In This Issue...

Contracts
“Corrupt Practices” Can Impact “Domestic” Contracts
*Article contributed by Glen Banks, Fulbright & Jaworski L.L.P.*

Debtor Creditor
*Pro Se* Plaintiff Not Entitled to Damages Against Student Loan Lender for Alleged Violation of the FCRA

Employment Law
First Department Confirms Award of Damages for Retaliatory Discharge

Family Law
Third Department Holds that Father’s Right to Counsel in Child Abuse Case Was Not Fully Protected

New York Civil Procedure
Divided U.S. Supreme Court Holds CPLR 901(b)’s Statutory Damages Restriction in Class Actions is Procedural, not Substantive

New York Crimes & Offenses
Second Department Holds that Convictions of Both Intentional and Reckless Assault Are Not Mutually Exclusive

New York Criminal Procedure
Court of Appeals Holds Search of DMV Records Performed After Allegedly Unlawful Seizure Is Not the Fruit of the Poisonous Tree

Professional Responsibility
The Second Circuit Ruling on Attorney Advertising: What Are the Current Do’s and Don’ts?
*Article contributed by James L. Bernard and Joel Cohen, Stroock & Stroock & Lavan LLP*

Real Property
Second Department Holds Motion to Amend Complaint Properly Granted in Dispute over Control of Condominium Board of Managers

Torts
Court of Appeals Declines to Extend Assumption of Risk Doctrine Beyond Athletic and Recreational Activities

Wills, Trusts & Estates
Summary Judgment Precluded Due to Questions Regarding Undue Influence and Fraud in the Formation of Trust

Points of Law
Highlights

Bloomberg Law
Bloomberg Continuing Legal Education
indifference to human life as would an act of firing a gun into a crowd." Accordingly, the court held that even though the evidence would have sustained a conviction of intentional assault under a theory of transferred intent, it was also legally sufficient to support defendant's conviction of depraved-indifference reckless assault under Penal Law § 120.10(3).

New York Criminal Procedure
Unreasonable Search and Seizure
Court of Appeals Holds Search of DMV Records Performed After Allegedly Unlawful Seizure Is Not the Fruit of the Poisonous Tree


On March 30, 2010, the Court of Appeals of the State of New York affirmed the supreme court's denial of defendant's omnibus suppression motion (and the appellate division's subsequent affirming decision), because the search of the Department of Motor Vehicles ("DMV") records conducted by the officers who stopped defendant was not illegal.

The DMV Records Search

On January 1, 2005, defendant was driving a car in the vicinity of West 181st Street and Broadway in New York City. The police stopped him for playing music too loudly, learned his name, and then ran his name through a computer check of DMV files. They learned that defendant's driver's license was suspended with at least 10 different suspensions imposed on at least 10 different dates. The officers arrested defendant, and he was charged with one count of aggravated unlicensed operation of a motor vehicle in the first degree.

Omnibus Motion Denied

Defendant moved in his omnibus motion to suppress his driving record and any statements made after he was arrested, because, he alleged, the police had performed an unlawful stop and illegally obtained his driving record from the DMV. Defendant argued that but for the unlawful stop, the police would not have obtained his identity, and without his identity, would not have obtained his DMV records. Thus, defendant argued, the records were the fruit of the poisonous tree.

The court denied this portion of defendant's motion, reasoning that DMV records did not constitute evidence which is subject to suppression under a fruit of the poisonous tree analysis. The appellate division affirmed on similar reasoning:

The identity of a defendant is never suppressible as the fruit of an unlawful arrest, and, because it was defendant's identity that led to the discovery of his DMV driving record, the record itself was also not suppressible.

Identity Obtained During an Illegal Stop Not Suppressible

The Court reasoned that when an illegal arrest leads only to the discovery of a defendant's identity, which in turn leads to an official file or other independent evidence, the subsequently discovered material is not suppressible. Further, the Court noted that the records in question were already in the hands of the authorities, and that the exclusionary rule does not reach backward to taint information already in official hands before any illegality occurred. The Court also looked at the policy rationale of the exclusionary rule and decided that suppressing a defendant's identity did not serve the underlying purpose of the rule, because identity evidence is not unique such that, once suppressed, it cannot be obtained via other means.

Dissent

The dissent argued that the majority decision would give law enforcement "incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police." Further, the dissent maintained that the immigration and deportation cases on which the majority relied were limited to using a defendant's identity discovered during an illegal stop to establish the jurisdiction of a civil court, not to obtain evidence of a crime to be used in a criminal proceeding.

