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This Court Took a Wrong Turn with *Bates*: Why the Supreme Court Should Revisit Lawyer Advertising

Ralph H. Brock
"THIS COURT TOOK A WRONG TURN WITH BATES:"
WHY THE SUPREME COURT SHOULD REVISIT LAWYER ADVERTISING

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"Membership in the bar is a privilege burdened with conditions."**

ABSTRACT:

With the ever-increasing use of advertisements on electronic broadcast media, the necessity to regulate legal advertising simultaneously develops. The U.S. Supreme Court has not heard a case concerning legal advertising in over twenty years and has never addressed the issue in the context of electronic media. This Article will highlight the established limitations placed on lawyer advertising; these restrictions on First Amendment rights are accepted by members of the legal profession. The piece then follows the Supreme Court's evolving jurisprudence in the realm of legal advertising, and takes issue with the Federal Trade Commission's asserted, but misplaced, jurisdiction over

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** In re Rouss, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.).
lawyer advertisements. In the midst of differing signals and caselaw, lower courts have struggled to analyze permissible or impeding regulations at the state level in the context of electronic ads, and two case studies are explored extensively. Finally, this Article asserts the need for state bar regulation of quality of legal services claims, particularly in the burgeoning field of electronic and broadcast media advertisements.

INTRODUCTION

Imagine, if you will, a television advertisement patterned after the opening scene from The Black Widow, the September 27, 2005 episode of the Boston Legal television series. The ad opens with a shot of the city’s central downtown legal district. The camera finds the lawyer who, like the arrogant and ethically-challenged lead characters of Boston Legal, Denny Crane and Alan Shore, strides purposefully, resolutely into the scene. The accompanying music is Henry Mancini’s pounding jazz theme from the Peter Gunn television detective series. Implicit in this lawyer’s message is that she looks great—she does not have to ask—and like the lawyers in the fictional firm of Crane, Poole & Schmidt, she is invincible. Her name and contact information are superimposed on the unfolding scene. No words are spoken; none are needed.


2. The author has seen yellow page ads for various law firms, many in the same telephone directory, featuring identical pictures of William Shatner, the Canadian-born actor who portrays Denny Crane, that suggest he is a member of the firm. Since Shatner is not a lawyer, such ads are inherently deceptive and misleading. He also does television ads for law firms. See, e.g., http://www.youtube.com/watch?v=xe6t9UQvto0 (last visited Apr. 7, 2009).

3. Although the Peter Gunn series is fifty years old, running from 1958-61, see http://en.wikipedia.org/wiki/Peter_Gunn (last visited Apr. 7, 2009). The theme, as the Boston Legal episode suggests, is still quite recognizable. See Boston Legal: The Black Widow, supra note 1.

4. In the Boston Legal episode, the Peter Gunn theme stops briefly as Alan Shore asks, in reference to an earlier episode, “Denny, we look good, right?” Denny Crane replies, “We look great.” The Peter Gunn theme resumes. See Boston Legal: The Black Widow, supra note 1.
Today the fictitious Boston Legal-inspired ad would hardly raise an eyebrow. Yet it would convey a highly subjective and unverifiable message about the quality of the lawyer's services, and it would do so without the use of any verbal expression. Such an advertisement would not work in anything but the electronic media. This Article starts with the premise that any quality-of-legal-services advertising is subjective and unverifiable, is inherently misleading, especially in the electronic and broadcast media, and is inconsistent with the privilege of membership in a learned profession "burdened with conditions." The issue addressed here is whether and how such advertisements may be regulated (or even prohibited) by the Rules of Professional Conduct without violating First Amendment-protected commercial speech rights.

This Article will start by putting into perspective the generally accepted burdens on lawyers' First Amendment rights. Then it will lay the foundation for further discussion by surveying the Supreme Court cases involving lawyer advertising. Next, it will address how the Federal Trade Commission has interfered in state rule-making decisions (despite its lack of jurisdiction) by arguing that any professional advertising that is not demonstrably false, fraudulent, or misleading is in the public interest and should be allowed. After that, the Article will consider the lower court cases that have been trying to apply the Supreme Court decisions on printed advertising to various forms of electronic advertising, focusing on two cases in particular. Finally, the Article will suggest how state bars can constitutionally regulate quality-of-legal-services advertisements, especially television advertisements that utilize unverifiable slogans, self-laudation, puffery, hyperbole, and the like.

I. SOME CONDITIONS THAT BURDEN THE PRIVILEGE OF MEMBERSHIP IN THE BAR

A. Universally Accepted Burdens on a Lawyer's First Amendment Rights

No one can dispute that the First Amendment right to freedom of speech is not absolute. As Justice Holmes famously put it, "The most
stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." The modern counterpart is joking about bombs or security in an airport check-in line. In the context of legal ethics, the ABA Model Rules of Professional Responsibility contain many limitations, apart from the Information about Legal Services (advertising) rules, that generally place restrictions on a lawyer’s right to say certain things that could benefit the lawyer, a client, or both. For example, a lawyer is generally prohibited from:

- revealing confidential information;
- revealing information relating to the representation of a former client;
- revealing information learned in a consultation with a prospective client, even if no client-lawyer relationship ensues;
- communicating ex parte with a judge, juror, prospective juror, or other official;
- communicating with a discharged juror or prospective juror in certain circumstances;
- making an extrajudicial statement that will have a substantial likelihood of materially prejudicing an adjudicative proceeding;
- communicating without consent about the subject of the representation with a person the lawyer knows to be represented by another lawyer;
- stating or implying to an unrepresented person that the lawyer is disinterested;
- giving legal advice to an unrepresented person whose interests are in conflict with a client’s;
- making a statement that the lawyer knows to be false concerning the qualifications or integrity of a judge; or
- stating or implying an ability to influence improperly a


7. See, e.g., Transportation Security Administration information, http://tristatehomepage.com/content/fulltext/?cid=35701 (“Talk to your children before you come to the airport and let them know that it’s against the law to make threats such as, ‘I have a bomb in my bag.’ Threats made jokingly (even by a child) can delay the entire family and could result in fines.”) (last visited Apr. 7, 2009).
government agency or official.  

Lawyers accept these normative limitations on substantive free speech rights—these conditions that burden the privilege of practicing law—because they are essential for maintaining client confidences and preserving the integrity of the profession. As Justice Stewart wrote:

A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

But as we shall see, when the issue is First Amendment rights to commercial speech versus decorum and dignity consistent with the standards of a learned profession, it is the obedience to ethical precepts that has had to yield.

B. Traditional Limits on Lawyer Advertising

Until the mid-1970s, ethical rules prohibited most, if not all, forms of lawyer advertising. Generally, the Supreme Court adhered to

8. Model Rules of Prof’l Conduct R. 1.6(a); 1.9(c)(2); 1.18(b); 3.5(b); 3.5(c); 3.6(a); 4.2; 4.3; 8.2(a); 8.4(e) (2008), available at http://www.abanet.org/cpr/mrpc/ (follow the “Table of Contents” hyperlink, then follow the hyperlink for a specific rule).

9. In re Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring). See also Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991) (opinion of Rehnquist, C.J.) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed . . . . Even outside the courtroom . . . lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.”).

the broad rule articulated in *Valentine v. Chrestensen*, a handbill distribution case, that while the First Amendment guards against government restriction of speech in most contexts, “the Constitution imposes no such restraint on government as respects purely commercial advertising.” The commercial advertising rule was so well-settled that challenges to restrictions on professional advertising were brought, not on First Amendment grounds, but on due process, equal protection, or interstate commerce interference grounds. The first crack in the façade appeared in 1975, in *Bigelow v. Virginia*, when the Court struck down Virginia’s attempt to prohibit a newspaper advertisement that announced the availability of legal abortions and provided contact information for obtaining such services because the advertisement conveyed information of potential interest and value that “coincided with the constitutional interests of the general public.” After following *Valentine* consistently

11. 316 U.S. 52 (1942).
12. See, e.g., *Head v. N.M. Bd. of Exam’rs in Optometry*, 374 U.S. 424 (1963) (New Mexico statute prohibiting a newspaper and a radio station from publishing ads for a Texas optometrist did not impose a constitutionally prohibited burden upon interstate commerce); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (state statute that (1) prohibited an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist; (2) prohibited the advertisement of spectacles, eyeglasses, lenses or prisms, eyeglass frames, mountings, or other optical appliances; and (3) barred operators of retail stores from furnishing space therein to any person purporting to do eye examination or visual care did not violate due process); *Semler v. Dental Exam’rs*, 294 U.S. 608 (1935) (state statute that regulated advertising of dental services did not violate the Equal Protection Clause or impair the obligation of contracts). “Although the First Amendment issue was raised in *Head*, the Court refused to consider it because the issue had been neither presented to the state courts nor reserved in the notice of appeal.” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 357 n.8 (1977).

Even when advertising restrictions were challenged on First Amendment grounds, the Court afforded only limited protection. “When dealing with restrictions on commercial speech we frame our decisions narrowly, ‘allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression.’” *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (citing *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 456 (1978) (holding that a state could prohibit the use of trade names by optometrists, particularly in view of the considerable history of deception and abuse worked upon the consuming public through the use of trade names).

14. *Id.* at 822.
for more than thirty years, the Court in Bigelow reversed course and dismissed it as a limited decision relating only to reasonable restrictions on the manner of advertising, which did "not support any sweeping proposition that advertising is unprotected per se."\(^{15}\)

The next year, the Court held in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,\(^{16}\) a case involving a state prohibition on advertising prescription drug prices, that the advertisement of prescription drug prices was protected under the First Amendment notwithstanding its commercial speech character, but it was subject to some permissible regulation.\(^{17}\) At the same time, the Court noted "special problems of the electronic broadcast media" and reserved the question whether advertising for legal and medical services "may require consideration of quite different factors" due to the "enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."\(^{18}\)

II. A QUICK SURVEY OF LAWYER ADVERTISING CASES IN THE SUPREME COURT

A. From Bates to Went For It.

A year after Virginia State Board of Pharmacy, the Court took up the issue of lawyer advertising in Bates v. State Bar of Arizona.\(^{19}\) Bates involved disciplinary proceedings against two lawyers for running a newspaper advertisement that listed certain legal services the lawyers

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15. Id. at 820.
17. Id. at 770.
offered and the fees charged for those services. Noting that the Arizona Bar sponsored a Legal Services Program with standard rates for routine services, the Court observed that the only services that lent themselves to advertising are the routine ones. The narrow holding in Bates was that the State Bar may not “prevent the publication in a newspaper of [an attorney’s] truthful advertisement concerning the availability and terms of routine legal services.” What is more interesting, and perhaps more important, are the limitations on advertising that the Court said might be permitted:

- Advertising that is false, deceptive, or misleading can be prohibited.
- Advertising claims as to the quality of legal services, which are not susceptible of measurement or verification, may be so likely to be misleading as to permit restriction.
- Similarly, in-person solicitation might be restricted.
- “And the special problems of advertising on the electronic broadcast media will warrant special consideration.”

1. *Ohralik*: In-Person Lawyer Solicitation Can Be Proscribed in the Name of Professionalism

The next year, in the case of an ACLU cooperating attorney who was disciplined for advising a victim of sterilization that the organization would provide free legal assistance, the Court held that such discipline violated the First and Fourteenth Amendments because the lawyer

20. *Id.* at 372-73.
21. *Id.* at 384. The Supreme Court of California anticipated Bates in *Jacoby v. State Bar of California*, 562 P.2d 1326 (Cal. 1977), which held that the use of the term “legal clinic” rather than “law office” did not violate a California rule of professional conduct that “specified that the only permissible ‘sign’ for a lawyer to use was one ‘disclosing his name or the name of his law firm, and the word attorney, attorney at law, counselor at law, lawyer, or law office,’” in order to prevent deception, “and the State Bar has not shown that the term ‘legal clinic’ is in any sense deceiving.” *Id.* at 1331 (internal quotation marks omitted).
23. *Id.* at 383-84.
24. *Id.* at 384.
25. *Id.*
solicited the litigation, not for pecuniary gain, but as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. The same day, though, in a case involving a disciplinary proceeding for direct, in-person solicitation of prospective clients, the Court seemed to limit permissible commercial speech by lawyers to the narrow facts in *Bates*. In *Ohralik v. Ohio State Bar Ass'n*, the Court distinguished the “restrained” advertising sanctioned in *Bates* from in-person solicitation for pecuniary gain, which “has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.” The Court went on to explain that the state interests implicated in a case of remunerative employment by in-person solicitation “are particularly strong.”

