

Commentary

Stern v. Bluestone Decision Troublesome

BY LAZAR EMANUEL

I am troubled by the court's decision in *Stern v. Bluestone*, (App. Div. 1st Dep't, no. 1926 111895/05, 1/31/08).

Attorney Stern sued Attorney Bluestone under the federal Telephone Consumer Protection Act (TCPA) of 1991, 47 U.S.C. §227. Stern claimed that Bluestone had violated the Act by sending him and an office associate 14 unsolicited faxes between November 2003 and March 2005.

Bluestone's practice apparently consists of representing litigants in malpractice claims against other lawyers. His faxes consist of one-page commentaries on issues involving attorney malpractice. At the bottom of the page, Bluestone lists only his name as author, his office address, his phone and fax numbers, and two websites.

In 2003, Bluestone was sued by another attorney named Antollino, who complained that Bluestone had directed similar faxes to him. However, the Antollino faxes included the following legend at the bottom of the page: "Presented by the Law Offices of Andre Lavoot Bluestone, concentrating on Attorney malpractice Litigation. Inquiries are welcome." After an adverse decision by the court in the Antollino matter, Bluestone eliminated the phrases "concentrating on Attorney malpractice Litigation" and "inquiries are welcome" from his faxes to Stern.

TCPA makes unlawful the use of "any telephone facsimile machine, computer or other device to send to a telephone facsimile machine, an unsolicited advertisement...."

An advertisement is any document which offers or explains "the commercial availability or quality of any service." The statute creates a private right of action in state court enabling a plaintiff to enjoin any violation of the Act and to receive up to \$500 in damages for each violation. In *Stern*, the Court construed each of the 14 faxes sent by Bluestone as a separate violation. The Court also confirmed the decision of the motion court that Bluestone had willfully or knowingly violated the Act, leaving in place a summary judgment for Stern in the amount of \$21,000.

Implications Troublesome

I am troubled by the majority's decision to treat Bluestone's faxes as advertisements as a matter of law.

Is it right to say that a communication from one lawyer to another offering insights and comments on substantive legal issues is an "advertisement," especially when there is no offer of services and the only references to the lawyer are his name, address, phone number and website? I don't think so. At least two or three times a week, I receive mail and e-mail from reputable law firms containing articles and comments on issues facing lawyers. I learn a great deal from these articles, and I don't want them to stop. TCPA was intended to stop faxes from local restaurants, dry cleaners and tax services.

It was not intended to stop the exchange of ideas between lawyer and lawyer or doctor and doctor. nor should the courts discourage such exchanges. On the contrary, they should declare that substantive communications between lawyers are the means whereby views on legal issues are spread and refined.

As Justice Kavanagh said in his dissent: The faxes sent by defendant to plaintiff seek to speak to legal issues involving attorney malpractice; not once by its terms does it propose a commercial transaction of any kind. The fact that its author is a lawyer who specializes in this field does not have the effect of converting what would otherwise be fully protected speech under the Constitution to an advertisement that promotes the availability of the sender's services.

Extended to its extremes, the view of the majority would entrap all means used to transmit information and commentary between lawyers – websites, blogs, e-mail, mail. TCPA may be confined by its terms to faxes, but the majority's definition of the term "advertisement" is broad enough to include all messages, even if the only reference they make to the sender is his name, address and phone number. In effect, this means that a lawyer can never express his views if he identifies himself as the author; if he identifies himself as the author of an article, for example, the article can be regarded as an advertisement.

The facts in Stern do not indicate that Stern ever asked Bluestone to discontinue the faxes to his office. Over a period of fourteen months, Bluestone sent 14 faxes to Stern. If we assume they were sent monthly, Stern had ample opportunity to call and demand that the faxes be stopped.

Nor do the facts establish whether Bluestone's commentary had any value to the recipients. Certainly, the judgment of \$21,000 against him would discourage him from continuing to convey his thoughts and comments to anyone. (As a matter of fact, Bluestone has discontinued his faxes and has created an internet Blog.) A decision which discourages the free exchange of ideas between professionals is itself disheartening. I do not think the Court intended its decision to extend to anything but unsolicited faxes, but there is always the risk that another court will extend Stern to encompass other communications. As we all know, judicial decisions sometimes have unintended consequences.

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