REGULATING PROFESSIONAL SERVICES ADVERTISING: CURRENT CONSTITUTIONAL PARAMETERS AND ISSUES UNDER THE FIRST AMENDMENT COMMERCIAL SPEECH DOCTRINE

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I. INTRODUCTION

The year 2006 marked the thirtieth anniversary of the United States Supreme Court's landmark constitutional decision in *Virginia State Board of Pharmacy v. Virginia Citizens Council*.[1] In that case, the Court held for the first time that commercial speech was eligible for First Amendment protection under the speech clause.[2] The case marked a dramatic shift in the Court's constitutional view of commercial speech and overruled a prior opinion, *Valentine v. Chrestensen*, which had excluded commercial speech from First Amendment protection.[3] *Virginia State Board of Pharmacy* launched the modern commercial speech doctrine and extended First Amendment protection to a category of expression—commercial speech—based primarily on the theory that the expression has First Amendment value because of its relationship to the function of our free market economy and contribution to public discourse about marketplace regulation.[4]

The commercial speech doctrine has been described as a "notoriously unstable and contentious domain of First Amendment jurisprudence" and, "[n]o other realm of First Amendment law has proved as divisive [for the Court]."[5] The doctrine has also been criticized on the basis that "[t]he want of clarity and predictability is all the more unfortunate given the frequency with which speech restrictions are imposed"[6] and that "[d]espite a regular flow of opinions over the two decades—typically at least one commercial speech decision per term—the

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1 Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748 (1976).

2 U.S. CONST. amend. I (stating, in relevant part, "Congress shall make no law . . . abridging the freedom of speech.").

3 Valentine v. Chrestensen, 316 U.S. 52 (1942), *overruled by Va. State Bd. of Pharmacy*, 425 U.S. 748.

4 *See Va. State Bd. of Pharmacy*, 425 U.S. 765 (finding the "free flow of commercial information" to be "indispensable to the proper allocation of resources in a free market system" and "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered"). Scholars criticized this approach; *see, e.g.,* Edwin C. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3, 5-6 (1976) (arguing that established First Amendment theory mandated "complete denial of first amendment protection for commercial speech"); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 25-27 (1979) (describing the Court's "economic analysis" as "surely correct" but arguing the case was wrongly decided in part because of the "irrelevance of traditional first amendment concerns to commercial advertising"); *see also* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 381 (1979) (arguing that the Court in *Virginia State Board of Pharmacy* failed to exhibit its "traditional reluctance to assess the economic merits of legislation" but "did not hesitate in giving constitutional status to its own view of economics").

5 Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).

6 Fred S. McChesney, *De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases*, 5 SUP. CT. ECON. REV. 81, 139 (1996).

Court's jurisprudence furnishes astonishingly little guidance."[7]

Perhaps no single issue has proven as vexing and frequently litigated under the commercial speech doctrine as the constitutionality of advertising regulations for licensed professionals like attorneys, accountants, pharmacists, and physicians. Indeed, the modern commercial speech doctrine arose and evolved in this very context. In *Virginia State Board of Pharmacy*, the Court ruled unconstitutional a state statute prohibiting pharmacists from advertising the retail prices of prescription drugs to consumers.[8] The following year, in 1977, the Court ruled in *Bates v. State Bar of Arizona* that states could not constitutionally ban lawyers from truthfully advertising prices for routine legal services.[9]

The Court's most recent commercial speech case, *Thompson v. Western States Medical Center*, a 2002 decision, was another professional services advertising case in which the Court ruled unconstitutional a federal statute that banned licensed pharmacies, pharmacists, and physicians from advertising compounded prescription drugs to consumers.[10] From *Virginia State Board of Pharmacy* in 1976 to *Western States* in 2002, a total of thirteen[11] of the Court's twenty-five[12] constitutional commercial speech cases involved regulations of commercial expression of licensed professionals. Not only have these cases established a constitutional framework for regulating professional services advertising, but they have also provided important developments in the evolution of the commercial speech doctrine itself.[13]

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7 *Id.*

8 *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

9 Bates v. State Bar of Ariz., 433 U.S. 350, 383-85 (1977).

10 Thompson v. W. States Med. Ctr., 535 U.S. 357, 360, 376-77 (2002).

11 *Id.*; Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994); Edenfield v. Fane, 507 U.S. 761 (1993); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978); *Bates*, 433 U.S. 350; *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

12 *See supra* note 11; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); United States v. Edge Broad. Co., 509 U.S. 418 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1992); Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977).

