07-3677-CV;07-3900-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

James L. Alexander,
Alexander & Catalano LLC,
Public Citizen, Inc.,

Plaintiffs-Appellees-Cross-Appellants,

-against-

Thomas J. Cahill, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department, Diana Maxfield Kearse, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts, Gary L. Casella, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District, Rita E. Adler, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District, Mark S. Ochs, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third Department, Anthony J. Gigliotti, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District, Daniel Drake, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial District, and Vincent L. Scarsella, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eighth Judicial District,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES
(In Reply on Defendants' Appeal & In Response on Plaintiffs-Appellees-Cross-Appellants' Cross-Appeal)

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MISCELLANEOUS

PRELIMINARY STATEMENT

Defendants, the chief counsels of attorney disciplinary committees in each of New York's four Judicial Departments, submit this brief in response to plaintiffs' cross-appeal from a judgment of the United States District Court for the Northern District (Scullin, J.). Plaintiffs James L. Alexander, Alexander and Catalano, LLC, and Public Citizen, Inc. challenge that portion of the judgment that upheld New York's rule prohibiting attorneys from soliciting accident victims and their families or representatives within a 30-day period following the accident. The period is reduced to 15 days if the law requires a filing within 30 days to protect the victim's or his or her estate's potential personal injury or wrongful death claim arising out of the accident.[1] The court found the rule to be constitutional under the First Amendment. The court observed that New York's rule was similar to one the United States Supreme Court upheld in Florida Bar v. Went For It, 515 U.S. 618 (1995). Applying the Court's reasoning in that case, the court below held that the New York rule was constitutional under the test set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Commn. of N.Y., 447 U.S. 557 (1980). The court also noted that New York's rule was substantially similar to a solicitation ban advocated by the New York State Bar

[1] Plaintiffs have abandoned their appeal from the portion of the district court's judgment that upheld restrictions on internet domain names, 22 N.Y.C.R.R. 1200.7(e). Plaintiffs have also abandoned their claim that the rules unconstitutionally restrict non-commercial speech (Plaintiffs' Br. at 15 n 1).

Association and to a federal rule imposing a limited attorney solicitation ban for the benefit of airline disaster victims.

Defendants also submit this brief as their reply brief in support of their appeal from the portion of the same judgment that declared unconstitutional New York's newly-adopted attorney advertising rules prohibiting attorneys from using testimonials from clients relating to pending matters, portraying judges or fictitious law firms, using attention-getting techniques unrelated to attorney competence, and using nicknames (such as "the heavy hitters") that imply an ability to get results.

QUESTION PRESENTED BY PLAINTIFFS' CROSS-APPEAL[2]

Whether New York met its burden under the standards set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Commn. of N.Y., 447 U.S. 557 (1980), of justifying its rule requiring attorneys to wait 30 days after an accident, or 15 days if the law requires a filing to be made within 30 days, before soliciting the accident victims, their family members, or legal representatives to retain them for a potential personal injury or wrongful death claim related to the accident.

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[2] The questions presented by our appeal, as well as the relevant statutes and regulations and the statement of the case pertaining to our appeal, are set forth in our main brief at pages 2-14.

STATUTES AND REGULATIONS INVOLVED

An attorney "advertisement" is defined by 22 N.Y.C.R.R. § 1200.1(k) as

> any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

An attorney "solicitation" is defined by 22 N.Y.C.R.R. § 1200.8(b) as

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

22 N.Y.C.R.R. § 1200.8(g) provides that

> [n]o solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

22 N.Y.C.R.R. § 1200.41-a(a) further provides that

> In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication

> shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

STATEMENT OF THE CASE

1. Statement of Facts Relating to the Limited Solicitation Ban

a. The New York State Bar Association Task Force on Lawyer Advertising Recommended a 15-day Ban on Attorney Solicitation of Accident Victims and Their Families

Defendants discussed the creation, work and various recommendations of the New York State Bar Association Task Force on Lawyer Advertising (the "Task Force") on pages 4-6 of their main brief. As relevant to plaintiffs' cross-appeal, the Task Force recommended that the Appellate Divisions adopt a rule imposing "a black-out period of fifteen days before permitting attorneys to mail solicitations to victims or their families following a personal injury or wrongful death" (A64, A141-A142). In its report, the Task Force noted that a 30-day ban on targeted direct mail solicitation of accident victims had already been upheld by

the Supreme Court in Went For It (A72-A74, A97). The Task Force agreed with the reasoning of the Supreme Court and stated that the 15-day "cooling off period would be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence, and would not preclude victims from seeking legal advice on their own initiative" (A116-A117).

