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

BARBARA D. UNDERWOOD
Solicitor General

ANDREW D. BING
Deputy Solicitor General

PETER H. SCHIFF
Senior Counsel

OWEN DEMUTH
Assistant Solicitor General

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Defendants-Appellants
The Capitol
Albany, New York 12224
(518) 474-6639

Dated: November 30, 2007

of Counsel

TABLE OF CONTENTS

Table of Contents (cont'd)

ARGUMENT (cont'd) **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

Table of Authorities (cont'd)

CASES **PAGE**

Table of Authorities (cont'd)

CASES **PAGE**

UNITED STATES CONSTITUTION

FEDERAL STATUTES

STATE STATUTES

Table of Authorities (cont'd)

STATE RULES AND REGULATIONS **PAGE**

MISCELLANEOUS

Table of Authorities (cont'd)

MISCELLANEOUS **PAGE**

Table of Authorities (cont'd)

MISCELLANEOUS **PAGE**

Table of Authorities (cont'd)

MISCELLANEOUS **PAGE**

JURISDICTIONAL STATEMENT

This appeal presents the question whether New York's rules banning certain types of attorney advertising are consistent with the First Amendment to the United States Constitution. The rules at issue prohibit 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. New York concluded that this type of attorney advertising should be banned because it is unverifiable, noninformational, and irrelevant to the public's interest in receiving information enabling it intelligently to select counsel.

Plaintiffs, a New York attorney, his law firm, and a not-for-profit public interest organization, challenged these provisions and others as violative of the First Amendment, invoking the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The United States District Court for the Northern District of New York (Scullin, J.) declared these rules unconstitutional, and entered a permanent injunction prohibiting their enforcement by defendants, who are the chief or acting chief counsels of the disciplinary committees of the Supreme Court, Appellate Divisions. On August 22, 2007, defendants filed a timely appeal. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291

because defendants appeal from a final order and judgment of the district court that disposes of all parties' claims.

QUESTIONS PRESENTED

1. Whether attorney advertising lacks First Amendment protection when it is unverifiable, noninformational and irrelevant to the public's interest in receiving information that enables it to choose rationally and intelligently a competent and appropriate attorney.

2. Even if some First Amendment protection extends to such advertising, whether New York met its burden of justifying the restrictions at issue here under the standards set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Commn. of N.Y., 447 U.S. 557 (1980).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New York's Code of Professional Responsibility (former DR 2-101(D)) declares that attorney

> [a]dvertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel.

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.

22 N.Y.C.R.R. Part 1200.6(c), the newly adopted attorney advertising rules at issue in this appeal, provide, in relevant part:

> (c) An advertisement shall not:
>
> (1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending . . .
>
> (3) include 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) rely 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) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

STATEMENT OF THE CASE

1. Statement of Facts

a. The New York State Bar Association Task Force on Lawyer Advertising

The attorney advertising rules at issue here resulted from proposals made by the New York State Bar Association Task Force on Lawyer Advertising (the "Task Force"). In June 2005, then New York State Bar Association ("NYSBA") president Vincent A. Buzard created the Task Force to address "increasing concern over lawyer advertising as contributing to the lack of public understanding about lawyer marketing" (A55). The Task Force consisted of 17 New York-licensed attorneys from a variety of practice areas and backgrounds.

The Task Force observed that its mission was urgent, citing "a surge of broadcast media, billboard, [I]nternet, blogs, and other forms of electronic communications by lawyers aimed at reaching the consumers in new ways [that] have caused [the Task Force] to question whether the existing rules and procedures are adequate to meet the public interest and ensure that consumers receive high-quality legal services" (A56). NYSBA's president instructed the Task Force to evaluate New York's existing attorney advertising regulatory regime and to recommend revisions as necessary (A55).

From June through October 2005, the Task Force met regularly to discuss its mission. As part of its work, it undertook a

comprehensive examination of New York's existing attorney advertising rules and those of other states, reviewed First Amendment attorney advertising jurisprudence, and evaluated nearly 200 actual attorney advertisements that had been released through various media statewide (A58-A60, A100-A102).

The Task Force issued its final report on October 21, 2005. The Task Force identified the proliferation of false, deceptive or misleading advertisements and the lack of enforcement resources as among the biggest problems faced by the bar and the judiciary in regulating attorney advertising under the existing scheme (A59). To address these concerns, the Task Force recommended a number of rules to the Appellate Divisions. The Task Force advocated restrictions on aspects of attorney advertising that it viewed as inherently or potentially misleading, including client testimonials, the use of trade names, representations of attorney associations, and material implying that the attorney had the ability to influence a court improperly (A147-A148, A169). In explanation of proposed rule 7.1 (prohibiting lawyers or law firms from false, deceptive or misleading communications), the Task Force emphasized that attorney advertising should help the public make an informed choice of counsel:

> [a] lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be

> measured or verified are not specifically referred to in [t]his rule, such communications are prohibited to the extent that they are false, deceptive or misleading.

(A146). NYSBA's House of Delegates approved the Task Force report and the proposed rules on January 27, 2006 (A51).

b. The Appellate Division's Adoption of the New Attorney Advertising Rules

After considering the Task Force's proposed rules, the Presiding Justices of the Appellate Division ("Appellate Divisions") approved for public comment their own proposed amendments to New York's attorney advertising rules in June 2006 (A47, A223). The Appellate Divisions initially allowed a 90-day comment period but extended the period for another two months until November 2006 (A225 ["Attachment 2": Comments of former Fourth Department Presiding Justice Eugene F. Pigott at Aug. 17, 2006 forum held by Monroe County Bar Assn.]) . During this time, the Appellate Divisions accepted and considered comments from numerous governmental agencies, organizations, law firms and individual lawyers. The Appellate Divisions appointed study groups, who met with law firms and local bar associations to discuss the Task Force Report and other regulatory approaches (A225 ["Attachment 2": Comments of former Fourth Department Presiding Justice Eugene F. Pigott at Aug. 17, 2006 forum held by Monroe County Bar Assn.]). The Appellate Divisions' proposed rules were substantially amended

based on these comments (A219-A220, A225 [“Attachment 2”: Comments of former Fourth Department Presiding Justice Eugene F. Pigott at Aug. 17, 2006 forum held by Monroe County Bar Assn.])). The Appellate Divisions adopted the new rules on January 4, 2007, effective on February 1, 2007 (A47).

