowed. The Court concluded that "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." *Peel,* at 110.

On a previous motion in the Hayes litigation, Judge Elfvin had held that Hayes' various statements of certification were potentially misleading and that Hayes had not shown a substantial likelihood of success in challenging the constitutionality of the New York rule. The court found no basis for changing its position in the current action and granted the Disciplinary Committee's summary judgment motion with respect to Hayes' claim that DR 2105(C)1 infringes on his First Amendment rights.

> ....[the Disciplinary Committee] has met its burden under the Central Hudson test by showing that (1) New York State has a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising; (2) DR 2105(C)1 directly advances such interests; and (3) DR 2105(C)1 is narrowly drawn and not more extensive than is necessary to serve the State's interests.

Vagueness Issue Requires Trial

On the second issue Hayes' claim that the rule's language is unconstitutionally vague Judge Elfvin determined that the issue could not be resolved on a motion for summary judgment and ordered that a trial date be set.

Whether a regulation is unconstitutionally vague involves a two step inquiry: (1) does the regulation give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) does the regulation apply specific standards for those who are charged with enforcing it. Greater tolerance is allowed for regulations imposing civil penalties than for those imposing criminal penalties. Regulations that infringe on the First Amendment are subject to a more stringent test than others.

In this case, Hayes has raised significant issues of fact in support of his position. The court noted "the somewhat arbitrary and inconsistent manner in which the Grievance Committee has issued guidelines in its interpretation of [DR 2105(C)1]."

One of the issues raised by Hayes was the vagueness of the term "prominently made" as applied to the statement of disclaimer. Hayes argued that the rule does not specify the font size of the statement as it relates to specific forms of advertising e.g., what size for billboards, what size for a letterhead.

Hayes also argued that the Grievance Committee's application of the rule as to him was arbitrary and inconsistent and that the committee had vacillated in its position regarding what language is required by the rule.

The Grievance Committee argued in turn that plaintiff's failure to comply with the rule was not due to any confusion about the language and scope of the rule, but rather to his "own disagreement with the applicability of the rule."

Judge Elfvin held that neither party was entitled to judgment as a matter of law and that the factual issues relating to vagueness would have to be resolved at trial.

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