DAILY BUSINESS REVIEW.COM
Miami-Dade Broward Palm Beach

September 4, 2012

Supreme Court on dangerous path to censor lawyer websites

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An extension of strict ad rules to lawyer websites will drive up the cost of legal services, drive down free information about lawyers and violate both the First Amendment and U.S. Constitution, write Thomas R. Julin and Jamie Z. Isani of Hunton & Williams.

The Florida Supreme Court on Friday will hear arguments for extending its strict ad rules to lawyer websites. If it agrees to do so, it will drive up the cost of legal services, drive down free information about lawyers, and violate both the First Amendment and Commerce Clauses of the U.S. Constitution in the process.

The court started down this path several years ago when during a routine tweaking of its notoriously vague ad rules, it asked a lawyer for The Florida Bar why lawyer websites had never been subjected to rules governing newspaper, radio, television and billboard ads.

The lawyer answered that the Bar could not possibly police the millions of web pages posted by Florida's 92,000 lawyers. That wasn't a very satisfying answer.

Sanction a few violators, the justices suggested, and the rest will fall in line. With that, the court ordered the Bar to come up with new rules to require all lawyer websites to meet its tough ad standards.

The big law firms were asleep at the switch. They took no notice of either the court's instructions or the Bar's submission and let the court adopt new rules without saying a word in opposition.

As the Jan.1, 2010, deadline for compliance approached, the techies in the bowels of the big firms charged with compliance let out a frightening yowl: "Can't do it!" "Won't do it!" "Would take forever!" "Help!"

Over the course of more than a decade, law firms had turned their websites into vast canyons containing not just basic bios, but complete indexes of professional lives. Nearly every case, deal, project, speech, seminar, honor and award studiously had been added, revised, embossed, buffed and polished. Teams of administrators had crafted complex templates, procedures, and processes to cope with the rapid pace of lawyer arrivals and departures. Sub-websites displaying specialties had been developed to inform any visitor of how each firm differentiated itself from others. Articles on every subject under the legal sun had been penned and posted, linked and synced.

Yet none of these websites had been designed to follow the arcane Florida Bar rules governing lawyer advertising because websites were regarded as information "requested."

The ad rules forbade any reference to past successes or results obtained, comparisons of lawyers' services with other lawyers' services, testimonials, statements describing the quality of the lawyer's services, visual or verbal descriptions, depictions, illustrations, portrayals likely to confuse, or statements implying — heaven forbid — that a lawyer is an expert.

But requested information were not regarded as ads.

The ad rules had been written in an earlier age. The precise date was Feb.21, 1980. That is when the Florida Supreme Court released a decision designed to cope with the U.S. Supreme Court ruling in Bates v. Arizona . It had invalidated the traditional flat ban on lawyer advertising and overturned the suspension of two young lawyers who had dared to publish a one column by 5-inch newspaper ad offering low fixed fees for divorces, adoptions and bankruptcies.

The U.S. Supreme Court explained that a ban on all lawyer advertising incorrectly assumes the public is "not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."

The ruling sent bar associations, including The Florida Bar, scrambling to write new rules to govern lawyer the coming flood of lawyer ads. Those rules were motivated by fear that consumers had so few ways to check the accuracy of lawyer advertising that they could be easily hoodwinked.

At the time, there was reason to believe that might be true. To even verify where a lawyer got his or her degree, a trip to the county law library and a bout with the multi-volume Martindale-Hubbell lawyer list was needed.

But today, a Google search typically yields thousands of results for any given lawyer, showing not only detailed biographical information from multiple sources, but news and information about prior representations and results. Free services abound that allow consumers to find lawyers with relevant experience and also to rate, compare and study lawyers. Avvo, Rate-A-Lawyer, LegalMatch.com and LawyerRatingZ.com are just a few such services.

In response to the general outcry from law firms right before the Jan.1, 2010, deadline for lawyer websites to comply with the ad rules, the Florida Bar Board of Governors mercifully postponed enforcement until July 1, 2010. That gave eight large law firms time to turn their attention to the alarms set off by their website wonks.

Finally focused, the firms together asked the Florida Supreme Court to extend the Bar's moratorium and to reconsider the matter altogether. They argued extension of ad regulation websites would not only exacerbate an existing First Amendment problem, but also violate the Commerce Clause by subjecting lawyers who practice entirely outside the state to Florida's uniquely difficult rules.

The court agreed to hold off while it considered these points. The Bar did more. It proposed watering down all of its ad rules, but still argued they should apply to lawyer websites.

The new rules would ban, among other things, “potentially misleading” or “unduly manipulative or intrusive” statements. Because such vague rules are difficult to understand, expect websites to lose lots of content and time if they go into effect. Also expect effort spent on compliance and enforcement to soar.

This approach is all wrong. Lawyer websites are not advertising. They are valuable resources waiting to be requested and critically used. The public benefits when Florida lawyers are free to create bold and interesting sites without fear that Bar regulators and the courts later will charge them with ethical lapses. The Florida Supreme Court was wise to stop and think this matter through.

Now, it should throw the whole idea out.