The Task Force further observed that eight states, not including New York, have enacted similar limited bans on attorney solicitation since Went For It, and that none of these rules have been found to be unconstitutional for reasons that would concern New York (A74-A75 n. 14). The Task Force additionally discussed the federal government's promulgation of the "Aviation Disaster Family Assistance Act," which prohibits attorneys or insurance companies from making unsolicited communications concerning a potential personal injury or wrongful death claim to airline accident victims or their families within 45 days after the accident (A115-A116). 49 U.S.C. § 1136(g)(2).

b. The Appellate Divisions Adopted the Limited Anti-Solicitation Ban

After considering the Task Force's proposed limited attorney solicitation ban, the Appellate Divisions drafted a similar rule and subsequently allowed for a five-month public comment period, during which they accepted and considered feedback on the limited anti-solicitation ban. The Appellate Divisions adopted the new

rules, including the limited anti-solicitation ban, on January 4, 2007, effective on February 1, 2007 (A47). The final version of the anti-solicitation rule provides for a 30-day ban on attorney "solicitations," defined as advertisements "directed to, or targeted at, a specific group of recipients, or their families or legal representatives, the primary purpose of which is the retention of the lawyer . . . and a significant motive for which is pecuniary gain." 22 N.Y.C.R.R. §§ 1200.8(b), (g). The ban is shortened to 15 days if a legal filing related to a potential personal injury or wrongful death claim must be made within 30 days. Id. The rules further provide that "no unsolicited communication shall be made" to an accident victim, family member or representative by an attorney seeking to represent that person in potential litigation within a 30-day period following the accident, or 15 days if a filing is required within the former time span. 22 N.Y.C.R.R. § 1200.41-a(a).

2. The Action

a. Plaintiffs' Complaint

Plaintiffs' complaint sought invalidation of the limited anti-solicitation ban. The complaint primarily alleged that the rules would improperly prevent citizens from receiving information about their legal rights in the days following an accident (A28-A29).

b. Proceedings Below

Plaintiffs moved for a preliminary injunction and defendants cross-moved to dismiss the complaint for, among other things, lack of standing (A7-A8). The district court reserved decision on plaintiffs' motion and denied defendants' cross-motion in an order entered April 23, 2007 (A32-A39). Following the denial of their motion to dismiss, defendants filed an answer (A41-A43). Thereafter, the parties stipulated to a set of facts and exhibits that became the basis for their competing summary judgment motions (A11, A45-A49).

3. The District Court Decision

The district court denied plaintiffs' motion for summary judgment and granted defendants' cross-motion as to 22 N.Y.C.R.R. §§ 1200.8(g) and 1200.41-a. The court analyzed the limited attorney solicitation ban under the "four-part analysis" that the Supreme Court first applied to commercial speech in Central Hudson Gas & Elec. Corp. v. Public Serv. Commn. of N.Y., 447 U.S. 557, 566 (1980):

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted,

> and [4] whether it is not more extensive than is necessary to serve that interest.

(bracketed numbers added.)

After a lengthy analysis, the district court concluded that New York's limited anti-solicitation ban satisfied each of the prongs in Central Hudson (A227-A256). Alexander v. Cahill, 2007 U.S. Dist. LEXIS 53602, **31-37 (N.D.N.Y. 2007). The court agreed with defendants that the solicitation ban materially advanced a substantial interest by means no more extensive than necessary (A248-A252). Thus, the court held that sections 1200.8(g) and 1200.41-a were constitutional under the First Amendment. Plaintiffs appeal (A264-A265).

SUMMARY OF ARGUMENT

New York's rule prohibiting attorneys from soliciting accident victims, their families or representatives within 30 days (or 15 days, if a filing must be made within the former period) is constitutional under the First Amendment. The district court, applying the test for commercial speech set forth in Central Hudson, correctly found that the rule was substantially similar to the rule upheld by the Supreme Court in Went For It and, further, was supported by the Task Force report and a federal statute imposing a more restrictive ban for the benefit of airline accident victims. Based on these findings, the court properly held that the rule materially advanced New York's substantial interest in

protecting client privacy and in maintaining respect for the legal profession, and did so by means no more extensive than necessary. Accordingly, the district court's grant of summary judgment to defendants' upholding the limited attorney solicitation ban should be affirmed.

Additionally, New York's rules prohibiting attorneys from advertising by using testimonials from clients relating to pending matters, portraying judges or fictitious law firms, using attention-getting techniques unrelated to attorney competence, and using nicknames (such as "the heavy hitters") that imply an ability to get results, are constitutional because each rule narrowly targets attorney advertising that is misleading, unverifiable, noninformational or otherwise irrelevant to providing the public with the relevant, factual information enabling it rationally and intelligently to choose competent and appropriate counsel. Thus, the attorney advertisements prohibited by these rules are not entitled to First Amendment protection under the first prong of Central Hudson. But even if this Court concludes that these attorney advertisements are protected by the First Amendment, New York's attorney advertising restrictions are constitutional under the remaining prongs of the Central Hudson test. The rules directly and materially advance a substantial governmental interest by means that are no more extensive than necessary. For the reasons stated below, the district court's judgment should be

reversed, the rules reinstated, and the permanent injunction granted plaintiffs vacated.