In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. “The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). While lawyers act in part as “self-employed businessmen,” they also act “as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.” *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

“While the Court in *Bates* determined that truthful, restrained advertising of the prices of ‘routine’ legal services would not have an adverse effect on the professionalism of lawyers,” the *Ohralik* Court said that “this was only because it found ‘the postulated connection between advertising and the erosion of true professionalism to be severely

28. *Id.* at 454.
29. *Id.* at 460 (internal citation omitted).
strained." 30  "The Bates Court did not question a State's interest in maintaining high standards among licensed professionals. Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of 'true professionalism.'" 31

2. Central Hudson: Now the First Amendment Protects Commercial Speech

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York 32 is not a lawyer advertising case, but it must be included in this discussion because it and its progeny turned commercial speech regulation (especially the state's interest in maintaining high standards among licensed professionals) on its head. Central Hudson involved a First and Fourteenth Amendment challenge to a state prohibition on all advertising by a public utility promoting the

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30. Id. at 460-61 (quoting Bates, 433 U.S. at 368) (emphasis in original).
31. Id. at 461 (quoting Bates, 433 U.S. at 368). But see Edenfield v. Fane, 507 U.S. 761, 774 (1993) (stating that "Ohralik does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances," and holding that a ban on in-person solicitation by certified public accountants, which was not "inherently conducive to overreaching and other forms of misconduct" was unconstitutional. (quoting Ohralik, 436 U.S. at 464)).

Two years after Bates, the Court held that the prohibition on the practice of optometry under a trade name is a constitutionally permissible state regulation in furtherance of protecting the public from demonstrated deceptive and misleading use of optometrical trade names.

Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.

Friedman v. Rogers, 440 U.S. 1, 12-13 (1979)
use of electricity. Relying on Virginia State Board of Pharmacy, the Court said that

[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them . . . ."33

The Court then articulated a three-part analysis for determining whether lawful and non-misleading commercial expression is protected by the First Amendment: (1) is the asserted governmental interest substantial? (2) does the regulation directly advance the governmental interest asserted? and (3) is it more extensive than is necessary to serve that interest?34

The Court has said "the application of the Central Hudson test was 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech—which [it] specifically has held does not require least restrictive means."35 Since


34. Id. at 566.


We reject appellant's contention that we should subject disclosure requirements to a strict 'least restrictive means' analysis under which they must be struck down if there are other means by which the State's purposes may be served. Although we have subjected outright prohibitions on speech to such analysis, all our discussions of restraints on commercial speech have recommended disclosure
"commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression,'" the Court said, quoting Ohralik, "[t]he ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State."36 Nevertheless, the Court has described the Central Hudson test as an intermediate scrutiny standard of review.37

In a lawyer advertising case, the first prong of the Central Hudson test is easily met. If the ad is not misleading, "'[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts.'"38 The second prong concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that "the speech restriction directly and materially advance the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"39

requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.

Id.

36. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. at 477 (quoting Ohralik, 436 U.S. at 456) (alteration in original).
This second prong, the Court has said, does not require that "empirical data come . . . accompanied by a surfeit of background information . . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." But as we shall see, without some evidence to support the second prong, the regulation will fail.

The last prong of the Central Hudson test is "whether the speech restriction is not more extensive than necessary to serve the interests that support it." Although it is difficult to distinguish the "not more extensive than necessary" standard from the "least restrictive means" standard, the Court insists that the two are not the same. "[N]instead, the case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'"

3. R.M.J.: Truthful, Non-misleading Listing of Practice Areas Cannot Be Prohibited

The first lawyer advertising case decided by the Court after Central Hudson was In re R.M.J. In that case, a lawyer was disciplined for violating a rule written to comply with Bates. The rule allowed a lawyer to

"publish . . . in newspapers, periodicals and the yellow pages of telephone directories" [ten] categories of information: name, address[, ] and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit

40. Id. (quoting Went For It, 515 U.S. at 628) (alterations in original) (internal quotation marks omitted).
42. Id. at 556 (quoting Went For It, 515 U.S. at 632) (alteration in original).
43. 455 U.S. 191 (1982).
arrangements; [to state] the fixed fee to be charged for certain specified "routine" legal services and list a general practice in one of three ways, or list one or more of twenty-three areas of specific practice. The lawyer was disciplined for using alternative terms for practice areas ("real estate" for "property law," for example), listing areas of practice not listed in the rule, and listing the jurisdictions of licensure.

The Court summarized the commercial speech doctrine, in the context of advertising for professional services, as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions, and misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

If the communication is not misleading, the state must assert a substantial interest before it can regulate the advertisement, and "the interference with speech must be in proportion to the interest served." The Court concluded that because the ad describing a "real estate" practice, rather than "property," and the listing of areas not on the list of practice areas provided by the bar, were not inaccurate or misleading,

44. Id. at 194-95 (quoting Mo. Rev. Stat., Sup. Ct. Rule 4, DR 2-101 (B) (1978) (Index Vol.)).
45. Id. at 197.
46. Id. at 203.
47. Id.
and since the bar showed no substantial interest promoted by the restriction, the ad could not be prohibited.48

4. Zauderer: Use of Accurate Illustration of Dalkon Shield Cannot Be Proscribed in the Name of Professionalism

Three years later, in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,49 the Court expanded the scope of permissible practice-area advertising to illustrations. The lawyer ran a newspaper advertisement publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dalkon Shield Intrauterine Device.50 The advertisement featured a line drawing of the device in violation of a rule imposing a blanket prohibition on the use of illustrations in lawyer advertising.51 The advertisement stated that the Dalkon Shield had caused infections and unplanned pregnancies; that the attorney was currently handling lawsuits in such cases and was willing to represent other women asserting similar claims; that readers should not assume that their claims were time-barred; that cases were handled on a contingent-fee basis; and that “[i]f there is no recovery, no legal fees are owed by our clients.”52 The Office of Disciplinary Counsel charged the lawyer, inter alia, with violating the disciplinary rule that prohibited the use of illustrations and a rule requiring attorney ads to be “dignified.”53

Noting that because the illustration of the Dalkon Shield was accurate and not misleading, the Court placed the burden on the state to show a substantial governmental interest justifying the restriction, and that the restriction is the least restrictive available.54 The Court expressed doubt that the state had a substantial interest in requiring that advertising be presented “in a dignified manner,” as required by the disciplinary rule

48. Id. at 205.
50. Id. at 630.
51. Id. at 630-32.
52. Id. at 631.
53. Id. at 632.
54. Id. at 647.
in question. That some members of the bar might find the advertisement beneath their dignity did not justify suppressing it.\textsuperscript{55}

Insofar as the reprimand was based on the lawyer’s use of an accurate illustration of the Dalkon Shield in his advertisement and his offer of legal advice, the Court said, the reprimand violated his First Amendment commercial speech rights.\textsuperscript{56} The Court emphasized that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’”\textsuperscript{57}

5. \textit{Shapero}: Ban That Targeted Truthful and Nondeceptive Direct-mail Solicitation Violated the First and Fourteenth Amendments

Another three years transpired before the Court, in \textit{Shapero v. Kentucky Bar Ass’n},\textsuperscript{58} broadened the scope of permissible lawyer advertising even more, drawing a distinction between direct, in-person solicitation of prospective clients that the (pre-\textit{Central Hudson}) Court had condemned in \textit{Ohralik}, and the permissible solicitation of legal business for pecuniary gain by sending truthful, nondeceptive letters to potential clients known to face particular legal problems. Such advertising was constitutionally protected commercial speech, the Court said, and even though it might present lawyers with opportunities for isolated abuses or mistakes, the Bar could regulate them through less restrictive and more precise means than a categorical ban, such as requiring lawyers to file any solicitation letter with the Bar.\textsuperscript{59}

The letter in \textit{Shapero} contained multiple underscored, uppercase letters that “fairly shouts at the recipient” to employ the lawyer. It

\textsuperscript{55} Id. at 647-48.

\textsuperscript{56} Id. at 655-56. The Court sustained Zauderer’s reprimand for offering to represent drunken driving cases on a contingent-fee basis, and for omitting information regarding the client’s obligation to pay costs in his contingent-fee arrangements in his Dalkon Shield advertisement. \textit{Id.}

\textsuperscript{57} Id. at 651 (quoting \textit{In re R. M. J.}, 455 U.S. 191, 201 (1982) (alteration in original)).

\textsuperscript{58} 486 U.S. 466 (1988).

\textsuperscript{59} Id. at 476.
stopped short of promising results, but barely. Nevertheless, in what must be one of the lowest moments in lawyer advertising litigation, the Court said that "a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never 'shout at the recipient' or 'grasp him by the lapels' as can a lawyer engaging in face-to-face solicitation." The Court did concede that a letter may be misleading if it unduly emphasizes trivial or relative uninformative facts, such as membership in the bar of the U.S. Supreme Court, or "offers overblown assurances of client satisfaction," reiterating the possibility mentioned in Bates that claims as to the quality of legal services may be so misleading as to warrant restriction, but those claims were not asserted in Shapero.

Justice O'Connor dissented, arguing that "[t]he roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations." She continued:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct . . . . Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service . . . .

60. Id. at 478.
61. Id. at 479.
62. Id.
63. Id. at 487 (O'Connor, J., dissenting).
64. Id. at 488-89 (O'Connor, J., dissenting).
6. Peel: Listing True and Verifiable Specialization Certification Could Not Be Prohibited

Next, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, a plurality reemphasized the Court's policy of favoring regulation, rather than an outright ban, of commercial speech in a case in which the disciplined lawyer's letterhead stated that he had been certified as a trial specialist by the National Board of Trial Advocacy (NBTA). The Illinois disciplinary commission charged that this was a potentially misleading representation because the NBTA was not an Illinois certification authority. The plurality, consistent with prior opinions, said that a state may not completely ban statements that are not actually or inherently misleading. The statement, which was susceptible of measurement or verification, could be regulated by screening such certifying organizations, or by requiring a disclaimer about certifying organizations or standards of specialty. Even if the lawyer's letterhead might be potentially misleading, the plurality explained, "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." The plurality did note that the Commission had no empirical evidence to support its claim of deception. "The Commission's concern about the possibility of

66. Id. at 107. Accord *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994) (holding that the Board of Accountancy could not discipline a lawyer / CPA who was also a Certified Financial Planner (CFP) for using the designations "CPA" and "CFP" in her advertising and other communication to the public in relation to her law practice). *But see In re Advisory Comm. on Prof'l Ethics Opinion No. 447*, 432 A.2d 59, 62 (N.J. 1981) (the practice of including extra-legal qualifications on a law firm letterhead, i.e., a CPA designation, "creates a possibility of confusion that is sufficient to sustain the constitutionality of restrictions on the place and manner of the communication.").
68. *Peel*, 496 U.S. at 110.
69. Id. at 109.
70. Id. at 108.
deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.\textsuperscript{71}

7. \textit{Went For It:} Thirty-day Prohibition on Targeted, Direct-mail Solicitations of Accident Victims Upheld; Bar Has Substantial Interest in Protecting Injured Citizens from Invasive Conduct and Erosion of Confidence in the Profession

