

Federal District Court Strikes Down Texas Criminal Restrictions on Professional Solicitations

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McKinley and Villasana v. Abbott, A-01-CA-643-LY (W.D. Tex. Mar. 25, 2010)

Brief Summary

The United States District Court for the Western District of Texas permanently enjoined enforcement of provisions of the Texas Penal Code which prohibited legal and medical professionals from soliciting individuals who were involved in accidents, arrested, or named as defendants in civil lawsuits for a 30-day period.

Complete Summary

In 1993, Texas prohibited certain licensed professionals (including attorneys, chiropractors, physicians, surgeons and private investigators) from sending solicitation letters to certain individuals who were involved in accidents, arrested or named as defendants in civil lawsuits for a 30-day period. In 2009, the Texas Assembly amended the law to impose criminal sanctions for such solicitations. The U.S. District Court for the Western District of Texas permanently enjoined the enforcement of the law.

Two professionals challenged the law as an unconstitutional limitation on commercial speech. The standard of intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), requires that laws regulating truthful and non-deceptive commercial speech must directly and materially advance a substantial state interest and be narrowly drawn.

A criminal defense attorney challenged the provisions that prohibited lawyers licensed in Texas from making solicitations to those who were arrested or served with a summons within 30 days of arrest or issuance of summons. The court focused on the potential harm to the individuals to whom solicitation was prohibited. It noted that a criminal defendant has a right to a speedy trial and the right to counsel, both of which require quick

access to representation. The court also contrasted the privacy interests of accident victims with persons who were recently charged or arrested for a crime, finding that the latter do not possess the same need for privacy protection. Finally, the court found that the criminal consequences imposed on soliciting attorneys did not directly or materially advance a substantial state interest and that the law was not narrowly drawn under the *Central Hudson* test.

The second plaintiff, a chiropractor, challenged the provisions that prohibited medical professionals from making solicitations to accident victims within 30 days of an accident. The state argued that there were substantial interests in protecting Texas citizens from emotional distress, stopping medical providers from making false, misleading or deceptive solicitations, protecting the privacy of Texas citizens, and maintaining ethical standards for chiropractors. The court found that those interests were substantial and that therefore the state met the first test under *Central Hudson*. But the state did not meet the second and third factors — that the law directly and materially advances the state’s interests and that it was narrowly drawn. The court also was concerned that this prohibition applied to medical professionals, which as a group had not previously been regulated in this manner. Moreover, plaintiff chiropractor was able to establish the benefit of early medical treatment. The alternative could be a substantial time period between injury and treatment. As such, the court found that the statute created a large gap between the supposed harm and the speech ban.

Significance of Opinion

Regulations on professional solicitations have been upheld previously and are not new to the legal profession. The U.S. Supreme Court previously has deferred to a state’s interest in protecting the privacy rights of accident victims. This case, however, presents an interesting example of when a state can overreach. The criminal consequences to the professionals was a compelling reason to strike the law, as was the effect of the law upon criminal defendants with competing constitutional protections such as the right to a speedy trial and right to counsel.

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