POINT I

(In response to plaintiff's cross-appeal)

NEW YORK'S LIMITED MORATORIUM ON ATTORNEY SOLICITATION OF ACCIDENT VICTIMS AND THEIR FAMILIES AND REPRESENTATIVES IS CONSTITUTIONAL UNDER CENTRAL HUDSON

The district court, applying the Central Hudson standard, correctly held that New York's temporary ban on attorney solicitation of accident victims and their families or representatives does not offend the First Amendment.[3] As the court

[3] Plaintiffs do not challenge the district court's construction of 22 N.Y.C.R.R. § 1200.41-a, banning "unsolicited communication[s]" to accident victims for 30 days following the accident (Br. at 57 n 11). Plaintiffs argued in the district court that the rule's failure to define "communication" would unconstitutionally extend the restriction to noncommercial speech. The district court properly limited the construction of section 1200.41-a to for-profit solicitations that comport with the rules' definitions of "solicitation" and "advertisement" in sections 1200.1(k) and 1200.8(b). See Virginia v. American Booksellers Assn., 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld"); Field Day, LLC v. County of Suffolk, 463 F.3d 167, 177 (2d Cir. 2006) ("'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems,' we may 'construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the Legislature]'") (citation omitted). Plaintiffs' brief analyzes together the validity of the two anti-solicitation regulations, 22 N.Y.C.R.R. §§ 1200.8(g) and 1200.41-a (Br. at 57 n. 11).

observed, the constitutionality of limited bans on attorney solicitations has largely been settled by the Supreme Court's decision in Went For It. In that case, the Supreme Court upheld a Florida rule imposing a 30-day ban on targeted direct-mail solicitation by attorneys of accident victims. The Court determined under Central Hudson that Florida's temporary ban materially advanced its substantial interests in regulating the legal profession and protecting its clients' privacy, and did so in a manner that was no more extensive than necessary.

The rule upheld in Went For It is substantially similar to the New York rule. Although New York's rule is more broadly applicable to all attorney solicitations, regardless of the medium used, it mirrors the Florida rule in four important respects. First, New York's rule specifies that the ban applies only to solicitations of accident victims, their families and representatives regarding the accident. Second, it limits the ban to 30 days following the accident.[4] Third, it narrowly defines solicitation as an advertisement directed to or targeted at a specific group of recipients for the purpose of obtaining employment for pecuniary gain. Finally, it leaves open ample alternate channels of communication for attorneys by, among other things, permitting them

[4] Unlike the Florida rule, New York reduces the ban to 15 days if the accident victim must make a filing within the 30-day period. Compare 22 N.Y.C.R.R. § 1200.8(g) with Fla. Bar Reg. R. 4-7.4(b)(1)(A).

to advertise their expertise on the Internet, radio, television and the print media, so long as they refrain from targeting accident victims directly. Thus, the district court correctly concluded that Went For It, which has been followed by at least 8 other states in the 13 years since it was decided, is dispositive of plaintiffs' First Amendment challenge.

The district court also properly relied on the analysis and recommendations of the Task Force, which specifically discussed the reasoning and impact of Went For It and recommended that New York adopt a 15-day anti-solicitation ban (A64, A72-A75, A97, A115-A117, A138, A141-A142). Finally, both the court and the Task Force observed that Congress had already enacted a more rigorous attorney solicitation ban more than a decade ago, preventing attorneys from making "unsolicited communications concerning a potential action for personal injury or wrongful death" within 45 days of an airline disaster (A115-A116, A250-A251). 49 U.S.C. § 1136(g)(2). In light of all of these considerations, and for the additional reasons discussed below, New York's limited ban on attorney solicitations of accident victims is constitutional under Central Hudson.

A. New York's Oversight of Attorney Communications Aimed at Prospective Clients and Desire to Protect Clients' Privacy Is a Substantial Interest Supporting the Limited Ban on Attorney Solicitations of Accident Victims.

The district court properly concluded that New York has a substantial interest in temporarily prohibiting attorneys from soliciting accident victims. As the court found, the limited ban promotes the State's interest "in protecting the privacy of its citizens and guarding against the indignity and offense of being solicited for legal services immediately following a personal injury or wrongful death event" (A249). This interest is identical to the one identified by the Supreme Court in Went For It, which had "little trouble crediting [that] interest as substantial" in light of Supreme Court precedent settling this matter. Id. at 625 ("Our precedents also leave no room for doubt that the 'protection of potential clients' privacy is a substantial state interest'") (quoting Edenfield v. Fane, 507 U.S. 761, 769 (1993)). The district court further noted that the Task Force concurred with the reasoning in Went For It, stating that a temporary ban on attorney solicitation of accident victims would "be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence, and would not preclude victims from seeking legal advice on their own initiative" (A116-A117, A249).