The Court's most recent pronouncement on lawyer commercial speech came in 1995 in \textit{Florida Bar v. Went For It, Inc.}\textsuperscript{72} \textit{Went For It} is significant because it demonstrates how the Bar can defend a rule restricting lawyer advertising by mustering evidence under the second prong of \textit{Central Hudson} to show that it has a substantial interest in protecting against erosion of confidence in the profession.\textsuperscript{73}

The rule at issue in \textit{Went For It} prohibited lawyers from sending targeted, direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster, or accepting referrals obtained in violation of that prohibition. The state bar asserted that its interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers was substantial, as was its interest "in preventing the erosion of confidence in the profession that such repeated invasions have engendered."\textsuperscript{74} In support, it proffered a 106 page summary of a two-year study of lawyer advertising and solicitation that showed that "the . . . public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession."\textsuperscript{75}

\begin{enumerate}
\item \textit{Id.} at 111.
\item 515 U.S. 618 (1995). Went For It, Inc. was a lawyer-owned referral service that sought to contact accident victims or their survivors within thirty days of accidents and refer potential clients to participating Florida lawyers. \textit{Id.} at 621.
\item \textit{Id.} at 627-28 (describing the record made by the Bar citing various surveys and editorials criticizing the use of targeted direct mail to accident victims).
\item \textit{Id.} at 635.
\item \textit{Id.} at 626. "The Bar's proffered study . . . provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more." \textit{Id.} at 635.
\end{enumerate}
The Florida rule, however, was not an outright prohibition against direct-mail solicitation, but only a thirty-day restriction on such activity, which is consistent with the Court's policy of regulation rather than banning commercial speech. The Court was satisfied that the rule "targets a concrete, non-speculative harm." 76

B. The Supreme Court's Review of Lawyer Advertising Has Been Limited to Print and Direct Mail Advertisements

Two things are worthy of note at this juncture. Beginning with Bates and continuing even after Central Hudson, the Court has considered lawyer advertising cases involving only written advertisements and in-person solicitations. 77 The Court has never addressed "the special problems of advertising on the electronic media [that] will warrant special consideration," which it reserved in Bates. 78 Neither has the Court considered the other question reserved in Bates, whether advertising claims as to the quality of legal services, which are not susceptible of measurement or verification, may be so misleading as to warrant restriction. 79

The second noteworthy point is that the Court has consistently favored lawyer commercial speech that is "susceptible of measurement or verification." It could be said that the susceptible-of-measurement-or-verification standard, in the context of lawyer advertising cases, is another way of articulating the first prong of the Central Hudson test, that to be protected, the commercial speech must not be misleading.

While the Court has never written on the merits of any form of lawyer advertising in the broadcast or electronic media, or on any cases involving subjective quality of services claims, it has left one tantalizing morsel on the table. In Committee on Professional Ethics & Conduct v. Humphrey (Humphrey I), the Iowa Supreme Court concluded that under Bates, television ads that did not aid the public in making an informed

76. Id. at 629.
79. Id. at 383-84.
decision about hiring a lawyer could be prohibited.\textsuperscript{80} The Supreme Court vacated and remanded \textit{Humphrey I} in light of \textit{Zauderer}.\textsuperscript{81}

The advertising rules at issue in \textit{Humphrey I} listed nineteen "items thought to be useful to the public (names, fields of practice, office and telephone answering service hours, hourly fee rate, fixed fees, range of fees for specific legal services, date and place of bar admissions, various licenses and memberships, etc.)."\textsuperscript{82} The rules further provided that:

The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner.\textsuperscript{83}

The television ads in question involved actors in fictitious settings talking about how persons injured by the conduct of others "should be talking to a lawyer," emphasizing the importance of which lawyer to choose.\textsuperscript{84} Graphics of the firm's name, address and phone number appeared on the screen and a voice-over said that "If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp [sic], serious personal injury and wrongful death handled on a percentage


\textsuperscript{82} \textit{Humphrey I}, 355 N.W.2d at 568.

\textsuperscript{83} \textit{Id.} at 568-69.

\textsuperscript{84} \textit{Id.} at 566.
basis. No charge for initial consultation. Call now at 288-0102. The telephone number was repeated twice. The Iowa court concluded that when the "efforts [of the advertising industry and the electronic media] are combined on behalf of a lawyer, a line can and should be drawn between what informs the public and what promotes the lawyer." On remand, the Iowa Supreme Court rejected any claim that Zauderer required a different result. "We took [the Bates exclusion of "special problems" inherent in electronic broadcasts] seriously and at face value" and "[t]he majority opinion in Zauderer strictly adheres to the exclusion of electronic advertising by carefully omitting it from its sweep"—actually, it excluded electronic advertising by repeatedly emphasizing written advertising.

Humphrey II is significant from a procedural standpoint because the lawyers' second appeal to the Supreme Court was dismissed for want of a substantial federal question. A dismissal for want of a substantial federal question, although not necessarily entitled to full precedential weight, constitutes a decision on the merits. Thus we finally have a Supreme Court decision on the merits regarding a lawyer's advertisement, regardless of whatever precedential weight the Court may decide to give it in the future, that draws a clear distinction between objective and verifiable written advertising and self-laudatory advertising on television.

85. Id.
86. Id. at 571.
87. See Comm. on Prof'l Ethics & Conduct v. Humphrey (Humphrey II), 377 N.W.2d 643, 645-46 (Iowa 1985), appeal dismissed for want of substantial federal question, 475 U.S. 1114 (1986). See also Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) ("The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellant's truthful advertisement concerning the availability and terms of routine legal services.").
C. Justice O'Connor's Plea for Professionalism

The Supreme Court has recognized, even after Central Hudson, that some restrictions on lawyer advertising are a legitimate burden on lawyers' First Amendment rights.91 At the same time, the Court began to denigrate the concept of professionalism in the name of lawyers' First Amendment commercial speech rights.92 In that context, Justice

91. Comments regarding the state's interest in regulating the legal profession include:

- "In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978).
- "While lawyers act in part as 'self-employed businessmen,' they also act 'as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.'" Id. (quoting Cohen v. Hurley, 366 U.S. 117, 124 (1961)).
- "The Bates Court did not question a State's interest in maintaining high standards among licensed professionals. Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of 'true professionalism.'" Id. at 461 (footnote omitted).
- "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) (internal citation omitted).

92. See, e.g., Ohralik, 436 U.S. at 460:

[I]t appears that the ban on solicitation by lawyers originated as a rule of professional etiquette rather than as a strictly ethical rule. '[T]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession.' (internal citation omitted); In re R.M.J., 455 U.S. 191, 203-04 (1981) (citing Bates, 433 U.S., at 368-72, 375-77) ([T]he potentially adverse effect of advertising on
O'Connor's plea for professionalism in her dissent in Edenfield v. Fane is worth considering:

I continue to believe that this Court took a wrong turn with Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); Shapero v. Kentucky Bar Ass’n., 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988); Peel v. Attorney Registration and Disciplinary Comm’n of Ill., 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (plurality opinion). These cases consistently focus on whether the challenged advertisement directly harms the listener: whether it is false or misleading, or amounts to "overreaching, invasion of privacy, [or] the exercise of undue influence," Shapero, supra, 486 U.S. at 475, 108 S. Ct., at 1922. This focus is too narrow. In my view, the States have the broader authority to prohibit professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech.

More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State’s desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.

93. In Edenfield, the Court struck down a ban on direct, in-person solicitation of potential clients by certified public accountants. See case cited supra note 31. As Justice O'Connor's citations to her dissenting opinions demonstrate, she, the late Chief Justice Rehnquist, and Justice Scalia eventually comprised a block that consistently objected to the expansion of lawyer advertising in the name of commercial free speech rights. Edenfield v. Fane, 507 U.S. 761, 778 (1993).
commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large. See Zauderer, supra, 471 U.S. at 676-677 (O'Connor, J., concurring in part, concurring in judgment in part, and dissenting in part); Shapero, supra, 486 U.S. at 488-491 (O'Connor, J., dissenting); Peel, supra, 496 U.S. at 119 (O'Connor, J., dissenting). In particular, the States may prohibit certain "forms of competition usual in the business world," Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (internal quotation marks omitted), on the grounds that pure profit seeking degrades the public-spirited culture of the profession and that a particular profit-seeking practice is inadequately justified in terms of consumer welfare or other social benefits. Commercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well.14

Despite Justice O'Connor's plea for professionalism, commercial speech still trumps most advertising limitations imposed on members of a learned profession. The question, then, is where the Court will draw the line on permissible restrictions. Will it stop at the measurable-or-verifiable commercial speech standard that seems to have guided its decisions thus far, or will it open the door to any and all subjective, unverifiable self-laudation, slogans, puffery, and hyperbole that are not demonstrably false, fraudulent, or misleading? The Federal Trade Commission, no advocate of ethical standards, even for a learned profession, would much prefer the latter.

III. The Federal Trade Commission's Officious Intermeddling

Before Central Hudson, the Court observed that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"\(^{96}\) When the Court held that pharmacists could not be prohibited from advertising the prices of prepackaged drugs, it noted that "the distinctions, historical and functional, between [other] professions, may require consideration of quite different factors. Physicians and lawyers, for example . . . render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."\(^{97}\) Chief Justice Burger agreed that "quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law."\(^{98}\) In those halcyon days the Court recognized that in some instances the State may decide that "'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.'"\(^{99}\) Even after Central Hudson, the Court recognized that "'the regulation of the activities of the bar is at the core of the State's power to protect the public.'"\(^{100}\)

In stark contrast to the Court's relatively restrained lawyer advertising jurisprudence, even after Central Hudson, the Federal Trade Commission (FTC) has made itself a most effective advocate for any and all lawyer advertising that is not demonstrably false and deceptive. It has

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95. Blackstone defined maintenance, for example, as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise." William Blackstone, 4 Commentaries *135.


98. Id. at 774 (Burger, C.J., concurring).


accomplished this, not without a touch of irony, through its use of deliberately misleading and deceptively-worded letters to various state supreme courts, state bar associations, and the American Bar Association (ABA) that clearly imply—but never explicitly assert—authority that it does not have.  

A. The Parker Doctrine

It is true that modern jurisprudence has recognized some Sherman Anti-Trust Act/FTC jurisdiction over regulated learned professions in general and the legal profession in particular. Not to put too fine a point on it, the Court held in Goldfarb that a local bar association's minimum fee schedule, the deviation from which could result in disciplinary action against the lawyer, constituted price fixing in violation of the Sherman Act. At the same time, Parker v. Brown makes it clear that state legislative acts, even if they have an anti-competitive effect, are beyond the scope of the Sherman Act. The threshold inquiry, then, in determining if an anti-competitive activity is


102. Goldfarb, 421 U.S. at 791-92: The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

103. 317 U.S. 341, 350-51 (1943). See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962). "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Parker, 317 U.S. at 350-51.
protected by the state action (or *Parker*) doctrine, is whether the activity is required by the State acting as sovereign. Thus the *Parker* doctrine, when it applies, is an unassailable defense against FTC action under the Sherman Act.

The lawyers in *Bates* first tried to raise a Sherman Act claim against the rule prohibiting their advertisement. The Court rejected the Sherman Act claim because the *Parker* state action doctrine immunized the advertising regulation from a Sherman Act claim. A restraint on lawyer conduct imposed by a rule promulgated by a state supreme court, "the ultimate body wielding the State's power over the practice of law," is a restraint compelled by direction of the state acting as a sovereign, and immune from a Sherman Act claim. It follows that the FTC likewise has no jurisdiction over such rules.

106. *Id.* at 359-60.
   Applying the *Parker* doctrine in *Bates* . . . the Court held that a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action.