As relevant to this appeal, the rules prohibit attorney advertisements from containing (1) client testimonials with respect to matters that are still pending (22 N.Y.C.R.R. § 1200.6(c)(1); (2) the portrayal of a judge, a fictitious law firm, or the use of fictitious name or other advertising device that inaccurately implies that lawyers are associated together in a law firm (22 N.Y.C.R.R. § 1200.6(c)(3)); (3) techniques used to obtain attention that are clearly and intentionally irrelevant to the selection of counsel, including the depiction of lawyers possessing or displaying characteristics that are clearly unrelated to legal competence (22 N.Y.C.R.R. § 1200.6(c)(5)); and (4) the use of nicknames, monickers, mottos or trade names that imply an ability to obtain results (22 N.Y.C.R.R. § 1200.6(c)(7)).

Despite these narrow new restrictions on attorney advertising, New York permits attorneys to include substantial, truthful and factual information in their advertisements. See 22 N.Y.C.R.R. § 1200.6(b) (including education, qualifications, honors, bar memberships, names of clients (who have consented in writing), fees, etc.). In addition, the new rules explicitly define a wide

range of permissible attorney advertising content, including statements that are reasonably likely to create an expectation about results the lawyer can achieve (22 N.Y.C.R.R. § 1200.6(d)(1)), statements comparing the attorney's services with those of other attorneys (22 N.Y.C.R.R. § 1200.6(d)(2)), testimonials by present and former clients in non-pending matters (22 N.Y.C.R.R. § 1200.6(d)(3)) and statements describing or characterizing the quality of services provided by the attorney or his or her law firm (22 N.Y.C.R.R. § 1200.6(d)(4)). The new rules do not further restrict attorney advertisements that otherwise comply with section 1200.6, provided that they are not false, deceptive or misleading or violative of a disciplinary rule, 22 N.Y.C.R.R. 1200.6(a), are accompanied by a disclaimer stating that "prior results do not guarantee a similar outcome" and can be factually substantiated, 22 N.Y.C.R.R. § 1200.6(e).

2. This Action

a. The Parties

Plaintiff James L. Alexander is the managing partner of plaintiff Alexander & Catalano, LLC, a personal injury law firm with offices in Syracuse and Rochester. Before New York adopted the new advertising rules, Alexander & Catalano regularly aired advertisements promoting its services through the use of various broadcast and print media. These advertisements were frequently

embellished with exaggerated images of the firm's attorneys as giants towering over local buildings, running to assist clients so fast that they appear as a blur, and counseling space aliens on insurance claims (A224 ["Attachment 1": DVD of Alexander & Catalano television advertisements]). In addition, the firm used jingles, slogans and nicknames in its advertisements; among other pronouncements, the firm billed itself as "the Heavy Hitters" and exhorted its clients to "Think Big" (A45, A224 ["Attachment 1": DVD of Alexander & Catalano television advertisements]).

Plaintiff Public Citizen, Inc. is a not-for-profit public interest organization claiming approximately 100,000 members throughout the nation, including around 10,000 in New York (A18). Public Citizen Litigation Group is a division of Public Citizen, Inc. and conducts pro bono constitutional litigation in state and federal courts on behalf of its clients. Public Citizen, Inc. and Public Citizen Litigation Group maintain an Internet web site and various web "blogs," and also participate in distributing educational materials on various legal issues to the public.

Defendants are the chief counsels of the disciplinary committees whose jurisdiction lies within each of the four Judicial Departments of the New York Supreme Court, Appellate Division. The committees enforce New York's Code of Professional Responsibility and the attorney disciplinary rules promulgated thereunder. See generally 22 N.Y.C.R.R. part 1200.

The committees are directed by the Presiding Justices of the Appellate Divisions, who are authorized to create and modify the attorney disciplinary rules, to investigate and prosecute violations, and to issue penalties, including disbarment, suspension and censure, where appropriate. Judiciary Law § 90(2).

b. Plaintiffs' Complaint

Plaintiffs filed their complaint on February 1, 2007, the day that the new advertising rules were to take effect (A16-A30). As relevant to defendants' appeal, plaintiffs sought to enjoin defendants from enforcing 22 N.Y.C.R.R. §§ 1200.6(c)(1), (3), (5) and (7), relating, respectively, to the use of testimonials, portrayal of judges and fictitious attorney relationships, clearly and intentionally irrelevant advertising techniques, and trade names, monickers and nicknames that implied an ability to obtain results. Plaintiffs alleged that these restrictions violated their First Amendment rights because they would prohibit "truthful, non-misleading communications that the state has no legitimate interest in regulating" (A22).

Plaintiffs James Alexander and Alexander and Catalano further complained that the new rules would prevent them from displaying in their advertisements the type of exaggerated imagery and catch phrases upon which they relied to attract customers, including their depictions of giant attorneys and their use of the "Heavy

Hitters" nickname (A24). Plaintiffs admitted that "the fictional traits exhibited by the lawyers in these scenes do not appear to be relevant to the selection of counsel" (A23). However, plaintiffs argued that these attention-getting devices were necessary because they were "especially relied on by consumers of moderate means who may not be experienced consumers of legal services and who are underserved by other attorneys" (A24). Plaintiffs further defended their use of the "Heavy Hitters" nicknames as a proper way to "[impl[y] knowledge of the subject matter of its practice" (A24). Plaintiffs sought a declaration that the challenged portions of the new rules were unconstitutional and injunctive relief against their enforcement (A30).

c. 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 granted plaintiffs' motion for summary judgment and denied defendants' cross-motion as to 22 N.Y.C.R.R. §§ 1200.6(c)(1), (3), (5) and (7). The court analyzed the advertising regulations 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.)