Plaintiffs' assertion that the State's established interest in protecting client privacy is somehow reduced to "an illegitimate and paternalistic interest in protecting consumers from being offended" because the New York rule applies to all advertising media (Br. at 59) is meritless. By expanding the rule to cover internet, radio and television advertisements, New York has recognized that potential clients are equally, if not more susceptible, to privacy invasions from advertising on these more widespread outlets. No matter what form the solicitation takes, the rule is consistent with Went For It in that it limits the ban to advertisements that are "directed to, or targeted at" a narrowly defined class of recipients and that "relat[e] to a specific incident." 22 N.Y.C.R.R. § 1200.8(b). Thus, paternalism and bad taste play no role in determining whether the solicitation violates the rule. Defendants concur with amicus New York State Bar Association ("NYSBA") that there is no meaningful distinction between an advertisement sent to accident victims through e-mail or regular mail because both constitute an "unwarranted intrusion of citizens by direct mail, direct email, and direct advertising in the locality where the disaster has occurred" (NYSBA Br. at 11). Accordingly, New York's limited ban on attorney solicitation of accident victims is supported by a substantial interest and satisfies the second prong of Central Hudson.

B. New York Demonstrated That the Limited Anti-Solicitation Ban Materially Advances the State's Interest in Protecting Clients from Unwarranted Invasions of Privacy.

The district court properly held that New York's Limited ban on attorney solicitation materially advanced its substantial interests in regulating the profession and protecting client privacy. The court noted that the rule had record support because the Task Force discussed its own proposed 15-day ban, based on Went For It and the adoption of similar state rules (A250-A251). The court also found persuasive the "emerging consensus among authorities," developing in the 13 years since Went For It, that "some form of moratorium" on attorney solicitations in the wake of accidents was desirable (A251). The court further observed that Congress's 1996 enactment of a 45-day moratorium on attorney solicitations of airline disaster victims lent further support to New York's less restrictive rule (A250-A251).

The court's analysis was proper and should not be disturbed. The Task Force Report, the Supreme Court's decision in Went For It and the federal anti-solicitation statute were sufficient to demonstrate that New York's limited anti-solicitation ban did not arise from "mere speculation or conjecture;" rather, this evidence established that the harm to clients and damage to the legal profession's reputation that unwelcome attorney solicitation within days of an accident inflict "are real and that its restriction will

in fact alleviate them to a material degree." Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995), quoting Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); accord Went For It, 515 U.S. at 626.

In light of the similarities between the New York rule and the Florida rule upheld in Went For It, it was not necessary for defendants to amass empirical evidence to establish what the Supreme Court and others in this country have already recognized: limited bans on attorney solicitation of accident victims do not offend the First Amendment. Under the circumstances, it was therefore sufficient for defendants to rely on the Task Force Report, 12 years of jurisprudence favoring these types of moratoria, and notions of common sense. See Went For It, 515 U.S. at 628 (history, consensus and "simple common sense" may provide a sufficient basis for supporting a restriction on speech) (citation omitted); accord Falanga v. State Bar of Georgia, 150 F.3d 1333, 1340-41 (11th Cir. 1998), cert. denied, 526 U.S. 1087 (1999) (State Bar's reliance on Supreme Court precedent upholding blanket ban on attorney in-person solicitation may have been sufficient "in and of itself" to justify the rule without the need for empirical evidence); Moore v. Morales, 63 F.3d 358, 361-62 (5th Cir. 1995), cert. denied, 516 U.S. 1115 (1996) (relying largely on Went For It in upholding rule prohibiting attorneys, physicians and other professionals from soliciting accident victims within 30 days following the accident); see also Sciarrino v. City of Key West,

Fla., 83 F.3d 364, 369 n. 4 (11th Cir. 1996), cert. denied, 519 U.S. 1092 (1997) (observing that the Supreme Court has not required extensive examination of available evidence to uphold speech restrictions "where the regulatory scheme is self-evidently destined to succeed or fail").

Plaintiffs' arguments to the contrary are without merit. New York's rule is not so different from the Florida rule upheld in Went For It that it constitutes "an entirely different and much broader rule" (Br. at 60). Indeed, the only material differences between the rules are that (1) the New York rule applies to all advertising targeted at the victims of specific accidents, rather than just regular mail; and (2) New York's rule provides for a shorter 15-day ban where a filing must be made within the 30-day period. The second distinction obviously favors New York's rule. As to the first, the fact that New York has targeted solicitation by means in addition to direct mail does not make New York's rule unconstitutional. On the contrary, making the rule applicable to other forms of attorney solicitation makes it more effective and thus materially advances New York's important interests. As the district court correctly observed, Central Hudson does not require a perfect fit between the rule's means and ends so long as they are reasonably proportionate. See Board of Trustee of State University of N.Y. v. Fox, 492 U.S. 469, 480 (1989); In Re R.M.J., 455 U.S. 191, 203 (1982). Inasmuch as New York's limited ban on attorney

solicitation of accident victims satisfies this requirement, it clears the third prong of Central Hudson.

