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THE FIRST AMENDMENT AND LAWYER BLOGS

by
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New York's recent move toward regulating lawyer blogs as advertising has triggered controversy because it signals more aggressive regulation by state licensing agencies of blogs by lawyers and other professionals. It is also an opportunity to consider the broader questions concerning the scope of constitutional protection for commercial speech.

The proposed New York rules (*see* http://www.nylawyer.com/adgifs/decisions/061506rules.pdf) would regulate any "computer-accessed communication," defined to include advertisements or solicitations disseminated through "web sites or pages" or "other internet presences." Among other things, lawyers may have to file all such communications with their attorney disciplinary committee. New York's Office of Court Administration has solicited feedback on the rules and is considering whether to adopt them.

The Supreme Court has struck down overbroad regulation of lawyer advertising under the First Amendment. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bates v. State Bar*, 433 U.S. 350 (1977). However, it is not clear how far states can go in regulating advertising. This depends at least partly on whether lawyer blogs are entitled only to the lower level of constitutional protection accorded commercial speech. The Supreme Court's test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) permits regulation of commercial speech if it is not misleading and the regulation is necessary to advance a substantial governmental interest. This gives regulators significant leeway, as indicated by *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), where the Court held that an interest in maintaining the professionalism of the bar was enough to support regulation of lawyer advertising.

Are lawyer blogs subject to the looser *Central Hudson* test? That is not clear, because the Court has never clearly defined the "commercial speech" category. It recently passed up the opportunity in *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed as improvidently granted, Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). *See* Ribstein, *High Court Cases May Shape First Amendment's Application to Federal Securities Laws*, Washington Legal Foundation LEGAL OPINION LETTER (Feb. 14, 2003).

Blogs in general, and lawyer blogs in particular, pose a particularly challenging problem for the commercial speech doctrine. Any blog by a practicing lawyer obviously promotes the lawyer's skill and knowledge to some extent. At the same time, even the most blatantly self-promoting weblog may include both important ideas and valuable information about legal services that deserve constitutional

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protection. Blogs therefore illustrate the close connection between the "market for goods and the market for ideas" that led Nobel Prize-winning economist Ronald Coase to question limiting constitutional protection for commercial speech (*Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974)). Indeed, the Court has observed in *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council*, 425 U.S. 748 (1976) that in a free enterprise economy "the free flow of commercial information is indispensable."

Even if it is theoretically possible to distinguish promotional websites from more purely informational blogs, the nature of blogs raises questions as to the justification for regulating this speech. As discussed in this author's article, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WILLIAM & MARY L.R. 185 (2006), the "blogosphere" itself provides a strong mechanism for filtering inaccurate information. Rapid dissemination of blog posts by RSS feeds throughout the Internet subjects them to broad scrutiny. Errors are corrected by comments and trackbacks inserted on subject posts, and search engines find and display both initial posts and commentary on these posts. Even if a potential client does not find the correction, lawyers have a strong incentive to be accurate because they know that they risk immediate reputational sanctions for careless analysis.

Given these self-correction devices, the added benefit from government screening and regulation of blog posts is unclear. Scrutiny by millions of eyes on the Internet serves as a more powerful constraint on misleading information than an overworked bar committee's sorting through a mountain of filed blog posts. Moreover, regulation could discourage the most responsible, and therefore risk-averse, lawyers, thereby opening the field for the unscrupulous.

Blogs are also distinguishable from other commercial speech in that they involve more self-expression than typical advertising. This is important because the Court suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* that one reason for giving less protection to commercial speech is that profit-motivated speech is less likely to be chilled by regulation. Under this rationale, a lawyer who needs advertising to promote her business is less likely to be deterred by, say, a filing requirement or risk of sanction than a lawyer whose blog is partly a hobby.

If the Court decides to confront the First Amendment issue in regulating lawyer blogs, and seeks to preserve the commercial speech category, it may try to distinguish blogs from advertising. The foregoing analysis suggests that the Court should consider the degree of interactivity the blog invites (for example, does it permit comments and trackbacks?), and the extent to which the lawyer uses the blog to express judgments and opinions.

On the other hand, the issue of whether to apply the First Amendment to blogs might finally persuade the Court of the futility of trying to distinguish commercial and non-commercial speech for First Amendment purposes, and to abandon the "commercial speech" doctrine. Such a move could have significant implications in many areas of business, particularly including securities, regulation. *See* Ribstein, *SEC 'Fair Disclosure' Rule is Constitutionally Suspect*, LEGAL OPINION LETTER (Oct. 6, 2000); Butler & Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KANS. L. REV. 163 (1994).

Blogs present a significant new opportunity for regulators. At the same time, regulators should understand that they risk giving courts an opportunity to refashion the First Amendment into a more effective constraint on regulation of business speech.

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