The court recognized that "tasteless" and "obnoxious" attorney advertising was now "ubiquitous" and that, as a result, "the public perception of the legal profession has been greatly diminished" (A29, n. 20). Nevertheless, the court summarily rejected New York's argument under the first Central Hudson prong that the new rules reached only irrelevant, unverifiable and noninformational advertising material that was not entitled to First Amendment protection (A235 n 4). Without further analyzing that question, the court applied Central Hudson's second, third and fourth prongs.

As to the second prong, the court, referring to the Task Force report on which the Appellate Divisions' rules were based, found that defendants had demonstrated a substantial governmental interest, i.e., "to ensure that attorney advertisements are not misleading," as to each of the rules (A237-A238). The court also found that the rules prohibiting attorney advertisements from portraying judges or invoking trade names satisfied the third Central Hudson prong because they directly advanced the State's interest in a material way, citing portions of the Task Force report that specifically discussed the potential of such devices to mislead or deceive the public (A239-A240).

However, the court found that defendants did not establish that the other portions of 22 N.Y.C.R.R. § 1200.6(c)(1), (3), (5), and (7) materially advanced the State's interests and invalidated them on that ground (A240-242). The court concluded that it was constrained to reject these rules, restricting the use of client testimonials in pending matters, the use of monickers and nicknames, the use of fictitious names to describe attorney relationships and the depiction of clearly and intentionally irrelevant material, because of a lack of support for them in the record (A242). The court held that these rules were unsupportable under the third Central Hudson prong because the Task Force had not actually recommended regulating advertising content in this manner. Rather, the report had emphasized the use of disclosure and

disclaimers instead of a "wholesale prohibition" on these types of advertisements (A241).

Finally, the court invalidated the rules prohibiting judge portrayals and the use of trade names under the fourth Central Hudson prong. In the court's view, these rules were not sufficiently narrowly tailored because "[d]efendants have failed to produce any evidence that measures short of categorical bans would not have sufficed to remedy the perceived risks of such advertising being misleading" (A243). Accordingly, the court granted plaintiffs' motion and issued a permanent injunction prohibiting defendants from enforcing the stricken rules. Defendants timely appealed (A261-262).[1]

---

[1] Several other rulings made by the district court are not at issue on this appeal. First, the district court also invalidated 22 N.Y.C.R.R. § 1200.6(g)(1), prohibiting pop-up and pop-under advertisements on websites other than those that the attorney or law firm owns (A244-245). Defendants do not press their challenge to that holding in this Court, because the argument was neither made below nor supported by evidence. We note, however, that pop up ads are intrusive, of no benefit to the public, and of no value to the fair and honest presentation of an attorney's advertisement of services or offer of representation.

Second, the district court sustained 22 N.Y.C.R.R. § 1200.7(e), containing restrictions on attorney and law firm domain names and websites, and 22 N.Y.C.R.R. §§ 1200.8(g) and 1200.41, containing a 30-day moratorium on communications to accident victims. (A246-252). These rulings have been challenged by the plaintiffs on their cross-appeal. (A 264-265).

Finally, the court narrowly construed the amendments as inapplicable to non-commercial attorney communications and granted defendants' motion for summary judgment as to plaintiffs' claims regarding application of the rules to non-commercial speech (A252-254).

SUMMARY OF ARGUMENT

The New York rules at issue here do not violate the First Amendment 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 to choose competent and appropriate counsel rationally and intelligently. The constitutionality of such rules is fully supported by Supreme Court precedent, New York's longstanding policy interests and the record before this Court. Accordingly, the district court should have held that the advertisements were not entitled to First Amendment protection under the first prong of Central Hudson. The court thus erred in applying the three remaining prongs of the Central Hudson test.

Even if it were appropriate to apply the test, however, the test was satisfied here, because defendants have demonstrated that 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.

ARGUMENT

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.

The types of attorney advertising prohibited by the regulations at issue are not protected by the First Amendment, under the first prong of the Central Hudson test. In holding to the contrary, the district court overlooked the First Amendment's role regarding commercial speech, especially attorney advertising: to protect the flow of truthful and verifiable information that enables consumers rationally to choose counsel based on facts that are relevant to the selection process. New York's attorney advertising rules do not restrict the flow of this information. Instead, they target only advertising that impedes informed decisionmaking by interjecting distorted imagery, unverifiable slogans, exaggerated dramatizations and other misleading gimmicks, none of which communicate facts helpful to choosing a lawyer. New York legitimately determined that these forms of lawyer advertising have the potential substantially to mislead and should therefore be precluded.

1. The Supreme Court Has Extended First Amendment Protection Only to Attorney Advertising That Is Factual and Relevant.

Attorney advertising that does not accurately inform the public about lawful activity is not protected by the First Amendment. "The First Amendment's concern for commercial speech is based on the informational function of advertising." Central Hudson Gas & Elec. Corp. v. Public Serv. Commn. of N.Y., 447 U.S. 557, 563 (1980). In Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), in which the Supreme Court first declared that commercial speech may be entitled to limited First Amendment protection, the court emphasized that states may impose regulations to ensure that "the stream of commercial information flow[s] cleanly as well as freely." Id. at 772.

The Supreme Court has carefully limited application of the First Amendment's commercial speech protections in the attorney advertising context. When it first considered attorney advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court held that a state could not ban attorney advertising containing truthful, basic, unadorned information about their services. However, it cautioned that

> [A]dvertising 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.

Id. at 383.

Accordingly, the Court has recognized that professional advertising, particularly by attorneys, may constitutionally be more stringently regulated than other forms of commercial speech. See id. ("[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.").

Supreme Court decisions following Bates have stricken only those attorney advertising regulations that interfered with the dissemination of truthful, factual, nonmisleading information relevant to the attorney's services. The Court has been careful to go no further. It has never held that puffery, dramatizations, exaggerations, unverifiable statements of opinion, slogans, or promises, absurd portrayals, extreme use of humor, appeals to emotions, fears or prejudices, special effects, nicknames, or other techniques in attorney advertisements unrelated to rational decisions about selection of counsel are protected commercial speech. Indeed, by basing its holdings primarily on the degree to which the subject advertising was fact-based and relevant, the Court has strongly implied that advertising that lacks these characteristics is not protected and need not be further analyzed under the Central Hudson test.