108. In *Hoover*, the Court held that a state supreme court, acting in a legislative capacity by promulgating rules governing the examination and grading of applicants for admission to the state bar, occupies the same position as that of a state legislature. Thus the *Parker* doctrine precluded a bar admission candidate's claim that a state supreme court's Committee on Examinations and Admissions had conspired to restrain trade in violation of § 1 of the Sherman Act by "artificially reducing the numbers of competing attorneys in the State." *Hoover*, 466 U.S. at 565. The Committee's actions (as adopted by the state supreme court) constituted those of the State and *ipsa facto* were exempt from the operation of the antitrust laws under the state action doctrine. *Id.* at 572-73 (citing *Bates*, 433 U.S. at 361).
B. The FTC Generally Has No Jurisdiction to Interfere in Lawyer Advertising Matters

Ignoring the Parker state action doctrine, the FTC does not hesitate to comment on proposed state court rules that would restrict lawyer advertising.109 Invariably its intervention includes this misleading reference to its "statutory mandate:"

The FTC enforces laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, which includes primary responsibility for stopping deceptive advertising practices.4 Pursuant to its statutory mandate, the Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. In particular, the Commission seeks to identify and prevent, where possible, business practices and regulations that impede competition without offering countervailing

109. The only exception that the author has found is in the Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as an attachment to Sept. 30, 2002 Letter to Alabama Supreme Court, infra note 110). There, the FTC admits that it has brought no cases involving restraints on lawyer advertising because such restraints "are typically formal rules issued by the courts, and thus, as state action, are not subject to antitrust enforcement." Letter from Fed. Trade Comm'n Staff to Robert G. Esdale, Clerk of the Ala. Supreme Court (Sept. 30, 2002), available at http://www.ftc.gov/be/v020023.pdf (quotation at page four of attachment).

The FTC, along with the Justice Department, also opposes definitions of the practice of law—again, a matter within the scope of the state action doctrine—that prevent nonlawyers from providing services in competition with lawyers "in situations where there is no clear demonstration that non-lawyer services would actually harm consumers." Letter from R. Hewitt Pate, Assistant Att’y Gen., et al., to Denise Squillante & Lee J. Gertenbert, Co-Chairs, Task Force to Define the Practice of Law in Mass. 1 (December 16, 2004), available at http://www.ftc.gov/os/2004/12/041216massuplltr.pdf. See also Letter from R. Hewitt Pate, Acting Assistant Att’y Gen., to ABA Task Force on the Model Definition of the Practice of Law (December 20, 2002), available at http://ftc.gov/opa/2002/12/lettertoaba.htm.
benefits to consumers.\textsuperscript{5} The Commission and its staff have had a longstanding interest in the effects on consumers and competition arising from the regulation of lawyer advertising and solicitation.\textsuperscript{6} The FTC believes that while false and deceptive advertising by lawyers should be prohibited, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value is likely to inhibit competition and frustrate informed consumer choice. This position is supported by research indicating that overly broad restrictions on truthful advertising may adversely affect prices paid and services received by consumers.\textsuperscript{7,110}

\textsuperscript{5}Specific statutory authority for the FTC’s advocacy program is found in Section 6 of the FTC Act, under which Congress authorized the FTC “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” and “[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest.” \textit{Id.} § 46(a), (f).
\textsuperscript{6}See, e.g., Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), \textit{available at} http://www.ftc.gov/os/2006/09/V060020image.pdf; Letter from FTC Staff to the Professional Ethics Committee for the State Bar of Texas (May 26, 2006), \textit{available at} http://www.ftc.gov/os/2006/05/V060017Comme ntsonaRequestforAnEthicsOpinionImage.pdf; Letter from FTC Staff to Committee on Attorney Advertising, Supreme Court of New Jersey (Mar. 1, 2006), \textit{available at} http://www.ftc.gov/be/V060009.pdf; see also, e.g., Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), \textit{available at}
The ploy often works; lawyers and courts that should know better bow to the FTC's pretended jurisdiction. For example, after the New Jersey Supreme Court Committee on Attorney Advertising promulgated Proposed Attorney Advertising Guideline 4, which would have permitted client endorsements or testimonials that were truthful, that did not compare one lawyer to another, and that did not describe the

http://www.ftc.gov/be/v020023.pdf. In addition, the staff has provided its comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989); and the State Bar of Georgia (Mar. 31, 1987). See also Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, supra).


See also Letter from Maureen K. Ohlhausen, Dir., Office of Policy Planning, et al., to S. Guy deLaup, President, La. State Bar Ass’n 1-2 (March 14, 2007), available at http://www.ftc.gov/os/2007/08/V070013larules.pdf (“Empirical research has found that restrictions on attorney advertising lead to higher prices for legal services and there is little evidence that restricting attorney advertising is likely to raise the quality of legal services.”) (footnote 4 omitted).
quality of the work the lawyer had performed, the FTC objected that the proposed guideline "would prohibit truthful, non-misleading claims about the nature of legal services, the quality of legal services, and comparisons between providers of legal services, if such claims are made through a client endorsement or testimonial." This objection challenged precisely the sort of sovereign state rulemaking that is immune from FTC oversight. Nevertheless, the FTC went on to complain that the proposed guideline would prohibit claims of aggressiveness or comparisons of professionalism that have traditionally been forbidden. As of this writing, the FTC is winning; Attorney Advertising Guideline 4 has not been approved by the New Jersey Supreme Court nor formally adopted by the Committee on Attorney Advertising.

The New Jersey Committee on Attorney Advertising also issued Opinion 39, which concluded that advertisements publicizing certain New Jersey lawyers as "Super Lawyers" or "Best Lawyers in America" violated the prohibitions against advertisements that are comparative in nature, and that are likely to create an unjustified expectation about results. When "Super Lawyers" and the New Jersey State Bar Association requested a stay, the FTC filed an amicus curiae brief, invoking its boilerplate assertion that it "encourages competition in the licensed professions, including the legal profession, through enforcement of the antitrust laws and competition advocacy," and compared "Super Lawyer" and "Best Lawyer" designations to the National Board of Trial


113. Id. at 2 nn.8-9.


Advocacy certification in *Peel* that "are objectively verifiable statements of fact."116 The New Jersey Supreme Court stayed Opinion 39,117 and appointed a special master to develop a record that will form a basis for a meaningful review by the court.118 The court adopted the special master's conclusion that "state bans on truthful, fact-based claims in lawful advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading," vacated Opinion 39, and remanded the matter for revision in light of the constitutional concerns and "the emerging trends in attorney advertising."119

C. The FTC and the New York Rules Amendments

Two additional examples will serve to show how effective the FTC can be, not only in persuading state bar rule makers not to act, but in obtaining substantive changes in rule-making. In June, 2006, the New York State Unified Court System proposed amendments to the New York rules governing lawyer advertising, and invited comments.120 The FTC responded, objecting to a number of the proposed amendments.121


121. The FTC's response included objections to:
   • Section 1200.6(a), which required the content of advertising and solicitation to be "predominantly informational;"
   • Section 1200.6(d)(3-6), which prohibited, *inter alia*, the voice or image of a non-attorney spokesperson recognizable to the public, the portrayal of a judge, the portrayal of a lawyer by a nonlawyer, the portrayal of the law firm as a fictitious entity, the use of a fictitious name, the depiction of a courtroom or
In its view, unfettered lawyer advertising is not only acceptable, but preferable, because "[s]uch techniques may be useful to consumers in identifying suitable providers of legal services" using "common methods that advertising firms have used to make their messages memorable."  

The FTC was especially incensed about proposed changes to § 1200.8, which would deter lawyers from participating in client-matching internet websites. Online matching programs invite attorneys to respond to a consumer inquiry through the service, providing information such as fees, experience and other qualifications. With this information, the client decides whether and which attorneys to contact. Online matching programs are desirable from the FTC's vantage point because they "have the potential to reduce consumers' costs for finding legal representation, which would likely increase competition among attorneys to provide legal services." The FTC devoted nearly two pages of its comments to its argument for online legal matching services. It brooked no concern courthouse, the portrayal of a client by a nonclient, and reenactments that were not actual or authentic;
- Section 1200.6(d)(7), which prohibited advertisement or solicitation made to resemble legal documents;
- Section 1200.6(d)(8), which prohibited the use of a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter;
- Section 1200.6(e)(1), which prohibited statements that are reasonably likely to create an expectation about results the lawyer can achieve;
- Section 1200.6(e)(2), which prohibited statements that compare the lawyer's services with the services of other lawyers;
- Section 1200.6(l)(1), which prohibited pop-up advertisement in connection with computer-accessed communications;
- Section 1200.6(k), which required all computer-accessed communications to disclose all jurisdictions in which the law or members of the law firm are licensed and all bona fide locations of the lawyer or law firm;
- Section 1200.6(o), which required the filing of a copy of the advertisement or solicitation with the attorney disciplinary committee; and
- Section 1200.8, which regulated solicitation and recommendation of professional employment.


122. Id. at 3. The incidental use of actors in place of live lawyers, the FTC says, could be clarified with disclosures.
123. Id. at 6.
for professional ethics, decorum or dignity. To the contrary, it disdained those qualities; increased competition and reduced consumer costs were its only interest.\(^{124}\)

While it is impossible to quantify the effect of the FTC’s objections,\(^ {125}\) it is easy to determine which of the original proposals were changed and which were not. The New York advertising rules as finally adopted abandoned the requirement that the content of advertising and solicitation be “predominantly informational.” The adopted rules also permitted reference to “bona fide professional ratings.” They permitted the use of non-attorney spokespersons and depictions of courtrooms or courthouses, but they retained prohibitions against the portrayal of a judge or a fictitious law firm, actors portraying the lawyer, members of the law firm or clients, and the use of a nickname, moniker, motto or trade name. At the same time, the rules permitted advertisements that were reasonably likely to create an expectation about the results the law can achieve, and statements that compare the lawyer’s services with the services with other lawyers. Pop-up computer ads were limited to the lawyer’s or law firm’s own website, and computer ads did not have to disclose all office locations. The final version of the rules eliminated the requirement that a copy of all advertisements be filed with the Department of Disciplinary Committee, but it still required lawyers to file a copy of all targeted solicitations. Finally, the amendments made no change to the rules that the FTC argued could deter lawyers from participating in client-matching websites.\(^ {126}\)

\(^{124}\) See id. at 6-7.

\(^{125}\) In addition to the FTC’s comments, the presiding justices of the Appellate Division’s four departments in New York received more than 100 comments and complaints from lawyers. John Caher, *N.Y. Courts Adopt Moderated Version of Lawyer Ad Rules*, N.Y.L.J., (Jan. 8, 2007), available at http://www.law.com/jsp/article.jsp?id=1167991327244.

\(^{126}\) http://www.nycourts.gov/rules/jointappellate/1200-6_finaltext_101107.pdf. Sections 1200.6(c)(1) (endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending), (3) (the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case), (5) (reliance on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence), (7) (utilization of a nickname, moniker, motto or
The FTC won on about half of its complaints, but it lost on major issues such as prohibitions against the portrayal of a judge or a fictitious law firm, actors portraying the lawyer, members of the law firm or clients, the use of a nickname, moniker, motto or trade name, and it lost on the issue of allowing lawyers to participate in client-matching websites. Characteristically, though, the FTC claimed that the revised New York rules incorporated "nearly all of the FTC Staff's recommendations." Although the FTC lost on the issue of online legal matching services in New York, it fared much better in Texas.

trade name that implies an ability to obtain results in a matter), and (g)(1) (utilization of a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own website or other internet presence), have been enjoined from enforcement by order of the United States District Court, Northern District New York, in the case of Alexander v. Cahill, No. 5:07-CV-117, 2007 WL 2120024 (N.D.N.Y. July 23, 2007), appeal pending, No. 07-3667-CV and 07-3900-CV (2nd Cir.), on First Amendment grounds. The Alexander case will be discussed extensively in Part IV of this Article.