C. New York Established That the Limited Solicitation Ban Is Not More Extensive than Necessary to Serve its Interests.

The district court also correctly determined that New York's limited ban on attorney solicitation of accident victims is not more extensive than necessary. In Went For It, the Supreme Court found that this final prong of the Central Hudson test is satisfied if the attorney solicitation ban permits "ample alternative channels for receipt of information about the availability of legal representation" while the ban is in effect. Went For It, 515 U.S. at 634. As in that case, those alternative channels remain open here so long as the attorney does not target a solicitation at the victim of a specific accident. See 22 N.Y.C.R.R. §§ 1200.8(g) (prohibiting only solicitation "relating to a specific incident"; 1200.41-a(a) (prohibiting only solicitation of representation "arising out of the incident"). For example, New York's rule does not prevent attorneys from generally advertising their expertise in personal injury and wrongful death lawsuits on the internet, television, radio, newspapers, billboards, direct mail or other media. Additionally, the rule does not prevent the public from contacting the attorneys about these matters.

In Went For It, the Supreme Court further determined that Florida's attorney solicitation ban was narrowly drawn because it was limited to 30 days. See id. at 633-34; compare Speaks v. Kruse, 445 F.3d 396, 401 (5th Cir. 2006) (declaring Louisiana statute imposing solicitation ban on chiropractors to be unconstitutional under the First Amendment because the statute contained no time limit for the ban). New York's rule is similarly limited and, indeed, provides a shorter duration than the Florida rule and the federal Aviation Disaster Family Assistance Act. Compare 22 N.Y.C.R.R. §§ 1200.8(g), 1200.41-a, with Fla. Bar Reg. R. 4-7.4(b)(1)(A), and 49 U.S.C. § 1136(g)(2).

Plaintiffs' argument that the rule renders accident victims helpless because it relegates them to "a random search through the phone book" (Br. at 65) is meritless. The rule does not limit the availability of competent and experienced counsel to clients who seek their services in the wake of an accident; it merely requires that attorneys who would aggressively target specific victims in the days following an accident hold off until the end of a short 15 or 30-day period. Accordingly, New York's limited attorney solicitation ban fully satisfies the Central Hudson test and should be upheld.

POINT II

(In reply on defendants' appeal)

NEW YORK MAY CONSTITUTIONALLY REQUIRE THAT ATTORNEY ADVERTISEMENTS PRIMARILY CONSIST OF INFORMATION THAT IS CAPABLE OF VERIFICATION AND RELEVANT TO THE INFORMED SELECTION OF COUNSEL

A. The First Amendment Does Not Protect Attorney Advertising That Lacks Relevant Information and Does Not Assist the Public in Rationally and Intelligently Selecting Competent Counsel.

On pages 16 through 29 of our main brief, we demonstrated that (1) New York's rules reach only attorney advertising material that is irrelevant, unverifiable and of no informational value, and (2) such attorney advertising is not protected commercial speech and therefore does not require application of prongs 2 through 4 of the Central Hudson standard. The essence of plaintiffs' argument in response is that Supreme Court commercial speech jurisprudence affords full Central Hudson protection to all lawful attorney advertising material, regardless of whether it actually helps the public rationally and intelligently to select counsel. In plaintiffs' view, there is no constitutional difference between hawking beer, see Bad Frog Brewery v. New York State Liq. Auth., 134 F.3d 87 (2d Cir. 1998), and pizza, see Pizza Hut, Inc. v. Papa John's Int'l., 227 F.3d 489 (5th Cir. 2000), cert. denied, 532 U.S. 920 (2001), on the one hand, and legal services, on the other (Br. at 24-26, 28, 38). The Supreme Court's attorney advertising decisions do not support this view.

"[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626, 651 (1985). In the handful of Supreme Court cases reviewing attorney advertising restrictions under the First Amendment, the Court has defined the "value" of attorney advertising by the degree to which it enables the lay public to evaluate the advertising attorney's competence and experience. Critically, in every Supreme Court case relied on by plaintiffs, Br. at 23, 25-26, 35, the court reviewed attorney advertising matter that was indisputably accurate, nonmisleading, easily verifiable and relevant to the attorney's services. See Peel v. Attorney Registration & Disciplinary Commn. of Ill., 496 U.S. 91, 108 (1990) (the extent to which attorney advertising material may constitutionally be regulated is guided "specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information"). Based on its finding that the advertisements at issue clearly possessed these qualities, the Court held in each case that they were entitled to First Amendment protection.