Thus, in Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978), the Court upheld Ohio's rule forbidding attorneys from directly

soliciting potential clients, observing that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." Id. at 455.[2] In In Re R.M.J., 455 U.S. 191 (1982), the Court found that Missouri's rules, limiting to a handful of categories the information that attorneys could advertise, violated the First Amendment. Id. The attorney disciplined in that case had advertised factual information about his services. Additionally, he had mailed to potential clients a card announcing the inception of his law practice. The Court found that the accurate information in these communications was protected by the First Amendment and rejected Missouri's argument that the information was at least potentially misleading. Id. at 206-07. Rather, the Court found that the attorney communication Missouri had sought to ban was "factual and highly relevant information" that was not misleading on its face. Id. at 205. However, the court acknowledged that attorney advertising posed "special risks of deception" and that regulation, even outright prohibitions, was permissible "when the particular content or method of the advertising suggests that it is inherently misleading or when

[2] However, the Supreme Court later invalidated under the First Amendment a similar solicitation ban for accountants. Edenfield v. Fane, 507 U.S. 761 (1993). The Court rejected the State defendants' argument that the rule was comparable to the rule upheld in Ohralik, explaining that "[u]nlike a lawyer, a [Certified Public Accountant] is not a 'professional trained in the art of persuasion.'" Id. at 775 (citation omitted).

experience has proved that in fact such advertising is subject to abuse." Id. at 200, 203.

Similarly, in Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626 (1985), the Court emphasized the factual nature of the information in the attorney advertisement at issue. There, the Court invalidated a state rule prohibiting the use of all illustrations in attorney advertisements. The Court observed that the illustration at issue of a birth control device was indisputably "easily verifiable and completely accurate." Id. at 645. The Court reiterated that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." Id. at 651. The Court also found that the advertisement contained no unverifiable assertion of expertise or "promise relating to the quality of [the attorney's] services;" it merely stated that the attorney had represented other women in a certain type of litigation, "a statement of fact not in itself inaccurate." Id. at 640 n 9. Inasmuch as the information in the illustration was "purely factual and uncontroversial" and Ohio had not demonstrated that it was nonetheless likely to confuse or deceive readers, the blanket ban violated the First Amendment. Id. at 651.

In Shapero v. Kentucky Bar Assn., 486 U.S. 466 (1988), the Court struck down a Kentucky regulation prohibiting attorneys from soliciting business from potential clients through targeted direct

mailings. Again, the Court's holding that the regulation violated the First Amendment turned on the undisputed evidence that the letters in question were "truthful and non-deceptive." Id. at 479.

In addition, the Supreme Court has held that the First Amendment permits factual advertising by attorneys of their credentials. See Peel v. Attorney Registration & Disciplinary Commn. of Ill., 496 U.S. 91 (1990). There, the plurality rejected an Illinois rule banning attorneys from holding themselves out as 'certified' or specialists in any area, where the advertisement in question was "true and verifiable." Id. at 100. The Court explicitly distinguished between "statements of opinion or quality and statements of objective facts that may support an inference of quality." Id. at 101. See also Ibanez v. Florida Dept. of Bus. & Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994) (Florida improperly disciplined an attorney/CPA who stated on letterhead that she was a certified financial planner, noting that regulations that curtailed the dissemination of "truthful, relevant information" must pass muster under the Central Hudson test because such information contributes to decisionmaking) (quoting Peel, 496 U.S. at 108.)

In the present case, the attorney advertising that is proscribed by the new rules is very different from the factual, verifiable and relevant advertisements that the Supreme Court has held to be protected. Use of nicknames such as "the heavy hitters"

that imply an ability to obtain results in a matter, depictions of attorneys exhibiting superhuman characteristics clearly unrelated to legal competence, and fictitious dramatizations do not provide any relevant information to prospective clients. Moreover, to the extent that such advertisements do imply, without any relevant factual support, that the attorney possesses superior qualifications, as plaintiffs suggested in their complaint (A24), such advertisements "are not susceptible of precise measurement and, under some circumstances, might well be deceptive or misleading to the public, or even false." Bates, 433 U.S. at 366. Whether affirmatively misleading or simply irrelevant, these advertisements are not entitled to any First Amendment protection.

2. The Supreme Court's Summary Dismissal in Humphrey Supports Attorney Advertising Restrictions Like New York's That Do Not Preclude Truthful, Factual and Relevant Communications.

Although the Supreme Court has not squarely addressed the issue in an argued case, the Court upheld in a summary dismissal Iowa's content-based attorney advertising restrictions. See 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). In that case, attorneys asserted that the

First Amendment barred state rules that prohibited attorneys from making public communications that contained, among other things, "self-laudatory or unfair statement[s] . . . that relat[ed] to the quality of . . . legal services [that] appeal[] to the emotions, prejudices, or likes and dislikes of a person, or which contain[] any claim that is not verifiable." Id. at 568. They also sought to invalidate a rule that required attorney television advertisements to be presented "in a dignified manner," without dramatics, background sound or unnecessary visual displays. Id.[3]

The Supreme Court of Iowa upheld the constitutionality of the restrictions. Citing Bates, the Iowa court held that irrelevant information was not protected:

> [i]nformation is not relevant if it makes no contribution to informed decision making. In other words, prohibition of such information does not impede, and in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism. We think the ads here would not aid the public in making the informed decision which is subject to the protection recognized in Bates.

355 N.W.2d at 570.

---

[3] The television advertisements in Humphrey featured actors portraying non-attorney laymen in various scenarios, including medical personnel in an examination room. In each scene, the actors described an injury caused by another's negligence and stated that the injured person will need to talk to a lawyer and that the choice of the lawyer is "something to think about." Humphrey, 355 N.W.2d at 566. The advertisements then cut to another actor playing a receptionist in a law office, with the attorneys' address and other information superimposed over the picture, while an off-stage voice urged customers to "call now" if they have suffered similar misfortunes. Id. at 366.