Professional Responsibility
Canons & Rules of Professional Ethics
The Second Circuit Ruling on Attorney Advertising: What Are the Current Do's and Don'ts?

Article contributed by: James L. Bernard and Joel Cohen, Stroock & Stroock & Lavan LLP

Almost since when “the law” first became a profession, its purists have wanted to separate us from the rest of the “business” world. No advertising—period. But times gradually changed—the result of vigorous competition in a changing world. Securing legal services is no longer accomplished by word of mouth, no longer by placing a call for a referral to the local bar association. Now the world has become all about websites, billboards, subway ads, expressive TV commercials, gifts of logoed mouse pads, coffee mugs, baseball caps, and tee shirts.
Given this change in the world order, the Supreme Court of the United States, beginning in 1977, greatly relaxed anti-advertising rules with a series of rulings, citing First Amendment constitutional grounds. But still, the purist-minded saw the pendulum shifting too far, and encouraged the Appellate Divisions of the New York State Supreme Court, among other bar decorum discipline enforcers, to strengthen the anti-advertising rules. They did so in 2007 with the adoption of a series of amendments to New York’s Code of Professional Responsibility.

Unsurprisingly, a number of lawyers, indeed, in the current instance, personal injury lawyers most affected by the rule changes, went to court to fight the good fight. On March 12, 2010, the Second Circuit, in the decision Alexander v. Cahill, 2010 BL 54980 (2d Cir. Mar. 12, 2010), affirmed in large part a summary judgment decision which invalidated so-called “content-based” restrictions on attorney advertising in New York (which may indeed also have an impact on the rules in states outside of the Second Circuit).

However, the key for the lawyer today is not the constitutional underpinning of the Second Circuit’s decision, but clear guideposts on precisely what advertising or solicitation can one (or one’s law firm) do, and what one cannot do while engaged in his or her law practice.

The Do’s

The Second Circuit’s decision focuses on the research and recommendations of the 2006 New York State Bar Task Force on Attorney Advertisement (“Report”) and contains some practical advertising guidelines. Still, the general rule of thumb is intuitive: Do what you like as long as it is not misleading or deceptive.

Attorneys can advertise using client testimonials, endorsements, and actors, but the Second Circuit’s decision contains a caveat. The Report found that testimonials can indicate future performance, and using actors may be misleading. In fact, the Report suggests a disclosure requirement, instead of totally prohibiting endorsements and actors. Thus, a safe approach to this form of advertising would be including disclaimers, like, “results not typical” or “paid actor.”

Portraying judges is not prohibited, as long as the tactics are not used to “imply an ability to influence a court.” For example, one law firm commercial depicting a judge in a courtroom, stated that the judge is there “to make sure [the trial] is fair.” This depiction was deemed unlikely to be misleading, so a total ban on the portrayal of judges was held unjustified.

Attention-getting techniques, unrelated to demonstrating characteristics of legal competence, are permissible, even if arguably distasteful, as long as they are not misleading or deceptive. The Second Circuit held that a ban on using theatrics like jingles and special effects did not materially advance the State interest in preventing misleading advertising.

Attorneys may disseminate broad, generalized mailings and publicize their level of experience in all forms of media, including pop-up ads. Even a targeted placement of an advertisement near a story about a particular accident is okay, with one possible exception. By footnote, the Court presented the issue of “meta tagging,” but did not resolve it. A meta tag enables one to cause an advertisement to pop up when someone conducts an online search for a specific topic—arguably the electronic counterpart of requesting specific placement of a print advertisement in a newspaper or magazine. But since it can directly target those who conduct certain online searches, the Second Circuit queried whether using meta tagging could potentially target personal injury victims or families, thus effectively violating the new 30-day moratorium on solicitations aimed at vulnerable individuals. Without further guidance, it is best to proceed here with caution.

Regarding websites, attorneys may use a domain name for a site that does not include the lawyer or law firm’s identity, as long as four requirements are met: 1) all pages of the website must show the name of the lawyer or law firm; 2) the lawyer cannot attempt to “engage in the practice of law using the domain name;” 3) the domain name may not imply an ability to obtain results; and 4) it may not otherwise violate a disciplinary rule. Basically, an attorney can refer clients to a website, www.lawyerinthecity.com, but must practice law under his own name or his official firm name. The District Court had found this new rule was sufficiently narrowly tailored because it is limited to a subset of domain names. (The plaintiffs did not appeal this finding and therefore the Second Circuit did not review it.)

The Don’ts

With the do’s come the don’ts. In rejecting all but one of the new content-based restrictions, the Second Circuit discussed nuances within the rejected rules that suggest some actions which may be fairly categorized as violating existing rules.

