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The Court of Appeals 'gets it' when it comes to technology

It is indisputable that technology is changing the world and the practice of law. Technological advances have increased our ability to rapidly disseminate information, and lawyers and non-lawyers alike have used this to their benefit.

Of course the Internet is the obvious medium that comes to mind, but the advent of the fax machine was the beginning of a revolution in the rapid exchange of information.

For years now, lawyers have used the fax machine to communicate and to conduct business.

One lawyer's creative attempt to use this medium to share information with other lawyers resulted in a lawsuit against him that ended up before the New York Court of Appeals.

By NICOLE BLACK
Daily Record Columnist

From 2003 to 2005, Andrew Lavoot Bluestone, a New York attorney and law blogger (New York Attorney Malpractice Blog, http://blog.bluestonelawfirm.com) who represents plaintiffs in attorney malpractice matters, used fax machines to distribute an "Attorney Malpractice Report" to other attorneys. The reports included short essays regarding attorney malpractice issues and included his firm's contact information and Web site addresses.

An attorney who had received a number of these reports commenced a lawsuit against Bluestone alleging violations of Telephone Consumer Protection Act of (TCPA) 1991.

Bluestone was represented on appeal by attorney Scott Greenfield, author of the well-read blog Simple Justice (http://blog.simplejustice.us).

Last fall, the Third Department concluded that Bluestone's faxes violated the TCPA:

"While Bluestone contends that his faxes were purely informational and do not explicitly offer services, his position defies common sense. The faxes at issue certainly have the purpose and effect of influencing recipients to procure Bluestone's services, which are for the specialized field of legal malpractice claims." *Stern v. Bluestone,* 47 AD3d 576 (Third Dept. 2008).

However, last week, the New York State Court of Appeals overturned the Third Department's ruling concluding that the primary purpose of the faxed reports was informational rather than promotional:

"We conclude that Bluestone's 'Attorney Malpractice Report' fits the FCC's framework for an 'informational message.' … In these reports, Bluestone furnished information about attorney malpractice lawsuits; the substantive content varied from issue to issue; and the reports did not promote commercial products. To the extent that Bluestone may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, '[a]n incidental advertisement' of his services, which 'does not convert the entire communication into an advertisement' (*Id.*)." *Stern v. Bluestone,* 2009 NY Slip Op 04740 (2009).

This is an important decision for New York law bloggers, whose numbers have increased exponentially since I began blogging in 2005. Although the court's decision was limited to its interpretation of certain provisions of the TCPA, its rationale applies equally to the vast majority of law blogs.

The primary purpose of most law blogs is the dissemination of information. Like Bluestone's "Attorney Malpractice Report," blogs educate the reader about a subject matter that is unrelated to the self-promotion of the blogger.

Certainly increased visibility of the blogger is a byproduct of the publication of a successful blog; and as a result of that visibility, new clients may follow. But, that doesn't mean that the primary purpose of the blog is the retention of clients.

In comparison, I think that most people would agree that the primary purpose of television and radio ads, billboard ads, professional Web sites and yellow page ads is the retention of clients. Blogs are different because the primary purpose of blogs — sharing information — is separate and distinct from the self-promotion that is the essential element of most advertisements.

Thankfully, the court's decision in *Stern v. Bluestone* is a strong indication that the highest court in New York understands this distinction. The court understands that lawyers' creative use of emerging Internet technologies is, in many instances, simply an extension of traditional networking activities, including speaking at a seminar, authoring an article in a legal publication, distributing a newsletter via e-mail or joining a committee at the local bar association.

It's good to know that the highest court in New York "gets it." Do you?

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