

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

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ABC Update

BY MARTHA R. LEHMAN

Second Circuit Weighs in on Advertising by Certified Attorneys

The U.S. Court of Appeals for the Second Circuit recently decided an opinion dealing with advertising by certified attorneys. In *Hayes v. State of New York Attorney Grievance Committee of the Eighth Judicial District, et al.*, the Second Circuit determined that a disclaimer required by Rule 7.4 of the New York Rules of Professional Conduct and relating to attorney specialization could not be enforced against the plaintiff. In addition, the court determined that two components of the required disclaimer were invalid.

Hayes concerned a civil litigator in the Buffalo, N.Y., area who was board-certified in civil trial advocacy by the National Board of Trial Advocacy (NBTA). The Grievance Committee took issue with Hayes's advertising practices, specifically a disclaimer required by Rule 7.4. New York's version of Model Rule 7.4 governs advertising by lawyers who are certified as specialists by an ABA-approved organization. Lawyers advertising their certified status in New York must include a disclaimer about the certification that includes the private certifying organization along with a statement that the organization does not have any governmental authority; a statement that certification is not a requirement for the practice of law in New York; and a statement that certification does not necessarily indicate greater competence than other attorneys. The attorney sought a determination in the U.S. District Court for the Western District of New York that Rule 7.4 was unconstitutional. The district court granted judgment in favor of the Grievance Committee; however, the Second Circuit reversed.

The Second Circuit considered various state laws on certifying specialists as well as the U.S. Supreme Court's history governing lawyer advertisement. The court looked at each piece of the disclaimer as a separate requirement and determined that two of the three requirements were invalid. The

court found fault with "certification is not a requirement for the practice of law" and certification "does not necessarily indicate greater competence than other attorneys experienced in this field of law." The court opined that the Grievance Committee failed to demonstrate that there was sufficient public harm to justify a restriction on the commercial speech of attorneys and that the general public was unlikely to conclude that certification was required for an attorney. The court also determined that the disclaimer's requirement that certification not be deemed greater competence than other attorneys in the field was problematic.

The Second Circuit examined the qualifications for certification by the NBTA and concluded that the certification by NBTA could reasonably be considered to provide assurance of "competence" greater than that of other lawyers. The court wrote that "such a requirement does not serve a substantial state interest, is far more intrusive than necessary, and is entirely unsupported by the record. As such, it cannot survive First Amendment scrutiny."

The Second Circuit's opinion only applies to New York lawyers who are board certified attorneys and advertise that fact. Please consult your state and local disciplinary rules before advertising your certification. **abi**

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Martha R. Lehman
Krieg DeVault LLP
Indianapolis

Martha Lehman, a partner with Krieg DeVault LLP in Indianapolis, is the chair of the American Board of Certification's Marketing Committee and serves on its Board of Directors.