

SUPREME COURT OF WISCONSIN

Office of Lawyer Regulation v. Hupy

333 Wis. 2d 612 (2011) · Decided May 27, 2011

SUMMARY

The Wisconsin Supreme Court reviewed attorney Michael F. Hupy's appeal from a referee's recommendation of a public reprimand and assessment of disciplinary costs. The court was evenly divided on an alleged violation involving a postcard, found a violation concerning a misleading 2006 advertising brochure, and rejected the alleged violation concerning a law-firm anniversary sticker. The court imposed a public reprimand and \$35,000 in costs.

CASE DETAILS

COURT	Supreme Court of Wisconsin
WRITING FOR THE COURT	Chief Justice Abrahamson; Justice Bradley; Justice Crooks; Justice Prosser; Justice Roggensack; Justice Ziegler
JURISDICTION	Wisconsin
DECIDED	May 27, 2011
DISPOSITION	other
PROCEDURAL POSTURE	Attorney Hupy appealed from a referee's report and recommendation in an attorney disciplinary proceeding. The Supreme Court of Wisconsin reviewed the referee's factual findings, legal conclusions, recommended discipline, and assessment of costs.
STANDARD OF REVIEW	The court reviews a referee's factual findings for clear error, reviews legal conclusions de novo, and independently determines the appropriate level of discipline while benefiting from the referee's recommendation. First Amendment issues are independently reviewed, including an independent examination of the record to determine whether the challenged conduct falls within free-speech protection.
PRECEDENTIAL VALUE	Published Wisconsin Supreme Court opinion; precedential authority, although the court was evenly divided on Count 1.
PARTIES	Michael F. Hupy v. Office of Lawyer Regulation

TOPICS

[appellate procedure](#)[standard of review](#)[free speech](#)[first amendment](#)[due process](#)

PRACTICE AREAS

legal ethics

attorney discipline

professional responsibility

attorney advertising

constitutional law

QUESTIONS PRESENTED

1. Whether republishing in 2006 a brochure stating that Charles Hausmann was still practicing law pending his criminal appeal constituted conduct involving dishonesty, fraud, deceit, or misrepresentation under SCR 20:8.4(c).
2. Whether the brochure constituted protected speech under the First Amendment to the United States Constitution or Article I, section 3 of the Wisconsin Constitution.
3. Whether SCR 20:8.4(c) was unconstitutionally vague or failed to provide adequate due process notice.
4. Whether use of a 35th-anniversary sticker constituted a material misrepresentation in violation of former SCR 20:7.1(a) or SCR 20:7.5(a).
5. What discipline and costs were appropriate.

HOLDINGS

1. The court was evenly divided on whether the postcard statement violated SCR 20:8.4(c); consequently, the court did not resolve the issue or address the related constitutional challenges.
2. Republishing the brochure in 2006 with the statement that Hausmann was still practicing law pending his appeal constituted conduct involving a misrepresentation in violation of SCR 20:8.4(c).
3. The brochure was commercial speech and the false statement was not protected by the First Amendment or Article I, section 3 of the Wisconsin Constitution.
4. SCR 20:8.4(c) provided sufficient notice of the prohibited conduct and was not unconstitutionally vague as applied to Hupy's false advertising statement.
5. Use of the 35th-anniversary sticker was not a violation of former SCR 20:7.1(a) or former SCR 20:7.5(a) because any discrepancy between a 30-year and 35-year founding date was not material.
6. A public reprimand was appropriate for Hupy's violation arising from the 2006 brochure.
7. Hupy was required to pay \$35,000 in costs.

KEY QUOTATIONS

"The statement was clearly a misrepresentation of fact when it was made again in 2006. That it was a repetition of a formerly true statement does not change its nature as a false statement in 2006." (647)

"Publishing a statement, especially a statement that a fellow lawyer is violating a supreme court order, without knowing the contents of the statement, is a quintessential act of recklessness." (650-651)

"While commercial speech generally merits some protection under the First Amendment, that protection does not extend to commercial speech that is false, deceptive, or misleading." (652-653)

"We agree with Attorney Hupy that no reasonable person would be influenced by a five-year difference between a personal injury law firm that was either 30 years old or 35 years old." (656)

FACTUAL BACKGROUND

Attorney Michael F. Hupy and his firm sent direct-mail advertising to prospective personal-injury clients that criticized competitor Charles Hausmann and the Hausmann-McNally firm. In 2006, Hupy republished a brochure stating that Hausmann was still practicing law pending his criminal appeal, even though the appeal had ended and Hausmann's Wisconsin law license had been suspended. Hupy also used a 35th-anniversary sticker on firm letterhead, although the court determined that any discrepancy between a 30-year and 35-year founding date was not material.

PROCEDURAL HISTORY

The Office of Lawyer Regulation filed a disciplinary complaint alleging three violations arising from attorney advertising. The referee found violations on all three counts and recommended a public reprimand and payment of all proceeding costs. On appeal, the Supreme Court of Wisconsin was evenly divided on Count 1, rejected Count 3, found a violation on Count 2, imposed a public reprimand, and ordered payment of \$35,000 in costs.

DISPOSITION

other

CASES CITED

- In re Disciplinary Proceedings Against Arthur, 2005 WI 40, ¶ 78, 279 Wis. 2d 583, 694 N.W.2d 910
- In re Disciplinary Proceedings Against Inglimo, 2007 WI 126, ¶ 5, 305 Wis. 2d 71, 740 N.W.2d 125
- In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶ 44, 261 Wis. 2d 45, 660 N.W.2d 686
- Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 & n.31 (1984)
- Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990)
- Biskupic v. Cicero, 2008 WI App 117, ¶ 27, 313 Wis. 2d 225, 756 N.W.2d 649
- In re Disciplinary Proceedings Against Beaver, 181 Wis. 2d 12, 22, 510 N.W.2d 129 (1994)
- City of Milwaukee v. Blondis, 157 Wis. 2d 730, 735, 460 N.W.2d 815 (Ct. App. 1990)
- Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637-638 (1985)
- In re Disciplinary Proceedings Against Schalow, 131 Wis. 2d 1, 13, 388 N.W.2d 176 (1986)
- Stern v. Department of Revenue, 63 Wis. 2d 506, 509-510, 217 N.W.2d 326 (1974)
- In re Disciplinary Proceedings Against Campbell, 113 Wis. 2d 715, 335 N.W.2d 881 (1983)