The Humphrey court found that the rules did not offend the First Amendment because they "specifically allowed dissemination of all information necessary to assist the public in seeking and selecting counsel" and further provided a mechanism to permit the inclusion of other useful information in advertisements. Id. at 571. The rules were narrowly tailored because "[a]ll that is prohibited are the tools which would manipulate the viewer's mind and will." Id.

The Supreme Court vacated the Humphrey court's judgment and remanded it for further consideration in light of its decision in Zauderer. See Humphrey, 472 U.S. 1004 (1985). On remand, the Supreme Court of Iowa adhered to its original decision, stating that nothing in Zauderer warranted a different result. 377 N.W.2d 643 (Iowa 1985). The court emphasized the important role that Iowa's regulations played in curbing the "very real potential for abuse" that existed in the electronic broadcasting advertising medium. Id. at 646.

The Supreme Court dismissed the appeal from that decision for want of a substantial federal question. See Humphrey, 475 U.S. 1114 (1986). It is settled that a summary dismissal of the Supreme Court constitutes a decision on the merits that is binding on all lower courts. See Hicks v. Miranda, 422 U.S. 332, 344 (1975); Roxbury Taxpayers Alliance v. Delaware County Bd. of Supervisors,

80 F.3d 42, 48 (2d Cir. 1996), cert. denied sub nom. McDonald v. Delaware County Bd. of Supervisors, 519 U.S. 872 (1996).

The district court should have followed the Supreme Court's decision in Humphrey and sustained the advertising restrictions at issue here. The Iowa attorney advertising regime addressed in Humphrey was more restrictive than New York's scheme: while the Iowa rules required that attorney advertising be "dignified" and absolutely prohibited the use of statements that were self-laudatory, appealed to the emotions and tastes of consumers, and that related to the quality of the attorney's services, New York's restrictions are more narrowly drawn. Indeed, New York permits representations as to an attorney's legal abilities or the quality of his services so long they are actually relevant thereto and are reasonable. 22 N.Y.C.R.R. § 1200.6(d), (e). Thus, the Court's dismissal of the appeal in Humphrey is controlling Supreme Court precedent supporting New York's prohibition of attorney advertisements containing irrelevant and noninformational material.

3. Many Other States Have Adopted Attorney Advertising Regulations Precluding Noninformational and Irrelevant Advertisements.

It has now been three decades since the Supreme Court's landmark decision in Bates, and 22 years since it refused to overturn Iowa's attorney advertising regulatory scheme in Humphrey. During that time, New York and many other states have adopted

regulations specifically targeting attorney advertising that is noninformational, unverifiable and irrelevant to the informed selection of counsel. In addition to Iowa, many states have promulgated rules that are similar to, if not more restrictive than, New York's attorney advertising rules. Specifically, there are seven states (Arkansas, Florida, Indiana, Nevada, Pennsylvania, South Carolina and Wyoming) that currently prohibit or restrict the use of client testimonials in attorney advertisements.[4] At least 12 states (Arizona, California, Florida, Indiana, Louisiana, Mississippi, Nevada, New Jersey, North Carolina, Ohio, South Carolina and Texas) restrict or entirely prohibit the use of trade names or fictitious names to identify an attorney or law firm.[5] Five states (Indiana, Louisiana, Mississippi, Oregon and Texas) bar

---

[4] Ark. R. Prof. Conduct 7.1(d) (Arkansas); Fla. Bar Reg. R. 4-7.2(c)(1)(j) (2007) (Florida); Ind. Rules of Prof'l Conduct 7.2(d)(3) (2007) (Indiana); Nev. Rules of Prof. Conduct R. 7.1(d) (2007) (Nevada); Pa. RPC 7.2(d), (e) (2007) (Pennsylvania); SCACR Rule 407, Rule 7.1(d) (2007) (South Carolina); Wyo. Prof. Conduct Rule 7.1(d); 7.2(h) (2007) (Wyoming).

[5] Ariz. Rules of Prof'l Conduct R. 7.5(a) (2007) (Arizona);Cal. Rules of Prof'l Conduct, rule 1-400(9) (California); Fla. Bar Reg. R. 4-7.9(c) (2007) (Florida); Ind. Rules of Prof'l Conduct 7.5(b) (2007) (Indiana); La. St. Bar Ass'n. Art. XVI § 7.5(a) (2007) (Louisiana); Miss. RPC Rule 7.7(b) (2007) (Mississippi); Nev. Rules of Prof Conduct R 7.5(a) (2007) (Nevada); N.J. Court Rules, RPC 7.5(a), (f) (2007) (New Jersey); N.C. Prof. Cond. Rule 7.5(a) (2007) (North Carolina); Ohio Prof. Cond. Rule 7.5(a) (2007) (Ohio); SCACR Rule 407, Rule 7.1(e) (2007) (South Carolina); Tex. R. Prof. Conduct 7.01(a) (2007) (Texas).

attorneys from communications implying an ability improperly to influence judicial proceedings.[6]

Many other states mirror New York's concern that attorney advertising should be primarily factual and relevant to the attorney's actual qualifications and experience. To this end, several states bar dramatizations or potentially confusing visual and verbal illustrations (Arkansas, Florida, New Jersey, South Dakota and Wyoming),[7] and statements regarding the quality of legal services (including comparisons with the services of other attorneys) that cannot be verified or factually substantiated (Florida, Iowa, Kansas, New Hampshire, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Texas, Vermont, West Virgina, Wisconsin, Wyoming).[8] Further, at least

---

[6] Ind. Rules of Prof'l Conduct 7.2(c)(5) (2007) (Indiana); La. St. Bar Ass'n. Art. XVI § 7.1(a)(iii) (2007) (Louisiana); Miss. RPC Rule 7.1(c) (2007) (Mississippi); ORPC 7.1(a)(5) (2006) (Oregon); Tex. R. Prof Conduct 7.02(a)(5) (2007) (Texas).