127. Brief of the Federal Trade Commission, supra note 116, at 18. The FTC is not always persuasive. The Standing Committee on Legal Ethics of the Indiana State Bar Association, for example, rejected the FTC’s opposition to [O]verly broad restrictions that prevent the communication of truthful and non-misleading information [that is] likely to inhibit competition and to frustrate informed consumer choice,” noting that “claims of intentions to ‘fight’ to be ‘tough’ or to be ‘aggressive’ do little or nothing to actually inform the public but may well create impressions or imply comparisons which are false or misleading.

JEFFREY S. NICKLOY, ET AL., IND. STATE BAR ASS’N, REPORT OF THE SPECIAL COMMITTEE ON LAWYER ADVERTISING 7, 13 (2006), available at http://www.inbar.org/content/pdf/REPORT.pdf (citing the FTC’s letter to the New Jersey Committee on Attorney Advertising, supra note 112). In rejecting the FTC’s objection, the Standing Committee’s proposed comment to Indiana’s advertising rule included the following:

Subjective advertising poses particular problems because it is inherently not subject to verification or objective analysis. For example, claims of intentions to “fight” to be “tough” or to be “aggressive” do little or nothing to actually inform the public but may well create impressions or imply comparisons which are false or misleading. Furthermore, subjective advertising which panders to a public impression of attorneys as combative, devious or underhanded is inconsistent with
D. The FTC and the Texas Ethics Committee

In August, 2005, the Professional Ethics Committee for the State Bar of Texas issued Ethics Opinion 561.128 The question before the Committee was, "May a lawyer pay a fee to be listed on a privately sponsored internet site which obtains information over the internet from potential clients about their legal problems and forwards the information to one or more lawyers who have paid to be listed on the internet site?"129 The Committee's answer, in a word, was "no." While the Texas advertising rules permit a lawyer to pay reasonable fees for advertising and public relations services, as well as the usual charges of a lawyer referral service that meets the requirements of the state statute, only a lawyer referral service operated by a governmental entity or a non-profit entity was eligible for certification.130 Inasmuch as the privately sponsored internet site was a privately-owned, for-profit organization, it did not meet the certification requirements under the statute. The privately sponsored internet site did not provide allowable advertising or

the efficient, effective and equitable application of the law and inherently deceptive. The use of subjective advertising also imposes difficult enforcement problems upon the Courts, requiring the use of valuable resources to determine whether such advertising contravenes these Rules. For these reasons, such advertising is to be discouraged, unless it is the only means by which helpful information can be conveyed to the public. Advertising containing objective information is preferred, not only because it can presumably be substantiated, but also because it allows prospective clients to draw their own conclusions regarding the importance of the information.

Id. at 13.


public relations services, the Committee said, but instead existed to solicit or refer prospective clients to subscribing lawyers who have paid a fee, which violated the advertising rules.131

An online legal matching service, LegalMatch, a California company, asked the Committee to reconsider and clarify Opinion 561 with respect to whether LegalMatch's services violated TEX. DISCIPLINARY R. PROF’L CONDUCT 7.03, which prohibited lawyers from paying a nonlawyer to solicit or refer prospective clients. At that point the FTC intervened, addressing a letter to the Chairman of the Professional Ethics Committee for the State Bar of Texas, again falsely asserting jurisdiction to enforce the federal antitrust laws over the legal profession by “encourag[ing] competition in the licensed professions, including the legal profession, both through enforcement of the antitrust laws and through competition advocacy.”132 Although it cited no empirical evidence, the FTC went on to speculate that online legal matching services “are likely to reduce consumers’ costs for finding legal representation and have the potential to increase competition among attorneys.”133 The coup de grace was the FTC's assertion that the state bars of North Carolina, South Carolina, and Rhode Island had issued ethics opinions explicitly allowing such services to operate,134 and the Utah State Bar had partnered with such a service to help clients find a pre-screened Utah lawyer.135 Typically, though, the FTC failed to

131. Texas Professional Ethics Opinion 561, supra note 128.
133. Id.
mention that six other state bars, Nebraska, Iowa, Pennsylvania, Ohio, Arizona, and South Dakota, had issued ethics opinions explicitly prohibiting online legal matching services.136

The Texas Ethics Committee caved. Although the Committee commonly takes months, if not years, to issue an opinion, less than two months after the FTC submitted its comments the Committee issued Opinion 573, effectively overruling Opinion 561.137 Opinion 561 had clearly held that under the Disciplinary Rules and the Texas Lawyer Referral Act a lawyer may not pay a fee to be listed on a privately sponsored internet site that obtains information over the internet from potential clients about their legal problems and forwards the information to one or more lawyers who have paid to be listed on the internet site.138 Pretending that Opinion 561 somehow left the question open, Opinion 573 began with the presumption that lawyers could ethically participate in online legal matching services, couching the question to be decided in terms of "what requirements must be met in order for a Texas lawyer to participate in a privately sponsored internet service that obtains information over the internet from potential clients about their legal


problems and forwards the information to lawyers who have paid to participate in the internet service?" The Committee then concluded that an internet referral service was permissible, *inter alia*, if it operated under a wholly automated process, based on the information provided by potential clients and information provided by participating lawyers, and it ensured that a potential client understood that lawyers who responded had paid a fee to be included, and that the service made no assertions about the quality of legal services.

The Federal Trade Commission, through deliberately misleading claims of Sherman Act jurisdiction over the legal profession and unrelenting opposition to restrictions on lawyer advertising, has been fairly successful in promoting advertising rules that permit, if not encourage, subjective and unverifiable quality-of-legal-services advertising, self-laudation, slogans, puffery and hyperbole. At the same time, and without guidance from the Supreme Court, some state bars have adopted rules to restrict such advertising. How those rules have fared in the face of constitutional challenges is the subject of Part IV.

IV. OPPOSING TRENDS IN THE LOWER COURTS

Not surprisingly, the inertia of professionalism in the Anglo-American legal system has made it difficult for courts in the post-*Bates* era, with only a few exceptions, to condone anything more than objectively verifiable advertising. Although advertising rules that

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140. *Id.* In the Committee's revised opinion, an internet referral service "would be an advertising or public relations service permissible for Texas lawyers under the Texas Disciplinary Rules of Professional Conduct rather than a prohibited referral service" under Opinion 561.


142. The *Bates* Court observed that:
permit subjective and unverifiable quality-of-legal-services advertising, self-laudation, slogans, puffery and hyperbole may be the wave of the future, the current majority view still seems inclined toward professionalism. Some examples are mentioned in the margin.143

[i]t appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on “trade” as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession.


143. See, e.g.:
• Fla. Bar v. Gold, 937 So. 2d 652, 656-57 (Fla. 2006) (republication or circulation of news articles in direct mail solicitations referring to past successes or results obtained).
• Iowa Supreme Court Attorney Discipline Bd. v. Bjorklund, 725 N.W.2d 1, 8 (Iowa 2006) (statements about unmatched scholarly achievements, that the lawyer was the foremost authority on drunk driving with vast knowledge, experience and expertise that “has resulted in overwhelmingly favorable results for clients”).
• In re P.R.B., 868 A.2d 709, 709-10, 712 (Vt. 2005) (yellow page advertisement that began “INJURY EXPERTS” followed by the names of the firm’s attorneys and a smaller caption that read “WE ARE THE EXPERTS IN” three enumerated areas of the law).
• Hayes v. Zakia, 327 F. Supp. 2d 224, 230 (W.D.N.Y. 2004) (statement that the lawyer is certified as a specialist in a particular area of law without identifying the certifying organization and prominently including a statement that the certifying organization is not affiliated with any governmental authority, that certification is not a requirement for the practice of law and does not necessarily indicate greater competence than other attorneys experienced in that field of law).
• In re Shapero, 780 N.Y.S.2d 680, 684 (N.Y. App. Div. 2004) (advertisement in New York, depicting lawyer as an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients, when lawyer who had continuously resided in Florida since 1991, had not been actively engaged in practice of law in New York since 1995, who had
never tried a case to conclusion, and whose role in firm was limited to acting as spokesperson).


- Office of Disciplinary Counsel v. Furth, 754 N.E.2d 219, 223, 229 (Ohio 2001) (letter soliciting representation of juvenile in high-profile school shooting case, in which lawyer represented that his “entire specialty is representing children and young adults in often major criminal matters,” that he had a national reputation, and that he was “the very best at what I do”).

- Farrin v. Thigpen, 173 F. Supp. 2d 427, 447 (M.D.N.C. 2001) (lawyer’s television advertisement showing insurance adjustor recommending settlement at the mere mention of the lawyer’s name, followed by the actor Robert Vaughn stating that insurance companies know the lawyer’s name, and urging viewers injured in an auto accident to tell them “you mean business” by calling the lawyer).

- Ky. Bar Ass’n v. Mandello, 32 S.W.3d 763, 765 (Ky. 2000) (letter soliciting medical malpractice case that stated that lawyer’s background provided a “strong basis” for representation, where the lawyer had been in practice only two years and had never handled a medical malpractice case).


- Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Bjorklund, 617 N.W.2d 4, 9 (Iowa 2000) (advertisement distributed to movie theatre patrons asking “Have You Been Caught Drinking and Driving” and answering “I Can Help!”).


- Fla. Bar v. Lange, 711 So. 2d 518, 521 (Fla. 1998) (yellow page advertisement stating “All Federal & State Court in 50 States” and slogan “When the Best is Simply Essential”).

- Office of Disciplinary Counsel v. Shane, 692 N.E.2d 571, 573-74 (Ohio 1998) (television advertisements that consisted of client endorsements, and advertisements in the vein of “there’s no charge unless we win your case,” where the lawyer’s standard contingent fee contract provided that clients were liable for costs and expenses).

- *In re* Anonymous, 689 N.E.2d 442, 444 (Ind. 1997) (yellow page advertisement describing the lawyer’s firm as a “premier” personal injury law firm with “the track record and resources you need to win a settlement”).

- *In re* Anonymous, 689 N.E.2d 434, 434 (Ind. 1997) (lawyer advertising that he specialized in personal injury cases when in fact he was not so certified).
- Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Kirlin, 570 N.W.2d 643, 644-45 (Iowa 1997) (advertising containing references to memberships in professional organizations that did not include a “notice to the public” that such memberships “do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such lawyer is necessarily any more expert or competent than any other lawyer”).
- Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wherry, 569 N.W.2d 822, 825 (Iowa 1997) (advertisement of practice in specific areas where lawyer did not meet eligibility requirements).
- Medina County Bar Ass'n v. Grieselhuber, 678 N.E.2d 535, 536 (Ohio 1997) (use of the words “We Do It Well” in advertisement).
- Miss. Bar v. Attorney R., 649 So. 2d 820, 824 (Miss. 1995) (lawyer’s ad listing various fields of practice without including required statement that state did not certify expertise in the particular areas of the law).
- In re Anis, 599 A.2d 1265, 1271 (N.J. 1992) (a lawyer’s solicitation of victim’s families the day after the remains of victims of the explosion of Pan American Flight 103 over Lockerbie, Scotland were identified).
- Trumbull County Bar Ass’n v. Joseph, 569 N.E.2d 883, 884 (Ohio 1991) (use of the term “specialize” where lawyer was not formally recognized).
- In re Zang, 741 P.2d 267 (Ariz. 1987) (lawyer advertising, particularly on the electronic media, that were simply emotional, irrational sales pitches).
- In re Felmeister & Isaacs, 518 A.2d 188, 208 (N.J. 1986) (television advertisement that utilizes drawings, animations, dramatizations, music, or lyrics, that relies on techniques to obtain attention that depend upon absurdity and that demonstrates a clear and intentional lack of relevance to the selection of counsel, or that contains any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence).
- Comm. on Prof'l Ethics & Conduct v. Humphrey, 377 N.W.2d 643, 647 (Iowa 1985), appeal dismissed for want of substantial federal question, 475 U.S. 1114 (1986) (electronic lawyer advertising that contains background sound, visual displays, more than a single, nondramatic voice, or self-laudatory statements).
- Leoni v. State Bar of Cal., 704 P.2d 183, 194 (Cal. 1985), appeal dismissed, 475 U.S. 1001 (1986) (lawyers’ letters sent to defendant debtors that were “almost certain to cause panic and to mislead the recipients,” which omitted the amount of attorney fees the firm would charge, and which did not make it clear to the lay recipients that the letters were advertisements).
- Spencer v. Supreme Court of Pa., 579 F. Supp. 880, 888 (E.D. Pa. 1984), aff’d without op., 760 F.2d 261 (3d Cir. Pa. 1985) (the use of terms that subjectively evaluate a lawyer’s credentials or the quality of services).
- In re Utah State Bar Petition, 647 P.2d 991, 995 (Utah 1982) (the use of billboards, circulars, matchbooks, and inscribed pencils and pens).
A. The ABA Model Restrictions on Lawyer Advertising