The present case is very different because the Supreme Court has never declared, even in dicta, that the irrelevant, unverifiable and noninformational attorney advertising proscribed

by New York's rules is entitled to First Amendment protection. Plaintiffs' selective quoting of Supreme Court cases in their brief ignores the factual context in which these cases came to the Court. See Houchins v. KQED, Inc., 438 U.S. 1, 10-11 (1978) (Supreme Court precedent addressing the reach of the First Amendment must be viewed in the context of the facts presented).

Plaintiffs generally acknowledge that the only advertising material that falls within the reach of New York's rules is comprised merely of jingles, special effects, slogans and other "silly" attention-getting techniques that provide no information relevant to a rational evaluation of the competence and experience of the attorney (Br. at 36-37). Plaintiffs nonetheless insist that their advertisements are valuable to consumers because they package information "in easy-to-understand form . . . attract viewer interest . . . give emphasis . . . and make information more memorable" (Br. at 36). In the attorney advertising context, however, none of these purported benefits render the advertisements worthy of constitutional protection. Contrary to plaintiffs' argument, no Supreme Court opinion has ever held, in an attorney advertising context, that this type of superficial gimmickry is protected commercial speech. Plaintiffs' explanation that their advertisements are necessary to attract the attention of "[c]onsumers of moderate means who may not be sophisticated consumers of legal services," who rely primarily on the gimmickry,

not on truthful or relevant information about the attorney's abilities (Br. at 36-37; A28), is at odds with the reasoning of the Supreme Court's advertising decisions, which emphasize that protected attorney advertising speech is that which provides the public with relevant, factual information it can use to choose an attorney.

As explained in defendants' main brief (Defendants' Br. at 22-25), the only Supreme Court decision to address directly, albeit in summary fashion, the propriety of restrictions on irrelevant, nonfactual attorney advertising material, was its dismissal of the plaintiffs' second appeal in Committee on Professional Ethics & Conduct of the Iowa State Bar Assn. v. Humphrey, 355 N.W.2d 565 (Iowa 1984), vacated and remanded, 472 U.S. 1004 (1985), after remand, 377 N.W.2d 643 (Iowa 1985), appeal dismissed for want of substantial federal question, 475 U.S. 1114 (1986). The Supreme Court's dismissal of the Humphrey appeal for want of a substantial federal question is controlling here. See Hicks v. Miranda, 422 U.S. 332, 344 (1975); see also McCarthy v. Philadelphia Civil Serv. Comm'n., 424 U.S. 645, 646 (1976). The issues that the Supreme Court deemed insubstantial in Humphrey are strikingly similar, if not identical, to the one presented here: whether a state constitutionally may require that attorney advertisements be relevant, verifiable and helpful to the intelligent and informed selection of counsel. See Wright v. Lane Co. Dist. Ct., 647 F.2d

940, 941 (9th Cir. 1981) (the "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases") (citation omitted).

Plaintiffs' contention that Humphrey "cannot mean anything today" (Br. at 31) should be rejected. No Supreme Court decision issued after Humphrey, which followed the Central Hudson test by six years, has directly addressed the issues raised in those appeals. Moreover, there have no been subsequent doctrinal refinements in the Court's attorney advertising jurisprudence that would permit this Court to hold that Humphrey is no longer the law. See Montgomery v. Carr, 101 F.3d 1117, 1129 (6th Cir. 1996) ("We lack the power to hold that a Supreme Court case has been overruled by implication."). Even if there were anything in the Supreme Court's later attorney advertising decisions to cast doubt on the validity of Humphrey (and plaintiffs identify nothing that does) this Court should hesitate to enunciate a rule that undermines it in the absence of a clear directive from the Supreme Court. See Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Plaintiffs' reliance (Br. at 17, 24-26, 34) on this Court's decision in Bad Frog Brewery is misplaced. In that case, this Court reviewed a First Amendment challenge to a determination by the New York State Liquor Authority disapproving a beer label that depicted a cartoon frog apparently making an obscene gesture. The Court determined that the label was protected speech under Central Hudson because, in identifying the beer to consumers, it conveyed "minimal information" sufficient to propose a commercial transaction. Id. at 96-97.

Bad Frog does not govern the outcome here. First, Bad Frog was not an attorney advertising case. The Supreme Court has recognized that attorney advertising, where important rights may be riding on the selection of counsel, may be deserving of less constitutional protection than advertising of other products or services that is subject only to the morals of the marketplace. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977); see Edenfield v. Fane, 507 U.S. 761, 775 (1993) (invalidating a solicitation ban for accountants because "[u]nlike a lawyer, a [Certified Public Accountant] is not a 'professional trained in the art of persuasion'"); see also Gentile v. State Bar of Nev., 501 U.S. 1030, 1073 (1991) ("Even in an area far from the

courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses").

