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Attorney Advertising

Court of Appeals Upholds Attorneys' Right To Disseminate Unsolicited "Legal Reports" ... So Long as Reports Contain no more than Incidental Advertisement

In an effort to better serve, educate, and yes, even solicit, potential clients and to gain referrals, attorneys are, with ever increasing frequency, regularly publishing written reports and informational materials speaking to topics of current legal interest. While many appreciate the value of these publications, and the time and effort invested in their creation, believe it or not, some actually find them to be an annoyance and/or offensive. In the recent case of *Stern v. Bluestone*, 12 N.Y.3d 873, 883 N.Y.S.2d 782 (June 11, 2009), the New York Court of Appeals upheld, with a limited caveat, an attorney's right to disseminate via facsimile transmission ("fax") unsolicited reports and written informational materials regarding topics of legal interest.

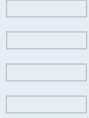
In *Stern*, over a sixteen month period, Stern, an attorney maintaining a solo law practice, received via fax from Bluestone, also a solo practitioner, fourteen unsolicited reports, entitled, "Attorney Malpractice Report," each of which consisted of a short essay on a legal malpractice topic.

Apparently displeased with having received the unsolicited reports, Stern commenced a lawsuit against Bluestone under the Telephone Consumer Protection Act (TCPA) of 1991 (47 U.S.C. § 227). The TCPA prohibits the use of any telephone fax machine to transmit an "unsolicited advertisement," which during the relevant period, the statute defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission" (47 U.S.C. § 227 [a] [5]). Stern claimed that Bluestone's reports, which contained Bluestone's contact information and web site addresses, were "unsolicited advertisements" within the TCPA's meaning. Stern sought as damages \$500.00 relative to each Attorney Malpractice Report he received, which he asked the court to treble on account of Bluestone's alleged willful or knowing violation of the TCPA.

A few months after he initiated his lawsuit against Bluestone, Stern moved for summary judgment. In response, Bluestone argued that his Attorney Malpractice Reports were not advertisements, or at the very least a factual question existed as to whether they were. Supreme Court granted Stern's dispositive motion. In doing so, the court held that Bluestone's faxes "indirectly advertised the commercial availability

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and quality of defendant's services as a malpractice attorney." On appeal, the Appellate Division, First Department, with two Justices dissenting, upheld the order granting Stern's motion for summary judgment.

On further appeal, the Court of Appeals reversed the order of the Appellate Division and denied Stern's dispositive motion. In doing so, the Court of Appeals cited a 2006 Federal Communications Commission (FCC) regulation, 71 Fed. Reg. 25967 (2006) (codified at 47 CFR § 64.1200), which elaborates what constitutes an "unsolicited advertisement." This regulation provides, in relevant part, that:

[f]acsimile communications that contain *only information*, . . . , would not be prohibited by the TCPA rules. *An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement . . .* Thus, a . . . newsletter sent via facsimile would not constitute an unsolicited advertisement, *so long as the newsletter's primary purpose is informational, rather than to promote commercial products.*

71 Fed. Reg. at 25973 (emphasis supplied).

The Court of Appeals found that Bluestone's Attorney Malpractice Reports fit the FCC's framework for an "informational message" and thus the fourteen faxes transmitted to Stern did not constitute "unsolicited advertisements" within the TCPA's meaning. The Court of Appeals reasoned that the reports contained substantive content about attorney malpractice lawsuits that varied from issue to issue and did not promote commercial products. The Court of Appeals, which suggested that it would have granted summary judgment to Bluestone had he filed a dispositive cross-motion in the court below, further reasoned that to the extent that Bluestone's motivation in producing his Attorney Malpractice Reports was to gain referrals, the reports could only be said to contain, at most, "[a]n incidental advertisement" of his services, which was insufficient to convert the entire communication into an advertisement.

Stern makes clear that attorneys can freely use their fax machines to disseminate written reports and informational materials about topics of current legal interest without fear of penalty, so long as the reports/informational materials contain no more than "an incidental advertisement." ■

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