The American Bar Association first promulgated restrictions on lawyer advertising in its 1908 Canons of Professional Ethics.\textsuperscript{144} The ABA Model Code of Professional Responsibility replaced the Canons in 1969. The Model Code was last amended in August, 1980. In the final version, most (but not all) of the model advertising rules were contained in “Selection of Lawyer: Lawyer Advertising,” EC 2-9 through EC 2-15, and DR 2-101 “Publicity in General,”\textsuperscript{145} which included prohibitions against self-laudation\textsuperscript{146} and “representations concerning the quality of service, which cannot be measured or verified.”\textsuperscript{147} The Model Code was superseded by the 1983 Model Rules of Professional Responsibility.\textsuperscript{148} The Model Rules generally abandoned those useful prohibitions in favor of a general rule providing that “[a] lawyer shall not make a false or

\begin{itemize}
  \item Eaton v. Ark. Comm. on Prof’l Conduct, 607 S.W.2d 55, 59 (Ark. 1980) (mail-out advertisement listing a $10 fee for an initial consultation with no time or subject limitation, inclusion of the advertisement in a packet of discount coupons from other local businesses).
  \item In re Oldtowne Legal Clinic, P.A., 400 A.2d 1111 (Md. 1979) (the use by lawyers of trade names).
  \item In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (advertising in any area in which the lawyer is not currently competent, the use of handbills, circulars, billboards, or by any other means, except the established and regularly circulated, or broadcast, media, and advertising that the lawyer is a specialist where there was no procedure for the certification of specialists).
\end{itemize}


146. \textit{Id.} EC 2-8.

147. \textit{Id.} EC 2-9.

misleading communication about the lawyer or the lawyer’s services. A
communication is false or misleading if it contains a material
misrepresentation of fact or law, or omits a fact necessary to make the
statement considered as a whole not materially misleading.”

It should be noted that some of the early advertising cases were
decided under state equivalents of the Model Code. Since then, almost
all states have adopted some version of the Model Rules. That said, and
with some thirty years of post-Bates experience, two cases have come to
epitomize divergent views of Bates’s progeny.

B. The Pit Bull Case

In the first case, Florida Bar v. Pape, the Florida Bar filed
complaints against two lawyers for their use of television advertising that
invoked the image of a pit bull dog wearing a spiked collar, utilized the
phrase “pit bull” in the firm’s advertisement and logo, and prominently
displayed the firm’s toll-free telephone number, 1-800-PIT-BULL.
The advertising allegedly violated Florida Rules of Professional Conduct 4-
7.2(b)(3) and 4-7.2(b)(4), which stated:

(3) Descriptive Statements. A lawyer shall not make
statements describing or characterizing the quality of
the lawyer’s services in advertisements and written
communications; provided that this provision shall
not apply to information furnished to a prospective

149. Id. R. 7.1. The State Bar of Nevada has officially sanctioned some of the
egregious forms of lawyer advertising. For example:
- You can now advertise testimonials, endorsements, and jury verdicts. The
  main caveat is you must also include adequate disclaimers to overcome the
  inherently misleading nature of such statements.
- You can now have accident scenes, be a cartoon, or otherwise have dramatic
  and suspenseful depictions. RPC 7.2 (d), (e), and (f) have been revoked.
- If you are going to advertise a fee or range of fees, all the related conditional
  terms (if any) must be included within reason.
State Bar of Nevada, Top Nine Things You Might Not (But Should) Know About
150. 918 So. 2d 240 (Fla. 2005).
151. Id. at 241-42.
client at that person's request or to information supplied to existing clients.

(4) Prohibited Visual and Verbal Portrayals. Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.\textsuperscript{152}

A referee found that the advertisement did not violate rule 4-7.2(b)(3), drawing a distinction between an advertisement that describes qualities of the attorneys and ads that describe the quality of legal services. Similarly, the referee found that the ad did not violate rule 4-7.2(b)(4) because pit bulls are perceived as "loyal, persistent, tenacious, and aggressive," qualities that were objectively relevant to the selection of an attorney because they were informational.\textsuperscript{153} The Florida Supreme Court disapproved the referee's findings and imposed discipline on the two lawyers.

1. The Florida Supreme Court's Findings

Relying on comments to the rules, the court noted that the advertising rules were designed to permit lawyer advertisements providing "objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types

\textsuperscript{152} Id. at 242 (footnote omitted). See also FLA. RULES OF PROF'L CONDUCT R. 4-7.2(c)(2), 4-7.2(c)(3) (2009), available at http://www.floridabar.org/divexe/rrtfb.nsf/FV/805933D56732F188852573C6006D4167. The current version of Rules 4-7.2(c)(2) and (c)(3) provide as follows:

(2) Descriptive Statements. A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and unsolicited written communications.

(3) Prohibited Visual and Verbal Portrayals and Illustrations. A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.

\textsuperscript{153} Pape, 918 So. 2d at 242-43.
of cases the lawyer handles." Advertisements using slogans... fail to meet these standards and diminish public confidence in the legal system." The combined effect of the "sensationalistic image" of a pit bull and a slogan, the court continued, implied to consumers that the attorneys [were] advertising themselves as providers of pit bull-style representation in violation of the prohibition against advertising about the quality of the lawyers' services. The court found that the referee's attempt to distinguish between the "quality of the lawyer's services" and the qualities of the lawyer was an artificial one: "From the perspective of a prospective client unfamiliar with the legal system and in need of counsel, a lawyer's character and personality traits are indistinguishable from the quality of the services that the lawyer provides." The court also found that the pit bull logo and telephone number were manipulative and misleading, suggesting not only that the lawyers could achieve results but that they also engaged in a combative style of advocacy. "The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information." The court seemed almost obsessed with the "darker side of the qualities often also associated with pit bulls: malevolence, viciousness, and unpredictability," devoting two pages of

154. Id. at 243.
As a preliminary matter, the pit bull logo and 1-800 PIT-BULL telephone number in the ad by the attorneys do not comport with the general criteria for permissible advertisements set forth in the comments to section 4-7 of the Rules of Professional Conduct. . . . The comment to Rule 4-7.1 provides that 'a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner.

Id.

Arguably there may be a due process problem in imposing discipline based on unenforceable hortative comments, rather than on the disciplinary rules themselves. But see Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 655 (1985) (notice and opportunity to respond in a disciplinary proceeding are sufficient to satisfy the demands of due process).

155. Pape, 918 So. 2d at 243-44.
156. Id. at 244.
157. Id.
its opinion to studies and anecdotal examples. It concluded that permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system.

2. Application of the First Amendment

The Pape court began its First Amendment analysis not with Central Hudson, which is never mentioned in the opinion, but with the proposition that "[l]awyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified." Working its way through the Bates progeny, the court said that the Supreme Court in R.M.J. (the case in which lawyers were limited to listing only prescribed areas of practice) dealt with "restrictions on clearly factual and relevant information that had not been found to be misleading or likely to deceive." With respect to Zauderer the court noted that the Dalkon Shield advertisement "did not promise results or suggest any special expertise but merely conveyed that the lawyer was representing women in Dalkon Shield litigation and was willing to represent other women with similar claims." Finally, the court cited the opinion in the Peel case, where the Supreme Court upheld the lawyer's right to list his certification by the National Board of Trial Advocacy on his letterhead because "the facts as to NBTA certification were 'true and verifiable.'"

Returning to the advertisement in Zauderer, the court observed that while "[t]he Dalkon Shield illustration informed the public that the lawyer represented clients in cases involving this device," the pit bull

158. Id. at 245-46.
159. Id. at 246-47 (footnote omitted). But see, e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 368-72, 375-77 (1977) (potentially adverse effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech).
160. Pape, 918 So. 2d at 247.
161. Id. at 248.
162. Id.
163. Id. at 249.
The image did not convey "objectively relevant information about the attorneys' practice." The court concluded that the U.S. Supreme Court requires a lawyer's advertisement to be objectively verifiable. Since the image and the words "pit bull" were intended to convey an image about the nature of the lawyers' litigation tactics, not objectively verifiable information about the lawyers' practice, the "advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment."  

C. The "Heavy Hitters" Case

The polar opposite of Pape is Alexander v. Cahill, a New York case that challenged three distinct categories of disciplinary rules—restrictions on potentially misleading advertisements, restrictions that imposed a thirty-day moratorium on certain communications following a personal injury or wrongful death event, and the alleged application of the rules to nonprofit legal organizations that did not charge clients. This Article addresses only the first category, a challenge to five rules amendments to prohibit potentially misleading lawyer advertising.  

1. The Challenged Disciplinary Rules

The amendments prohibiting potentially misleading advertisements included the following:

- an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;
- the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated

164. Id. (emphasis in original).
165. Id.
167. Id. at *5-11.
169. Id. DR 2-101(C)(1).
together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case; 170

- reliance on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; 171
- utilizing a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter. 172

The amended rules also provided that a lawyer or law firm shall not utilize:

- a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm’s own web site or other internet presence. 173

After the amended rules were adopted, the law firm of Alexander & Catalano, which had previously promoted itself as “the heavy hitters” in broadcast media, print advertisements, and other forms of public media, suspended certain of its advertisements and sought a declaratory judgment and an injunction in federal district court prohibiting the enforcement of these advertising restrictions on the grounds that they violated its First Amendment rights. 174

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170. Id. DR 2-101(C)(3).
171. Id. DR 2-101(C)(5).
172. Id. DR 2-101(C)(7).
173. Id. DR 2-101(G)(1).
174. Alexander v. Cahill, No. 5:07-CV-117, 2007 WL 2120024, at *1-*2 (N.D.N.Y. Jul. 23, 2007). The lawsuit, filed on February 1, 2007, was a calculated challenge to the amended rules that became effective that same day. See New York Amended Rules, supra note 168. “Prior to February 1, 2007, Alexander & Catalano’s commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm’s name. A number of the firm’s commercials also contained fictional or comical scenes.” Cahill, 2007 WL 2120024, at *1. The other plaintiff, Public Citizen, Inc. challenged different parts of the amended rules that, while interesting, are not relevant to this discussion. Id. at *2.
2. The Court Ignored Objective Verification in its
Central Hudson Analysis

Ignoring the admonition in Bates, that quality-of-legal-services
claims may be so likely to be misleading as to permit restriction (which
Bates and its progeny have suggested is an objectively verifiable
standard), the district court purported to apply a Central Hudson analysis
to advertisements that were potentially misleading, concluding that
Alexander & Catalano could not be prohibited from employing such
hyperbole as depicting its lawyers towering over downtown buildings,
counseling space aliens about an insurance dispute, and running so fast to
reach a client in distress that they appeared as a blur.\(^{175}\)

The district court’s initial inquiry\(^{176}\) was whether New York had
a substantial interest in protecting consumers from misleading attorney
advertising. Of course it did.\(^{177}\) The parties stipulated that “[a]lthough a
very small minority of advertisements could be categorized as false or
deceptive on their face, about a third of them . . . were found to be
deceptive.”\(^{178}\) That satisfied the first prong of Central Hudson.\(^{179}\)

\(^{175}\) Id. at *1-*2, *12-*13. A recent student note on Cahill argues that the
district court broke new ground by applying the Central Hudson test to advertising
that is only potentially misleading. Jay D. Kreismann & Menachem Lanner, Note,
The Cahill Decision: Evolution or Revolution? An Analysis of Alexander v. Cahill
and its Potential Effect on Attorney Advertising, 21 GEO. J. LEGAL ETHICS 841, 850
(2008). The Supreme Court has said, though, that “[s]tates may not completely ban
potentially misleading commercial speech if narrower limitations can ensure that the
information is presented in a nonmisleading manner.” Ibanez v. Fla. Dep’t of Bus. &
Prof’l Regulation, 512 U.S. 136, 152 (1994) (O’Connor, J., concurring in part and
dissenting in part) (citing In re R.M.J., 455 U.S. 191, 203 (1982)).

