# Jeff Geiger Counters

## Attorney Ad Rules in NY Take a Hit

**By: Jeff Geiger.** ***This was posted Tuesday, March 23rd, 2010***

As previously reported, proposed amendments in Virginia to the Rules of Professional Conduct that govern lawyer advertising and communications by lawyers with prospective clients would prohibit in-person solicitation in all matters, not just those involving personal injury cases. While I was, and remain, critical of such a change, a decision by the U.S. Court of Appeals for the Second Circuit in Alexander v. Cahill (March 12, 2010) evinced a thirty-year trend toward greater protection of First Amendment rights for lawyer advertising and solicitation of clients. While upholding New York's thirty-day ban on direct unsolicited communications in potential personal injury and wrongful death actions, the Court of Appeals eviscerated a number of prohibitions on advertising. Specifically, the Court of Appeals addressed the regulation of commercial speech that was purportedly false or deceptive.

Of course, what is false or deceptive? In the end, the Court of Appeals concluded that a number of provisions governing lawyer advertising were unconstitutional.

1. Client testimonials are not inherently misleading. While they could mislead if they suggest that past results indicate future performance, not all need do so. As an aside, one would never want a client testimonial that would suggest the attorney's prowess. . . .

2. Portraying a judge in an advertisement is not per se false, deceptive or misleading. What would be of concern is the implication that the attorney has the ability to influence the court improperly.

3. Banning so-called "irrelevant" ads is not appropriate: "[q]uestions of taste or effectiveness in advertising are generally matters of subjective judgment." Indeed, "[g]immicks . . . do not actually seem to mislead." One is reminded of a television advertisement some years ago of an attorney flying in an UFO—while much was said, it was clearly not misleading and obviously gripped the viewer's attention.

4. An outright prohibition on the use of nicknames, mottos or trade names that imply the ability to obtain results in matter is not appropriate. In the case at bar, the Court noted that the term "Heavy Hitters" would be prohibited even as it was not in any manner misleading.



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This decision, while only directly applicable to New York, should give rise to the call to affirm First Amendment protection of commercial speech and to avoid a knee-jerk reaction to regulate professionals in a paternalistic fashion. Again, I reach back to the Supreme Court's decision in Bates v. State of Arizona which confirmed that advertising (even lawyer advertising) serves individual and societal interests in assuring informed and reliable decision making. I welcome your comments and UFO sightings.



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