[7] Ark. R. Prof. Conduct 7.2(e) (Arkansas); Fla. Bar Reg. R. 4-7.2(c)(3) (2007) (Florida); N.J. Court Rules, RPC 7.2(a) (2007) (New Jersey); S.D. Rules of Prof'l Conduct 7.1(c)(15) (2007) (South Dakota); Wyo. Prof. Conduct Rule 7.2(h) (2007) (Wyoming).

[8] Fla. Bar Reg. R. 4-7.2(c)(1)(I) (2007) (Florida); Iowa R of Prof'l Conduct 32:7.1(b) (2007) (Iowa); KRPC 7.1(c) (2006) (Kansas); N.H. Rules of Prof'l Conduct Rule 7.1(c) (2007) (New Hampshire); Nev. Rules of Prof. Conduct R. 7.1(c); 7.2(g)(2007) (Nevada); N.C. Prof. Cond. Rule 7.1(a)(3)(2007) (North Carolina); N.D.R. Prof. Conduct Rule 7.1(c) (2007) (North Dakota); Ohio Prof. Cond. Rule 7.1: (2007) (Ohio); ORPC 7.1 (Oregon) (2006); SCACR Rule 407, Rule 7.1(c); SCACR Rule 407, Rule 7.2(f) (2007) (South Carolina); Tenn. Sup. Ct. R. 8, Rule

three states in addition to New York (New Jersey, South Dakota and Wyoming) require that attorney advertisements primarily emphasize information that is useful and relevant to the public's search for competent and appropriate counsel.[9]

These regulatory schemes have either gone unchallenged or have been substantially upheld and even endorsed by the lower federal and high state courts. See, e.g., Matter of Felmeister & Isaacs, 104 N.J. 515, 525 (N.J. 1986) (adopting New Jersey rule requiring that attorney advertisements be "predominantly informational" and "without the use of drawings, animations, dramatization, music or lyrics," on the ground that advertising techniques that "have absolutely nothing to do with those qualities that are rationally related to the lawyer's competence" perform a public disservice); Florida Bar v. Pape, 918 So.2d 240, 247 (Fla. 2005), cert. denied, 547 U.S. 1041 (2006) (sanctions upheld against attorneys who displayed an illustration of a pit bull in their advertisements on ground that "[l]awyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information

---

7.1(c) (2006) (Tennessee); Tex. R. Prof Conduct 7.02(a)(4) (2007) (Texas); Vt. Prof. Cond. Rule 7.1(c) (2007) (Vermont); W. Va. Prof. Cond., Rule 7.1(c) (2007) (West Virginia); Wis. SCR 20:7.1(a)(3) (2006) (Wisconsin); Wyo. Prof. Conduct Rule 7.1 (2007) (Wyoming).

[9] N.J. Court Rules, RPC 7.2 (2007) (New Jersey); S.D. Rules of Prof'l Conduct 7.1(b) (2007) (South Dakota); Wyo. Prof. Conduct Rule 7.2 (2007) (Wyoming).

that can be objectively verified"); Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D. N.C. 2001) (rejecting plaintiff attorneys' First Amendment challenge to North Carolina advertising scheme on ground that the fictional advertising content at issue was not protected commercial speech); Texans Against Censorship v. State Bar of Texas, 888 F. Supp. 1328, 1350 (E.D. Tex. 1995), aff'd, 100 F.3d 953 (5th Cir. 1996) (substantially upholding Texas advertising regulations because, consistent with Supreme Court precedent, they "only prohibit[ed] lawyers from making claims they cannot substantiate"); Matter of Zang, 154 Ariz. 134, 145-46 (Ariz. 1987), cert. denied sub nom. Whitmer v. State Bar of Ariz., 484 U.S. 1067 (1988) ("While no doubt effective in attracting clients, 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.").

In sum, this Court should hold that New York's advertising rules fully comport with the First Amendment. By requiring that attorney advertisements contain verifiable, factual information relevant to the selection of counsel, the rules at issue do not preclude commercial speech that is protected by the First Amendment.

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.

As explained above, the regulations at issue here are constitutional under the first Central Hudson prong because the attorney communications that the regulations preclude are not protected by the First Amendment. The district court should have sustained the regulations on that ground alone. However, even if this Court concludes that the three remaining prongs of Central Hudson should be considered, the Court should hold that the regulations satisfy these additional requirements.[10]

The district court invalidated the rules primarily because it concluded that defendants had not provided sufficient empirical and anecdotal evidence to justify them. This was error. As the First Circuit has observed, "the [Supreme] Court has never laid down a categorical rule requiring that empirical evidence be shown to support every statutory restriction on speech." Auburn Police Union v. Carpenter, 8 F.3d 886, 900 (1st Cir. 1993), cert. denied, 511 U.S. 1069 (1994). While the Supreme Court has "occasionally

[10] It should be noted that the Supreme Court has variously described the Central Hudson test as having three or four prongs, depending on whether the preliminary inquiry into whether the content to be regulated is misleading, deceptive or unlawful is counted as the first prong. Compare 44 Liquormart v. Rhode Is., 517 U.S. 484, 500 n 9 (1996), with Florida Bar v. Went For It, 515 U.S. 618, 624 (1995). For purposes of this brief, we refer to the four-prong test.

cited the lack of empirical evidence as a further ground for striking down a restriction on speech," such evidence is not mandatory, particularly where the connections between restrictions and the affected conduct appear "intuitively reasonable." Id.

Moreover, although the Supreme Court has relied on empirical evidence in sustaining a restriction on attorney advertising, it has recognized that the proponent of a restriction on commercial speech need not introduce empirical evidence "accompanied by a surfeit of background information," explaining that "in other First Amendment contexts, we 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.'" Florida Bar v. Went For It, 515 U.S. 618, 628 (1995); see Metromedia v. City of San Diego, 453 U.S. 490, 509 (1981) (plurality rejects First Amendment attack on municipal billboard ordinance because the municipality could properly rely on the "accumulated commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety"). This precedent, the Task Force report and the experiences of Iowa and many other states are sufficient to uphold the rules under the remaining prongs of the Central Hudson test without resort to the data required by the district court.