Query whether there is, or should be, a distinction between potentially
misleading speech, such as the use of the designation CFP (certified financial
planner) when the certification was made by a private organization and not the state,
and the hyperbole in Cahill that is plainly neither measurable nor verifiable.

\(^{176}\) Cahill, 2007 WL 2120024, at *5. The court made no mention of the
Central Hudson premise that the advertisement must concern a lawful activity and

\(^{177}\) Cahill, 2007 WL 2120024, at *5-*6.

\(^{178}\) Id. at *6.

\(^{179}\) Id.
The next inquiry was whether the amended rules materially advanced the state’s interest. At a minimum, as the Supreme Court suggested in *Went For It*, the state must adduce anecdotal evidence, and preferably extensive and detailed anecdotal and statistical studies, to support its position.\(^{180}\) The defendant Disciplinary Committees submitted no statistical or anecdotal evidence, or studies from other jurisdictions, of consumer problems with or complaints about misleading attorney advertising. They did, however, submit a New York Bar Association Task Force Report that reviewed the state of the law on attorney advertising “in both its local and constitutional dimensions,” as well as summarizing empirical research on actual advertisements, position papers, cases, and articles. The court found that the Report was sufficient to support a finding that the state’s interests were materially advanced with respect to the amendments that prohibited the portrayal of judges in attorney advertisements and that prohibited the use of trade names that implied an ability to obtain results.\(^{181}\)

The court found, though, that the Disciplinary Committees had failed to show how the remaining amendments to DR 2-101(C) materially advanced the state’s interest. Therefore, it enjoined (C)(1), the prohibition against “an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;” (C)(3), the prohibition against “the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply[ing] that lawyers are associated in a law firm if that is not the case;” (C)(5), the prohibition against the use of techniques “that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;” and (C)(7), to the


The [Florida Bar] submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar’s contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession.

*Id.*

extent that it prohibited the use of a "nickname, moniker, motto or trade name that implies an ability to obtain results . . ."182

The two amendments that survived the first two Central Hudson prongs did not fare as well under the third test, i.e., whether they were sufficiently narrowly tailored. The court found that the amended rules prohibiting the portrayal of judges and prohibiting the use of trade names that imply an ability to obtain results "are categorical bans."183 Since the Disciplinary Committees failed to produce any evidence that measures short of categorical bans, such as disclaimers or better enforcement of existing rules on a case-by-case basis, would not accomplish the desired result, these two amendments did not survive the last Central Hudson test, and they too were enjoined.184

The court summarily disposed of the remaining amendments, the prohibition of pop-up and pop-under advertisements on websites, by noting that the Disciplinary Committees had adduced no evidence on the substantial interest and state’s interest prongs under Central Hudson, and the state’s argument on the last prong was “contrary to common sense” because “there [was] no evidence that the regulation, observation, or retention of pop-up and pop-under advertisements is any more difficult than the regulation, observation, or retention of advertisements on television, radio, or websites.” Thus the court enjoined the enforcement of these amendments as well, resulting in a clean sweep for the advertising plaintiffs on all five challenged amendments.185

182. Id. at *6-*7.
183. Id. at *8.
184. Id. at *8-*9.

In my humble opinion, the federal court’s decision should be viewed as an embarrassment to all those who played a part in the promulgation of those draconian restrictions. And, how is it that 267 members of NYSBA’s House of Delegates—
V. Restricting Quality-of-Legal-Services Claims

Lawyer advertising that is more than "predominantly informational," that includes self-laudation, slogans, puffery, hyperbole, sensationalism or fictionalized dramatizations is, in the final analysis, a quality-of-legal-services claim. Quality-of-legal-services claims, the Bates Court noted, are not susceptible of measurement or verification and thus may be so misleading as to permit restriction. From the oeuvre of the Court's professional advertising cases we can educe at least three different restrictions on quality-of-legal-services claims that should withstand commercial speech scrutiny.

many of whom are respected Bar leaders, seasoned trial attorneys, and, practitioners with major white-shoe firms—failed to recognize the fundamental constitutional infirmities of the restrictions they were embracing?

Id.

Nevertheless, as noted herein, supra, note 143, the trend in the courts has been to uphold restrictions on lawyer advertising. Only a few courts have held to the contrary. See, e.g., Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614 (E.D. Va. 2003) (stating that state bar could be preliminarily enjoined from disciplining lawyers who advertised that they were listed in The Best Lawyers in America); Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000) (stating that although a bar advertising rule prohibiting self-laudatory statements and statements describing or characterizing the quality of the lawyer's services was not unconstitutional, the bar could not prohibit a lawyer from including in his yellow page ad that he is "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory" because the bar failed to satisfy the third prong of Central Hudson in that it failed to adduce any evidence of identifiable harm); Grievance Comm. v. Trantolo, 470 A.2d 228, 233 (Conn. 1984) ("a blanket restriction on television advertising is not the sort of narrow regulation that the Supreme Court countenanced in R.M.J. and Central Hudson Gas."); Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000) (stating that although a bar advertising rule prohibiting self-laudatory statements and statements describing or characterizing the quality of the lawyer's services was not unconstitutional, the bar could not prohibit a lawyer from including in his yellow page ad that he is "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory" because the bar failed to satisfy the third prong of Central Hudson in that it failed to adduce any evidence of identifiable harm).

A. "The Special Problems of Advertising on the Electronic Broadcast Media"

The Supreme Court's commercial speech decisions involving professional advertising, starting with *Bigelow v. Virginia* and extending through *Florida Bar v. Went For It, Inc.*, have never condoned anything beyond paper and print advertisements in newspapers or the yellow pages, letterhead notations of specialization, and direct-mail solicitations. The Court itself has recognized that "[o]ur lawyer advertising cases have never distinguished among various modes of written advertising to the general public." The Court has never forswn its observation in *Bates* that "[a]s with other varieties of speech,

187. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 618 (1995) (prohibition against sending targeted, direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster, or accepting referrals obtained in violation of that prohibition, could be enforced); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994) (advertisements using the designations "CPA" and "CFP" in relation to law practice could not be prohibited); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 107 (1990) (plurality opinion) (stating that letterhead stating that lawyer was certified as a specialist by a national certification authority could not be prohibited); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (stating that truthful, nondeceptive letters to potential clients known to face particular legal problems cannot be prohibited); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 626-27 (1985) (stating that newspaper advertisement containing accurate illustration of Dalkon Shield and offer of legal advice in Dalkon Shield cases cannot be prohibited); *In re R.M.J.*, 455 U.S. 191 (1982) (stating that newspaper and yellow page advertisements containing truthful, non-misleading listing of practice areas cannot be prohibited); *In re Primus*, 436 U.S. 412 (1978) (stating that letter soliciting litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public, and not for pecuniary gain, cannot be prohibited); *Bates*, 433 U.S. at 350 (1977) (stating that truthful newspaper advertisement that listed certain legal services and the fees for those services could not be prohibited); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (stating that advertising prescription drug prices cannot be prohibited); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (stating that newspaper advertisement announcing the availability of legal abortions and providing contact information could not be prohibited). The Court did uphold a ban on in-person solicitation by lawyers in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

188. *Shapero*, 486 U.S. at 473 (emphasis added).
it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. . . . And the special problems of advertising on the electronic broadcast media will warrant special consideration." 189

The Court reaffirmed that proposition in *R.M.J.* 190 and *Zauderer.* 191 The lower courts have concurred. 192 The eight hundred pound gorilla in the room has been the general failure of the courts, with the notable exception of the Iowa Supreme Court in *Humphrey I,* to address the "special problems" of electronic advertising in general and television advertising in particular. 193 A television ad was at issue in *Pape,* but neither the Supreme Court of Florida nor the United States Supreme Court addressed it in the context of "the special problems of advertising on the electronic broadcast media." 194

It is true, as the Court observed in *Shapero,* that "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." 195 The first presidential debate between Richard M. Nixon and John F. Kennedy on September 26, 1960, is the classic example. Radio listeners generally thought Nixon won, but those who watched the televised version saw an obviously uncomfortable Nixon, refusing makeup to hide his five-o’clock shadow, underweight, pallid and dressed in an ill-fitting shirt following a two-week hospital stay, vying against a tan, confident and well-rested Kennedy. "Those

189. *Bates,* 433 U.S. at 384 (citations omitted).
192. See, e.g., Comm. on Prof’l Ethics & Conduct v. Humphrey (*Humphrey II*), 377 N.W.2d 643, 647 (Iowa 1985), appeal dismissed for want of substantial federal question, 475 U.S. 1114 (1986); *In re Felmeister & Isaacs,* 518 A.2d 188, 195 (N.J. 1986); and *In re Zang,* 741 P.2d 267, 279 (Ariz. 1987). But see *Petition for Rule Governing Lawyer Advertising,* 564 S.W.2d 638, 643 (Tenn. 1978) ("We are not unmindful of the *Bates* phraseology that ‘the special problems of advertising on the electronic broadcast media will warrant special consideration.’ We are not in agreement. . . . Advertising is advertising irrespective of the device or instrumentality employed.").
television viewers focused on what they saw, not what they heard. Studies of the audience indicated that, among television viewers, Kennedy was perceived the winner of the first debate by a very large margin.\textsuperscript{196}

The phenomenon is similar in the context of lawyer advertising, as the Iowa Supreme Court succinctly explained in \textit{Humphrey II}:

Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider.\textsuperscript{197}

Thus "electronic advertising presents a very strong potential for abuse, justifying its regulation."\textsuperscript{198} Regulation was further justified, the court said in \textit{Humphrey II}, when the advertising shifted from providing information about the availability and cost of legal services to "[e]lectronically conveyed image-building . . . . The special potential for abuse presented by electronic lawyer advertising is especially apparent at the important line we have tried our best to draw between the dissemination of protected information and crass personal promotion."\textsuperscript{199}

The Supreme Court of New Jersey, weighing similar concerns in \textit{In re Felmeister & Isaacs},\textsuperscript{200} started with the premise that the "twin

\begin{footnotes}


198. \textit{Humphrey II}, 377 N.W.2d at 647.

199. \textit{Id}. Although television advertisements were at issue in \textit{Pape} and \textit{Cahill}, neither court discussed "the special problems of advertising on the electronic media."