Second, the parties in Bad Frog agreed that the label accurately identified the product and, indeed, communicated "no information beyond the source of the product." Bad Frog, 134 F.3d at 96-97. Thus, it was protected commercial speech because it proposed a commercial transaction without containing inaccurate or misleading material that would have denied it the protection of the First Amendment under the first prong of the Central Hudson test.

Here, irrelevant, unverifiable and non-informational attorney advertisements and the attendant danger that they will mislead or deprive consumers of the information they need rationally and intelligently to choose competent counsel goes to the heart of defendants' appeal. New York's advertising rules are not concerned merely with labels that do no more than identify an attorney or his or her firm, but rather with a variety of advertising techniques involving irrelevant, exaggerated and unverifiable representations in order to attract customers. Thus, Bad Frog is distinguishable on its facts and does not prevent this Court from holding that irrelevant and unverifiable attorney advertising falls outside the reach of Central Hudson. See In Re R.M.J., 455 U.S. 191, 204 n. 15

(1982) ("[T]he Central Hudson formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public").

Additionally, plaintiffs' citations to federal Court of Appeals cases interpreting section 43(a) of the Lanham Act (Plaintiffs' Br. at 28-29, 38), do not support their arguments because that statute is irrelevant to the First Amendment issues presented here. The Lanham Act is a trademark infringement statute that was enacted to "protect persons engaged in commerce against false advertising and unfair competition." American Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390 (8th Cir. 2004) (citation omitted). Section 43(a) of that statute imposes civil liability on persons or businesses who make false or misleading descriptions or representations of fact in connection with commercial advertising. 15 U.S.C. § 1125(a). Unlike the Central Hudson test, which applies exclusively to commercial speech, this Court has observed that "[t]he Lanham Act has . . . been applied to defendants furnishing a wide variety of non-commercial public and civic benefits." United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 90 (2d Cir. 1997), cert. denied, 523 U.S. 1076 (1998).

Moreover, although puffery, defined in part as "an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying," is not actionable under the Lanham Act, see Pizza Hut, 227 F.3d at 497, this is a markedly different question than whether such representations are entitled to constitutional protection under the Central Hudson test. See, e.g., Davis v. Walt Disney Co., 430 F.3d 901, 903 (8th Cir. 2005), cert. denied, 547 U.S. 1159 (2006) (noting that the question of whether, under the Lanham Act, a trademark is likely to confuse the public as to the source or sponsorship of a company's goods or services must be considered separately from the issue of whether that trademark is protected by the First Amendment). Indeed, the Supreme Court has never held that puffery and other types of irrelevant attorney advertising techniques may not constitutionally be regulated. Many state attorney advertising schemes and the lower courts that have interpreted them, cited in our main brief on pages 25-29, have declared that attorney advertisements may be regulated to limit or exclude material, such as puffery, that provides no useful information to consumers. Accordingly, the Lanham Act's treatment of puffery is not relevant to the First Amendment questions regarding attorney advertising presented here.

Thus, far from creating an "arbitrary and unworkable system" that "eviscerates" the Central Hudson standard (Plaintiffs' Br. at

18), New York's attorney advertising rules are consistent with Supreme Court attorney advertising jurisprudence. This Court should therefore find that the rules are constitutional because they do not reach protected commercial speech. Moreover, as discussed below, even if irrelevant, unverifiable and non-factual attorney advertising is protected speech under Central Hudson's first prong, the New York rules satisfy its remaining three prongs.

B. Even If Attorney Advertising Targeted by New York's Attorney Advertising Rules Is Protected by the First Amendment, the Rules Are Constitutional Because They Satisfy the Remaining Three Prongs under Central Hudson.

Defendants' main brief at pages 30-42 addresses in detail how New York's attorney advertising rules satisfy each remaining prong of Central Hudson, should this Court find that the New York rules affect protected commercial speech. We add only the following brief responses to plaintiffs' arguments on these points.

1. New York's Necessary Oversight of Attorney Communications Aimed at Prospective Clients Is a Substantial Interest Supporting the New Rules.

Defendants explained in their main brief on page 32 that New York has a substantial interest in ensuring that attorney advertising is truthful, nondeceptive and relevant to the important factors a potential client must consider when choosing counsel.

The district court agreed (A237-A238), and its conclusion is fully supported by Supreme Court and other precedent. Plaintiffs' arguments that (1) defendants are foreclosed from asserting a secondary interest in maintaining professionalism and respect for the bar, and (2) that this interest has not been recognized by the Supreme Court (Br. at 42-45) are both meritless. As noted by the Task Force (A55-A56), New York's interest in preventing the dissemination of misleading attorney advertising is inextricably linked to its overarching interest in protecting the legal profession's image and reputation. Moreover, the Supreme Court in Went For It expressly found that the interest in protecting clients from unwelcome solicitations was related to Florida's "substantial interest . . . in preventing the erosion of confidence in the [legal] profession." Id. at 635. Defendants' reliance on Went For It, Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, (1975), and Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 460 (1978), sufficiently identified this state interest as supporting the New York rules. Accordingly, defendants have met the second prong of the Central Hudson test.