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

Under the second Central Hudson prong, New York was required to identify "a substantial interest in support of its regulation." Went For It, 515 U.S. at 624. The district court properly found that the State satisfied this requirement as to all the challenged regulations (A237-239). "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Id. at 625 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, (1975). This interest is "'especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Ohralik, 436 U.S. at 460, quoting Goldfarb, 421 U.S. at 792. Here, the district court correctly concluded that the Task Force report supported defendants' asserted interest in prohibiting attorney advertisements from containing deceptive or misleading content (A55-A56, A222-A223, A237-A238).

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

The third prong of Central Hudson obligates the State to "demonstrate that the challenged regulation 'advances the Government's interest in a direct and material way.'" Went For It, 515 U.S. at 625, quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (citation omitted). This test is met when the State can point to something other than "mere speculation or conjecture" to establish that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Rubin, 514 U.S. at 487, quoting Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); accord Went For It, 515 U.S. at 626.

The district court correctly concluded that New York satisfied this prong as to portions of 22 N.Y.C.R.R. §§ 1200.6(c)(3) (prohibition on portrayal of judges) and (c)(7) (prohibition on the use of trade names implying ability to obtain results). However, the court erred in holding that defendants did not satisfy the third Central Hudson prong as to the remaining portions of §§ 1200.6(c)(3) and (7) and all of (c)(1) (testimonials from client in a pending matter) and (c)(5) (irrelevant or unrelated context).

The court should not have tested the rules in isolation. New York did not write on a blank slate when it adopted the rules in 2007. New York's Code of Professional Responsibility has long declared that the purpose of attorney advertising is to "educate

the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel." Former DR 2-101(D); see former DR 2-101(B) ("Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyers' legal services, or claims that cannot be measured or verified"); EC 2-10 ("A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer").

Indeed, providing relevant information to the public has been one of the principal justifications, in New York and other jurisdictions, for permitting the restrained regulation of attorney advertising. See Matter of Zimmerman, 79 A.D.2d 263, 265 (4th Dep't 1981), appeal dismissed, 53 N.Y.2d 937 (1981) ("Commercial speech in the form of truthful advertising of legal services, designed to disclose information and to permit a consumer to reach an informed decision and to identify the legal services he desires, serves individual and societal interests"); cf. Falanga v. State Bar of Ga., 150 F.3d 1333, 1341 (11th Cir. 1998) (Georgia's historic regulation of in-person attorney solicitation explained lack of specificity of the extent of harm resulting from the

practice); see also Roy Sobelson, "The Ethics of Advertising By Georgia Lawyers: Survey and Analysis," 6 Ga. State Univ. L. Rev. 23, 24, 68-69 (1989) (noting concerns that public participants in lawyer advertising survey were likely to choose a lawyer "on the basis of information that has very little genuine content or is irrelevant to an informed selection of a professional").

New York's rule requiring that attorney advertising contain relevant, factual information reflects these principles and is consistent with longstanding jurisprudence. Accordingly, New York sufficiently demonstrated that the rules materially advance New York's interest in factual, relevant attorney advertisements. See Falanga, 150 F.3d at 1341 (Georgia's restriction on attorney solicitation was strikingly similar to the facts underlying the Supreme Court's decision in Ohralik and, therefore, Georgia's reliance on that case "may have been sufficient in and of itself to justify the standards").

In addition, the Task Force report echoed the longstanding principles that the new rules embody (A76, A144). Specifically, the Task Force explained that its proposed rule barring false, deceptive or misleading communications could also reach puffery, claims that cannot be measured or verified and other advertising devices that "hinder rather than . . . facilitate intelligent selection of counsel" (A146). Moreover, the Task Force adopted, as guidelines for its own proposed rules, standards previously

proposed by the Monroe County Bar Association, one of which stressed that "[a]ll information should be relevant to the thoughtful selection of counsel, and devices such as puffery, that are likely to hinder this process, should be minimized" (A124). Although the Task Force's proposed rule does not mirror the rule ultimately adopted by the Appellate Divisions, the concerns that the Task Force expressed establish that New York's prohibition of irrelevant, nonverifiable and nonfactual advertisements materially advances New York's interest in ending attorney advertising that is potentially deceptive or misleading.

Similarly, New York's prohibition of "nickname[s], monicker[s], motto[s] or trade name[s] that impl[y] an ability to obtain result in a matter," 22 N.Y.C.R.R. § 1200.6(c)(7) is not a novel proposition requiring the new empirical evidence and studies the district court demanded. The district court found that the ban on trade names materially advanced the State's interests but did not so conclude as to nicknames, etc.[11] In any case, New York's Code of Professional Responsibility has long prohibited attorneys from using not only a trade name but also "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name." New York Code of Professional Responsibility, DR

[11] This finding also appears to be inconsistent with the court's subsequent determination that section 1200.7(e)(3), prohibiting lawyers from utilizing an Internet domain name that "impl[ies] an ability to obtain results in a matter," was constitutional (A246-A248).

2-102(B) (22 N.Y.C.R.R. § 1200.7(b)); see Matter of Shephard, 92 A.D.2d 978 (3d Dep't 1983). That rule has not been directly challenged here. A rule extending this provision to attorney advertisements employing trade names, nicknames, monickers and mottos that imply an ability to get results therefore directly and materially advances New York's interest in furthering this longstanding policy.

In another professional context, the Supreme Court has held that trade names may constitutionally be regulated because they may potentially mislead the public. In Friedman v. Rogers, 440 U.S. 1 (1979), the Court upheld a Texas statute prohibiting optometrists from practicing under a trade name. The Court found no constitutional infirmity in the statute because it agreed with Texas that there was "a significant possibility" that trade names, which by themselves carried no intrinsic meaning, "will be used to mislead the public." Id. at 13. Thus, the statute was constitutional because it did not prevent the free and explicit dissemination of the factual information associated with trade names. Rather, it did "no more than require that commercial information about optometrical services 'appear in such a form . . . as [is] necessary to prevent its being deceptive.'" Id. at 16 (quoting Virginia Bd. of Pharmacy, 425 U.S. at 772 n 24). Moreover, in the present case, the Task Force report alluded to the Code's prohibition on the use of trade names, and further noted

their potentially misleading nature in its commentary to its proposed Rule 7.1 (A86-A87, A119, A147).