\end{footnotes}
goals" of lawyer advertising are informing the public and making legal services affordable.\textsuperscript{201} Noting that to be effective, advertising must attract and hold the consumer’s attention, the court:

opted for a regulation that allows a minimum amount of non-rational content, enough to attract attention and create interest. Our regulation would require that the advertisement be ‘predominantly informational,’ \textit{i.e.}, that in both quantity and quality, the communication of factual information rationally related to the need for and selection of an attorney predominates.\textsuperscript{202}

Significantly, the court “decided to continue more substantial restrictions on television advertising. There is no doubt that the potential impact of irrational factors is greatest in that medium.”\textsuperscript{203} The more substantial restrictions applicable to television advertising included the prohibition of drawings, animations, dramatizations, music, or lyrics. The rule also prohibited all advertisements “that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.”\textsuperscript{204}

The court then subjected the predominantly informational requirement, the special television restrictions, and the extreme portrayal prohibition to a \textit{Central Hudson} analysis. The state’s interest in the first two categories was in assuring that a client’s choice of counsel was based on rational, not emotional or irrational, factors.\textsuperscript{205} The state’s interest in the restriction on extreme portrayals was the preservation of public confidence in the bench and the bar.\textsuperscript{206} The direct relationship between all three rules and the state’s interest was apparent, the court said, and they were likewise the least restrictive alternative.\textsuperscript{207}

\textsuperscript{201} \textit{Id.} at 192.
\textsuperscript{202} \textit{Id.} at 193, 194.
\textsuperscript{203} \textit{Id.} at 195.
\textsuperscript{204} \textit{Id.} at 208 (Appendix).
\textsuperscript{205} \textit{Id.} at 198.
\textsuperscript{206} \textit{Id.} at 202.
\textsuperscript{207} \textit{Id.} at 200, 202, 203.
The court in *In re Zang* 208 followed *Humphrey II* and *Felmeister & Isaacs* with dicta warning that "dramatic, nonfactual advertisements are more likely to misrepresent or omit material facts, or to create unjustified expectations about the results a lawyer can achieve than are advertisements that primarily convey factual information that will help consumers make rational decisions about whether to seek legal services." 209 Since consumers have more experience with consumer products than with legal services, "the Rules of Professional Conduct do not tolerate the same sort of sales pitch for legal services that the Federal Trade Commission tolerates for most consumer products." 210

While the *Zang* court was not willing to place special restrictions on electronic advertising, it did adopt New Jersey’s "predominately informational" standard as an aspirational goal that was "consistent with the rationale for extending first amendment protection to lawyer advertising and with the public’s interest in access to and knowledge about . . . legal services." 211 The court concluded that "the bar should examine lawyers’ advertisements to determine whether, taken as a whole, they are predominately informational or are simply emotional, irrational sales pitches. While the latter may not be prohibited [by the advertising rule], they should be examined carefully to assure that they are neither false nor misleading." 212

In sum, the courts that have addressed the special problems of electronic advertising have recognized that it can be significantly more likely than print advertising to lend itself to emotional and irrational appeals that require special treatment. Such ads are also more likely to be false or misleading because they may misrepresent or omit material facts or create unjustified expectations about the results a lawyer may achieve, which would take the advertisement entirely out of the First Amendment protection provided by *Central Hudson*.

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209. *Id.* at 278-79.
210. *Id.* at 279.
211. *Id*.
212. *Id*.
B. Quality-of-legal-services Claims May Be Misleading Because They Are Not Measurably and Objectively Verifiable

Another question reserved in Bates and still unaddressed by the Supreme Court is whether claims concerning the quality of legal services are "so likely to be misleading as to warrant restriction." In Peel, the Court recognized a "distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality." In that same context, the Court has continued to observe that unverifiable claims concerning the "quality of legal services . . . may be so likely to be misleading as to warrant restriction." Indeed, in California Dental Ass'n v. FTC, a Sherman Act case, the Court, citing Bates, declared that "[i]t is, indeed, entirely possible to understand the [Dental Association's] restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery." The Court continued, "[t]he question here, of course, is not whether

213. Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977) ("advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.") Also see Zauderer, where the Court noted that:

[Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services, they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 640 n.9 (1985) (internal citation omitted).


217. Id. at 778. In a Sherman Act case, the Court applies a rule of reason test that "demands a more thorough enquiry into the consequences of those restraints," id. at 759, as opposed to the First Amendment intermediate scrutiny review it applies to state bar disciplinary rules under the intermediate scrutiny standard of review.
puffery may be subject to governmental regulation, but whether a [non-official] professional organization may ban it."^{218}

Unlike the question in *California Dental Ass'n*, which involved regulations imposed by an unofficial professional association, the question for lawyers is whether, under the *Parker* doctrine, a state supreme court, through its disciplinary rules, can ban quality-of-legal-services claims without running afoul of commercial free speech interests. The *Model Code*'s prohibition of quality-of-legal-service claims, adopted in many jurisdictions, has never been stricken as unconstitutional.^{219} The answer, then, to the question whether quality-of-legal-services claims may be subject to governmental regulation seems to be "yes," simply because such claims are not measurably and objectively verifiable.^{220}

218. *Id.* at 778 n.14. The California Dental Association (CDA) was a non-profit professional association of dentists, but it was not a state agency. Thus the FTC's jurisdiction extends to the CDA, which "provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed." *Id.* at 759.

219. A distinction should be made between subjective quality-of-legal-services claims and statements of verifiable recognition. *See, e.g.*, *Peel*, 496 U.S. at 111 (holding that a statement of certification by National Board of Trial Advocacy could not be prohibited). The distinction was made more difficult to discern when the self-laudatory prohibition of *Model Code of Prof'L Responsibility* DR 2-101(A) (1980) was replaced by *Model Rules of Prof'L Conduct* R. 7.1 (2007), which simply provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

220. *See, e.g.*, Fla. Bar v. Pape, 918 So. 2d 240, 249 (Fla. 2005) ("We conclude that an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment.").
C. Empirical Evidence Can Support the Asserted Governmental Interest in Protecting the Profession from Advertising that Reflects Poorly on the Profession

The second prong of the Central Hudson test asks whether the regulation directly advances the governmental interest asserted. ²²¹ Although the Court has said that Central Hudson does not require that "'empirical data come . . . accompanied by a surfeit of background information,'" ²²² neither is the state's burden satisfied by mere speculation or conjecture. It must adduce some evidence that the regulation in question advances its asserted interests in a direct and material way. ²²³ Thus, in Zauderer, the bar's failure to cite any evidence or authority that the use of illustrations in lawyer advertising would be misleading, manipulative, or confusing to the public was fatal, ²²⁴ as was the lack of empirical evidence in Peel that the letterhead listing of the lawyer's certification as a specialist was deceptive. ²²⁵

In Went For It, on the other hand, the Florida bar adduced empirical evidence to support its assertion that its interest in protecting privacy and tranquility of personal injury victims and their loved ones


²²³ Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("It presents no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions.").


²²⁵ Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 108 (1990) (plurality opinion); accord Mason v. Fla. Bar, 208 F.3d 952, 957-58 (11th Cir. 2000) (holding that without empirical evidence that advertisement asserting that lawyer's Martindale-Hubbell "AV" rating was "the Highest Rating" would mislead the unsophisticated public, advertisement did not violate prohibition against self-laudatory advertising).
against intrusive, unsolicited contact by lawyers was substantial, as well as its interest "in preventing the erosion of confidence in the profession that such repeated invasions have engendered." The Bar offered a one hundred and six page summary of a two-year study of lawyer advertising and solicitation, based on survey data and anecdotal evidence, that found that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession." The Court said that the Bar's evidence satisfied the second prong of the Central Hudson test.

Given the Florida Bar's evidentiary success in *Went For It*, it is interesting that the Bar adduced no evidence to support its position in *Pape*, that the lawyers' pit bull advertising campaign would "lead a reasonable consumer to conclude that the attorneys are advertising themselves as providers of 'pit bull'-style representation." The Bar prevailed nevertheless when the court concluded for other reasons that the pit bull ads were not constitutionally protected.

The New York Disciplinary Committees did not fare as well in *Alexander v. Cahill*, where the trial court applied the Central Hudson test. The state's burden on the second prong of the Central Hudson test was the same in *Cahill* as it was in *Went For It*, and the court recognized that the empirical and anecdotal evidence adduced in *Went For It* was

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227. Id. at 626.
228. Id. at 628. The Court went on to approve the Bar's regulation. "The Bar's proffered study . . . provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more." Id. at 635.
229. Fla. Bar v. Pape, 918 So. 2d 240, 244 (Fla. 2005).
230. Perhaps the Bar needed no such evidence, inasmuch as the Florida Supreme Court did not employ a Central Hudson analysis before concluding that the advertisements were not constitutionally protected. The only evidence the court cited was a veterinary association study and several court decisions recognizing "the dangerousness of pit bulls." Id. at 245.
231. Alexander v. Cahill, No. 5:07-CV-117, 2007 WL 2120024 (N.D.N.Y. Jul. 23, 2007), appeal pending, No. 07-3667-CV and 07-3900-CV (2nd Cir.). As noted earlier, this discussion is limited to the New York rules restricting potentially misleading advertisements. See supra, Part IV.
sufficient to carry the state's burden on the second prong. Nevertheless, the court categorically rejected the Disciplinary Committees' assertion that "they are entitled to rely on common sense, history, and consensus alone to support the State's restrictions in the absence of other evidence, apparently because the Disciplinary Committees neither duplicated the Florida Bar's study in *Went For It* nor asked the court to take judicial notice of it. The lesson learned is that if it is properly supported with evidence, states can assert a governmental interest in restricting advertising that reflects poorly on the profession, but courts are not willing to accept mere conventional wisdom in lieu of such evidence.

CONCLUSION

Many state rule-making authorities, often bowing to illegitimate pressure from the Federal Trade Commission, now permit or at least acquiesce in quality-of-legal-services claims in the electronic media, especially television, including self-laudation, slogans, puffery, hyperbole, sensationalism, and fictionalized dramatizations, none of which are susceptible of verification and measurement, and most of which reflect poorly on the profession. At the same time, rules adopted by the Florida Supreme Court to restrict such advertising have withstood constitutional scrutiny. On the other hand, enforcement of similar rules adopted by the New York Disciplinary Committees has been enjoined on constitutional grounds. The conflicting constitutional analyses are ripe for resolution; the Supreme Court has not written on lawyer advertising in more than twenty years, and it has never written on "the special problems of advertising on the electronic broadcast media [that] will warrant special consideration" that it reserved in *Bates*.

232. *Id.* at *5 n.5. The court went on to note that Kentucky authorities have successfully relied in part on the Florida Bar's study in support of a statute that prohibited and criminalized the solicitation of accident victims by attorneys within thirty days of an accident. *Id.* at *4* (citing *Chambers v. Stengel*, 256 F.3d 397, 403-04 (6th Cir. 2001)). The *Cahill* court also cited *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir. 2004), which found that "newspaper articles documenting solicitation problems related to chiropractors, declarations of solicited individuals, and articles from scientific and business publications" were adequate. *Id.* at *5.

233. *Id.* at *5 n.5.

As this is written, Cahill is the only lawyer advertising case in the appellate pipeline that has certiorari potential. Cahill presents a head-on collision between the Central Hudson premise that commercial speech enjoys some First Amendment protection and the still-unanswered question in Bates—whether lawyers' quality-of-legal-services claims may be so likely to be misleading as to permit restriction.235 If so, what special considerations are warranted because of the "special problems of advertising on the electronic broadcast media?"236

The Court did not take a wrong turn with Bates; lawyer advertising that is susceptible of measurement or verification is at once useful to the consuming public and consistent with true professionalism. The Court's tacit assent to the Iowa Supreme Court's decision in Humphrey II is some precedent for acknowledging the distinction between objective and verifiable written advertising and self-laudatory advertising on television.237 But the Court is in grave danger of taking a wrong turn if it does not allow States to limit lawyer advertising to claims that are susceptible of measurement or verification with special considerations for electronic advertising.

Relying on its existing jurisprudence, the Court should draw the line of permissible lawyer advertising for states that desire to maintain professionalism and dignity in our learned profession, at measurable and objectively verifiable claims in the media. Above all, the Court should not forget that "when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions."238 Thirty-five years of experience of self-laudation, slogans, puffery, hyperbole, sensationalism, and fictionalized dramatizations have proven that such advertising is, indeed, subject to abuse. For a learned profession in which membership "is a privilege burdened with conditions,"239 including universally accepted conditions that already limit members' First Amendment rights, restricting lawyer advertising to claims that are measurable and objectively verifiable does not seem at all unreasonable.

235. Id. at 383-84.
236. Id. at 384.
237. See supra, text accompanying notes 88-90.