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Viewpoint: Court Struggles to Regulate Attorney Blogging

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Ten weeks ago, the Virginia Supreme Court decided the case of *Hunter v. Virginia State Bar*. In several respects, *Hunter* was a case of first impression about lawyer bloggers.

Here's the case in a nutshell: Richmond, Va., criminal defense attorney Horace Hunter posted a blog on his website called "This Week in Richmond Criminal Defense." In the blog, Hunter wrote some posts about general criminal defense issues, but mostly — in 22 of 30 posts — he wrote about some of his own cases, all of which had resolved successfully by dismissals, acquittals or what Hunter considered favorable plea bargains. The Virginia State Bar filed disciplinary charges against Hunter in 2011 after Hunter refused to come up with a disclaimer that the VSB thought was sufficient, one that stated that the blog was an advertisement, and also disclaimed that future results would match those in the cases Hunter cited.

Hunter testified in his own defense, and acknowledged that one of the purposes of his blog was marketing, but also that he blogged to take a stand about criminal defense by combating the public perception that defendants charged with crimes are guilty until proven innocent. Hunter was publicly reprimanded. He then appealed to the intermediate appellate court and finally to the Virginia Supreme Court. He lost all the way up, with the Supreme Court deciding against him on Feb. 28.

But his case raised interesting issues, some of which no court had directly addressed before. Among them:

• When a lawyer posts a blog that is both promotional and informational, is that "hybrid" blog political free speech, getting the highest level of First Amendment protection, or is it "commercial free speech," thus invoking a lower constitutional standard?

• Could the Virginia State Bar regulate Hunter's blog by demanding a disclaimer saying the blog was an advertisement and that the reader should not expect similar results, even though the results posted were factually accurate?

• Could Hunter's blog use the actual names of his clients, including those who pleaded guilty, without their consent?

The court's majority found that Hunter's blog was commercial, not political, speech. As such, it was entitled to the protections lawyer advertising has received since the U.S. Supreme Court case of *Bates v. State Bar of Arizona* in 1977, but not more. The court admitted that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'" But the court concluded that "when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech."

It's here — in the combination of commercial and political speech — that the court broke new ground, finding that what Hunter had blogged was commercial speech only:

"Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client."

The strongly worded dissent disagreed, noting that the blog contained articles about criminal law policy issues, detailed descriptions of criminal trials, and Hunter's own "commentary and critique of the criminal justice system." Noting that "[s]peech concerning the criminal justice system has always been viewed as political speech," the dissent pointed out that Hunter testified that he used his own cases as an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

"Hunter conceded that one of the purposes of the blog was marketing," concluded the dissent. "Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial."

The majority and dissent even disagreed about the how the nature of the blog affected the free speech issues. The majority noted that the blog was hosted on Hunter's website, which also said "Contact us for representation," while the blog itself was not interactive. The dissent noted that the blog could be reached "directly" without navigating the firm's website, and that the lack of interaction could not turn political speech into commercial speech.

Both sides can't be right, and only the Supreme Court, which decided eight lawyer free-speech cases between 1977 and 1995 — but none since — knows the answer. Hunter has petitioned for a writ of *certiorari*, but it would be surprising to see the Supreme Court leap back into this fray.

So what does this mean for the lawyer/blogger? Washington, D.C., lawyer Carolyn Elefant, who blogs at My Shingle, and often blogs about blogging, wrote then that even though she, unlike Hunter, steers clear of trumpeting winning cases, if "Hunter's news feed qua blog is an advertisement and therefore requires disclaimers, mark my words, that decision will be construed broadly to encompass even legitimate blogs that discusses substantive legal issues."

Maybe yes, but probably not. *Hunter* is very unusual, if not unique, on its facts. First, everyone agreed that his blog contained elements of both marketing and political writing. Second, Hunter is something of a gadfly, who used his march through the Virginia state courts as an opportunity to publicize what was going on in his case, and of course, himself. His website currently highlights his *cert* petition.

Third, everyone agreed that his blog would have passed muster with the bar had he placed an appropriate disclaimer on his webpage. The bar wanted a statement that the blog was an advertisement, which Hunter refused to do. But many state bars, including California's, focus on regulations that prevent lawyers from guaranteeing results or implying a "guarantee, warranty or prediction" about results. (California Rule of Professional Conduct 1-400, standards 1 and 2.) What would have happened in a California discipline case if Hunter had been willing to more clearly disclaim results?

Of greater concern to me is that in approving the bar's advertising regulations, the court, almost without comment, approved these specific demands about disclaimers contained in Virginia Rule 7.2(a)(3):

"The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results."

Can a state bar dictate to a lawyer that a disclaimer be in a particular font size, and in a particular color? I doubt that this is a reasonable regulation of even commercial free speech. In other words, it sounds unconstitutional to me.

California's Rule 1-400 standards, which were approved by the State Bar with court authority, but not by our Supreme Court, state, in Standard 5, for example, that "a 'communication' ... seeking professional employment ... transmitted by mail or equivalent means which does not bear the word 'Advertisement,' 'Newsletter' or words of similar import in 12 point print on the first page" violates the ethics rule.

I doubt it. First, the Supreme Court case of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916 (1988), allowed a direct mailing that was targeted to a particular audience without any

disclaimers. While the court might not decide *Shapero* the same way today, it remains the law. Second, even without *Shapero*, requiring a particular font point size — or in Virginia's case, a color as well — is simply overreaching.

While *Hunter* may stand alone for the moment on blogging, in *Gee v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011), the U.S. Court of Appeals for the Fifth Circuit found several of Louisiana's advertising rules unconstitutional, including the rule that forbade "a reference or testimonial to past successes or results obtained." Tellingly, the court also struck down requirements as to font size, speed of speech on TV ads, and the requirement to have both written and spoken disclaimers on television and electronic media.

Meanwhile Hunter, while reprimanded, is likely a happy man. He can still practice law, and he is more famous now than he has been at any time in his career. If you are accused of a crime in the Richmond, Va., area and want to go to the most well-known defense counsel, Horace Hunter is your man.

Next week: How the Hunter case misunderstood its own rule on confidentiality, approving Hunter's acquittal on the one issue for which he should have been disciplined.

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