Attorneys may not present lawyers from different firms as though they are from the same firm—for example, a “Dream Team.” This very specific ban is the only content-based rule that was upheld by the Court—derived from the amendment prohibiting “the portrayal of a fictitious law firm.” The Attorney General, arguing to uphold the new Rules, asked that the Rule’s language be narrowly interpreted to apply only to the above scenario. The Second Circuit agreed, but left a perplexing question in its wake, choosing not to decide the propriety of actually portraying an attorney arguing against a fictitious law firm. Since the Rule’s plain language does seem to encompass this situation, one should probably avoid both scenarios until the Rule has played out further.
Nicknames and mottos should generally be avoided. While the Second Circuit quotes the Report, which found that many nicknames or mottos are “often misleading,” it nonetheless invalidated the Appellate Division’s attempted ban as overly broad and unnecessary. Caution, however, is the order of the day. The outright ban may have been deemed unconstitutional, but that does not give absolute license for attorneys to advertise using mottos like “most cash” or “maximum dollars.” These monikers suggest the outcome of a legal matter and are therefore misleading.

Finally, the clearest of the new don’ts after Alexander v. Cahill: attorneys are flatly prohibited from soliciting or targeting accident victims, their families, or the families of wrongful death victims via any media (internet, print, television, radio) within 30 days of the event. The Circuit did not classify this rule as content-based and firmly upheld its constitutionality.

With few exceptions, the Second Circuit’s decision essentially returns New York State’s content-based attorney advertising rules to square one. According to the Task Force, the status quo in New York is one of rampant violations and deceptive advertising practices. Using a random sampling of New York attorney ads, the Task Force reported that roughly one-third of advertisements are deceptive, and more than half violate the basic requirement to include the firm’s name, address, or telephone number. With the Report decrying the state of attorney advertising, we may see similar, more carefully tailored attorney advertising restrictions in the near future.

In fact, the Second Circuit mostly voided the new rules because the content-based prohibitions were outright bans. Applying the test established in Central Hudson & Gas Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), the Court held that the majority of the amendments failed to meet the “narrowly tailored” requirement of Central Hudson. The Second Circuit instead favored increased enforcement and suggested the additional use of disclaimers. Essentially, the Court did not seem to have an inherent problem with what the Appellate Division was trying to control in the new rules, but rather, took issue with how the control was being achieved.

This is not the last we will hear from the Appellate Division regarding the new Rules of Professional Conduct. Until we do, New York attorneys should continue to avoid misleading or deceptive advertising techniques and content.

James L. Bernard and Joel Cohen are partners in the Litigation Department of Stroock & Stroock & Lavan LLP. They also co-teach Professional Ethics at Fordham Law School. Judy Goodwin of Stroock’s Litigation Department assisted in the preparation of this article.


2 In 2005, The New York State Bar Association convened a Task Force to identify issues concerning the state of attorney advertising in New York State, and to recommend amendments to the rules regulating them. The Appellate Division largely relied on this report to develop the new—and now largely invalid—rules on attorney advertising.

Real Property
Condominium & Cooperatives
Second Department Holds Motion to Amend Complaint Properly Granted in Dispute over Control of Condominium Board of Managers


On March 30, 2010, the Appellate Division of the Supreme Court of New York, Second Department, unanimously affirmed an order that granted plaintiff’s motion for leave to amend the complaint to add an additional cause of action for attorney’s fees and expenses.

Annual Meeting of the Condominium Board

In a dispute among unit owners over the control of the condominium board of managers (the “Board”), members of the Board brought an action challenging the validity of a June 26, 2006 meeting at which certain unit owners purported to elect the individual defendants as members of a new board of managers. The trial court granted the Board’s motion for summary judgment on its first four causes of action, declaring, among other things, that the June 26, 2006 meeting was invalid, that the individual defendants were not duly elected to the Board, and for a permanent injunction barring the individual defendants from acting as members of the Board. This judgment was upheld on prior appeal.

The Motion to Amend the Complaint

In January 2009, the Board moved, pursuant to CPLR 3025(b) for leave to amend the complaint to include an additional cause of action to recover attorney’s fees and expenses, alleging that the condominium’s by-laws authorized the Board to recover those costs. The trial court granted the Board’s motion and defendant David Doos appealed.

The Second Department held that the trial court had properly exercised its discretion in granting the Board’s motion and unanimously affirmed the order, finding that the Board’s proposed amendment to the complaint was neither “palpably insufficient” nor “patently devoid of merit,” and that the amendment would not cause prejudice or surprise to the defendants.