

Fifth Circuit Strikes Certain Rules Governing Attorney Advertising in Louisiana

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Public Citizen Inc., et al. v. Louisiana Attorney Disciplinary Board, et al., No. 09-30925 (5th Cir. Jan. 31, 2011)

Brief Summary

Reviewing a challenge to portions of La. R. Prof'l Conduct 7 that restrict attorney advertising and require spoken and written disclaimers, the U.S. Court of Appeals for the Fifth Circuit struck down a blanket ban on ads depicting judges or juries or referring to a lawyer's past successes or results obtained for clients. The court also overturned a rule governing the font size and speed of speech in disclaimers. The court affirmed a prohibition of advertisements promising results and upheld rules limiting the use of nicknames or mottos implying an ability to obtain particular results.

Complete Summary

In October 2009, the Louisiana Supreme Court modified La. R. Prof'l Conduct 7, to restrict attorney advertising and require spoken and written disclaimers. Individual attorneys, a law firm, and Public Citizen Inc. (a national non-profit advocacy organization), challenged the new regulations as unconstitutional restrictions on commercial speech.

The Fifth Circuit found that the state's regulation of attorney advertising with respect to portrayal of judges and juries, and with respect to statements regarding past results, generally met the first prong of the U.S. Supreme Court's *Central Hudson* test regarding regulation of commercial speech. The state asserted two substantial government interests: to protect the public from unethical and potentially misleading lawyer advertising and to preserve the legal profession's ethical integrity.

The panel nonetheless struck down those regulatory bans because the state failed to satisfy either of the *Central Hudson* test's other two prongs. The state generally could not prove any potential harm from the challenged advertising and was unable to establish that the prohibitions were no more extensive than necessary to further its substantial interests.

By contrast, the court found outright that advertisements promising results were necessarily and inherently misleading and untruthful because no attorney could guarantee future results. Accordingly, the state could prohibit such advertisements. Likewise, the Fifth Circuit found that the prohibition of nicknames or mottos that state or imply an ability to obtain results materially advanced the state's interest in preventing deception of the public. The court determined that a majority of the public would interpret such advertisements as promising results regardless of facts or law.

The panel applied less stringent rational basis review to the disclaimer requirements. It found that the rule requiring disclaimers identifying actors as such (rather than as clients) was constitutional because the public could be easily confused by the depictions in commercials or advertisements. On the other hand, the panel held that the font size and speed of speech in disclaimers did not, by themselves, prevent consumer deception. In addition, the disclaimer rules were deemed to be unduly burdensome in that they effectively ruled out the ability of Louisiana attorneys to use 10- to 20-second radio or television advertisements.

Significance of Opinion

This Fifth Circuit's decision is a significant addition in the area of attorney advertising. It highlights the difficulties of proof faced by the state when trying to justify stringent regulations and provides a reasoned distinction between unconstitutional regulation of factually accurate statements concerning past results and inherently-inaccurate or untruthful statements or names/mottos that appear to promise or imply future results. The opinion also is notable in striking down certain disclaimer requirements even under the highly deferential rational-basis standard of review.

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