Similarly, New York's existing prohibition of trade names and other practices that obscure the true identity of the lawyers provides ample support for the rule restricting attorneys from using fictitious names or other devices inaccurately suggesting that the attorneys work together in the same law firm. Compare 22 N.Y.C.R.R. § 1200.7(b) (prohibiting use of misleading names) with 22 N.Y.C.R.R. § 1200.6(c)(3) (prohibiting portrayals of lawyers as associated in a firm if that is not the case). The new rule merely recognizes that the underlying State interest in restricting misleading references to attorney associations in advertisements is the same as the interest in regulating trade names: to prevent the public from being deceived about which attorneys are actually practicing in the firm doing the advertising. See Matter of Von Wiegen, 63 N.Y.2d 163, 176 (1984) (noting that the purpose of the prohibition of trade names in DR 2-102(B) "is to prevent the public from being deceived about the identity, responsibility and status of those who use the name"). The Task Force's commentary that "[a] lawyer should not hold himself or herself out as being a partner or associate if the lawyer only shares [an] office with another lawyer" provides additional support for this rule (A148). See also N.Y. State Bar Assn. Committee on Professional Ethics Op. No. 75-381 (professional

legal corporation may not include, as a part of its name, the name of a former partner who currently is practicing law with another firm).

For substantially the same reasons, as the district court found, New York's rule prohibiting the portrayal of judges in attorney advertising materially advances New York's interests. Again, New York's Code of Professional Responsibility already prohibits attorneys from stating or implying that they "are able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." New York Model Code of Professional Responsibility DR 9-101(C) (22 N.Y.C.R.R. § 1200.45(c)). Moreover, as the district court correctly noted (A240), the Task Force report supports the promulgation of this rule, commenting that attorneys should not issue communications implying that they have the ability to influence a court improperly (A148). See N.Y. State Bar Assn. Committee on Professional Ethics Op. No. 73-284 (use of the abbreviation "Hon." to designate a retired judge should not be used on a law firm's letterhead or other communications, although a card containing the designation sent once solely to member of the legal profession was permissible).

New York's rule permitting client testimonials only for non-pending matters is similarly founded on established interests, namely, the need to preserve the integrity of the attorney-client

relationship.[12] New York Code of Professional Responsibility DR 5-101(A) (22 N.Y.C.R.R. § 1200.20) ("A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will or reasonably may be affected by the lawyer's own financial, business, property or personal interests"). See Matter of Greene, 54 N.Y.2d 118, 127-28 (1981) (upholding constitutionality of disciplinary rule restricting attorney solicitation partly on ground that "[t]here is . . . a substantial governmental interest in preventing conflicts of interest in attorney-client relationships"). While not recommending a total ban on client testimonials, the Task Force report noted the validity of this interest and observed that client testimonials "can be inherently misleading because testimonials suggest that past results are indications of future performance" (A80-A81). New York's modest limitation on client testimonials regarding pending matters in attorney advertisements materially and directly advances these interests. The rule ensures that a client will not feel pressured by his or her attorney to endorse the attorney's work in a pending matter out of fear that anything less would lessen the attorney's zeal in pursuing the case.

[12] Neither plaintiffs' complaint nor the district court decision provided any specific discussion as to why New York's limited regulation of client testimonials was violative of the First Amendment.

3. New York Established That the Rules are Not More Extensive Than Necessary to Serve Its Interests.

The fourth prong of Central Hudson asks whether the "fit" between the goals identified and the means chosen to advance the goals is reasonable. Because the "least restrictive means" test traditionally employed in First Amendment challenges to noncommercial speech has no place in commercial speech analysis, the fit need not be "necessarily perfect" or even "the single best disposition." Board of Trustee of State University of N.Y. v. Fox, 492 U.S. 469, 480 (1989). Rather, the State need only demonstrate that the rule is reasonably in proportion to the interest served. Id.; see In Re R.M.J., 455 U.S. at 203.

Here, New York's challenged restrictions were reasonably proportionate to defendants' asserted interest in ensuring that attorney advertising provides useful, factual and relevant information. New York permits substantial attorney advertising content. Sections 1200.6 (d) and (e) demonstrate that the State understood that its prohibitions must be narrowly drawn not to ban truthful, relevant information. These sections allow attorneys to advertise on a wide range of topics. Thus, lawyers may include statements that are reasonably likely to create an expectation of results, that compare the lawyer's services to those of other attorneys, and that describe the quality of the services, so long as their representations are capable of factual substantiation and advise that prior results do not guarantee a similar outcome. See

22 N.Y.C.R.R. §§ 1200.6(d), (e); see also § 1200.6(b) (listing substantial factual information includable in advertisements).

Because the rules at issue here are narrowly drawn, the district court's conclusion that they imposed "categorical bans" (A242-A243) was incorrect. Contrary to plaintiffs' argument and the district court's findings, these restrictions are a far cry from the sweeping bans that were invalidated in Bates, In Re R.M.J. and Zauderer. As discussed above, New York's rules are largely encompassed by the rules upheld by the Supreme Court's summary dismissal in Humphrey. Therefore, the district court's conclusion here that New York's interests could be as well served by disclaimers was error. The rules at issue are narrowly drawn to serve the State's interest in assuring that attorney advertising is relevant, factual and not misleading. Accordingly, they satisfy the final Central Hudson inquiry.

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.

Dated: Albany, New York
November 30, 2007

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Defendants-Appellees

BARBARA D. UNDERWOOD
Solicitor General

ANDREW D. BING
Deputy Solicitor General

PETER H. SCHIFF
Senior Counsel

OWEN DEMUTH
Assistant Solicitor General

of Counsel

By:_____
OWEN DEMUTH
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 474-6639

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 9,401 words.

_____
OWEN DEMUTH
Assistant Solicitor General

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Albany, New York 12224
(518) 474-6639