2. New York Demonstrated That the Rules Materially Advance the State's Interest in Assuring That Attorney Advertising Is Not Misleading.

As explained on pages 33-40 of our main brief, defendants have satisfied the third prong of the Central Hudson test because the rules in section 1200.6(c) materially advance the substantial interests that led New York to adopt the rules. Plaintiffs' complaint (Br. at 45-46) that defendants should be foreclosed from citing the Task Force Report because they did not do so before the district court should be rejected. Defendants may rely on the Task Force Report to support New York's advertising rules because the Appellate Divisions indisputably considered them in formulating the rules. (A219-A220, A223, A225 ["Attachment 2": Comments of former Fourth Department Presiding Justice Eugene F. Pigott at Aug. 17, 2006 forum held by Monroe County Bar Assn.])). Contrary to plaintiffs' assertions, the findings of the Task Force, coupled with defendants' showing that the rules are reasonable extensions of prior disciplinary rules that have long been in effect in New York, are sufficient materially to advance New York's stated interests in regulating attorney advertising.

With respect to plaintiffs' specific arguments (Br. at 53-54) attacking New York's rule prohibiting clients from giving endorsements to attorneys with respect to pending matters, defendants note that these arguments have been raised for the first time on appeal. We observe, however, that neither plaintiffs'

complaint nor their memoranda of law submitted in support of their summary judgment motion specifically address how New York's limited proscription of client testimonials is unconstitutional under the First Amendment.

In any event, plaintiffs' new assertion (Br. at 54) that the rule governing client testimonials should be stricken as underinclusive because clients "could still . . . be pressured into giving a testimonial related to a past case, or even . . . about the lawyer's quality," is unavailing. "The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further." Mainstream Mktg. Servs. v. FTC, 358 F.3d 1228, 1238-39 (10th Cir.), cert. denied, 543 U.S. 812 (2004). Here, New York's rule effectively furthers its interest in protecting the client-attorney relationship because it significantly eliminates the danger that clients will feel pressured into providing an endorsement regarding a matter that has not yet concluded. That there might still exist situations where an unscrupulous attorney may succeed in exerting such pressure with respect to past cases does not render this rule irrational. Thus, plaintiffs' underinclusiveness argument fails. See United States v. Edge Broadcasting Co., 509 U.S. 418, 434

(1993) (the First Amendment does not "require that the Government make progress on every front before it can make progress on any front").

3. The Rules Are Not More Extensive than Necessary to Serve New York's Interests.

New York has satisfied the fourth and final prong of the Central Hudson test by demonstrating that the challenged rules in section 1200.6(c) are narrowly drawn (Defendants' Br. at 41-42). Contrary to plaintiffs' arguments (Br. at 54-55), sections 1200.6(b), (d) and (e) qualify the restrictions by permitting attorneys to advertise on a wide variety of topics, including by the use of client testimonials, with a limited exception, and statements about the quality of the services offered. These rules demonstrate that the Appellate Divisions were cognizant of Supreme Court jurisprudence cautioning that states must not prevent attorneys from making fact-based, verifiable and relevant communications regarding their services. By their plain terms, the rules do not restrict these types of communications. Thus, plaintiffs' argument (Br. at 55) that the rules are "vastly overbroad" should be rejected.[5]

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[5] To the extent that plaintiffs have invoked the overbreadth doctrine here, the Supreme Court has noted that it does not apply to facial challenges to rules regulating commercial speech. See Ohralik, 436 U.S. at 462 n. 20; Bates, 433 U.S. at 380-81.

CONCLUSION

The judgment of the district court, insofar as it granted plaintiffs' motion for summary judgment as to §§ 1200.6(c)(1), (3), (5) and (7) of defendants' attorney advertising regulations, declared those provisions to be unconstitutional under the First Amendment, and enjoined their enforcement, should be reversed, and the regulations declared constitutional; the balance of the judgment, including the district court's grant of summary judgment to defendants as to §§ 1200.8(g) and 1200.41-a, declaring those provisions to be constitutional under the First Amendment, should be affirmed.

Dated: Albany, New York
April 2, 2008

Respectfully submitted,

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07-3677-CV;07-3900-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

James L. Alexander,
Alexander & Catalano LLC,
Public Citizen, Inc.,

Plaintiffs-Appellees-Cross-Appellants,

-against-

Thomas J. Cahill, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department, Diana Maxfield Kearse, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts, Gary L. Casella, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District, Rita E. Adler, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District, Mark S. Ochs, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third Department, Anthony J. Gigliotti, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District, Daniel Drake, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial District, and Vincent L. Scarsella, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eighth Judicial District,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)(7)

The undersigned attorney, Owen Demuth, hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, statement with respect to oral

argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 7,494 words.

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