13 *See* Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 11 (2002) (suggesting that "the [United States Supreme Court] decisions in lawyer advertising cases ought to be considered one piece of a larger movement in commercial speech jurisprudence" and further characterizing this as "a movement that has expanded First

This article explores the current constitutional parameters of government restrictions on professional services advertising. The article first traces the seminal commercial speech opinions of the United States Supreme Court including *Virginia State Board of Pharmacy* and *Bates*, and also explains the role of the *Central Hudson* analysis,[14] a controversial form of intermediate scrutiny established by the Court in 1980 to constitutionally test commercial speech restrictions. The article then traces the Court's commercial speech decisions decided subsequent to *Central Hudson* in which the constitutionality of government restrictions on professional services advertising and related public communications was at issue.[15] Next, the article surveys recent cases in this area decided by federal courts of appeals, federal district courts, and state supreme courts, and summarizes those issues on which lower courts seem to have reached consensus. The article concludes with a summary of established constitutional parameters for professional services advertising within the framework of the *Central Hudson* analysis and identifies critical issues within this analytical framework that remain ambiguous or undecided.

II. SEMINAL COMMERCIAL SPEECH CASES DECIDED BY THE UNITED STATES SUPREME COURT

In 1942, the United States Supreme Court categorized "purely commercial advertising" as unprotected speech under the First Amendment.[16] Prior to reversing this ruling in *Virginia State Board of Pharmacy* in 1976, the Court had decided two cases—one in 1973[17] and the other in 1975[18]—which raised questions about the continued validity of the wholesale First Amendment exclusion of protection of commercial speech.[19] As discussed more fully in the Part that follows, the decision in *Virginia State*

Amendment protection for commercial speech").

14 *Cent. Hudson*, 447 U.S. at 566.

15 This article focuses primarily on mass media advertising and other public communications by licensed professionals and not in-person solicitation, which raises disparate constitutional issues.

16 Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), *overruled by Va. State Bd. of Pharmacy*, 425 U.S. 748.

17 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 378 (1973).

18 Bigelow v. Virginia, 421 U.S. 809 (1975).

19 For a detailed discussion of the pre-1976 commercial speech doctrine, see generally ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 25-50 (2003); Soontae An, *From a Business Pursuit to a Means of Expression: The Supreme Court's Disputes over Commercial Speech from 1942-1976*, 9 COMM. L. & POL'Y 201 (2003); Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from* Greater New Orleans Broadcasting, 37 AM. BUS. L.J. 587, 592-96 (2000); Daniel E. Troy, *Advertising: Not 'Low Value' Speech*, 16 YALE J. ON REG. 85, 121-25 (1999).

Board of Pharmacy and then the decision in *Bates* in 1977 expanded the First Amendment to include commercial speech and, more specifically, professional services advertising. In addition, these decisions set the stage for the Court's opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission* in 1980,[20] the third cornerstone of the modern commercial speech doctrine.

A. *The Commercial Speech Doctrine Before 1976*

In *Valentine v. Chrestensen*, in 1942, the Court upheld a city code provision banning the distribution of commercial advertising material in public streets.[21] The Court reasoned that "purely commercial advertising" was ineligible for First Amendment protection and thus the ban did not impact constitutionally-protected speech.[22] The *Chrestensen* opinion is significant in that it established the Court's original commercial speech doctrine,[23] which remained valid precedent for more than thirty years.[24]

However, in the 1970s, the Court began to revisit the commercial speech doctrine established in *Chrestensen*. In 1973, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court ruled, five-to-four, that Pittsburgh could constitutionally enforce a city ordinance against employment discrimination by prohibiting newspapers from publishing gender-specific "help-wanted" advertisements.[25] The *Pittsburgh Press* majority reaffirmed from *Chrestensen* that commercial speech—that which does "no more than propose a commercial transaction"—was ineligible for First Amendment protection.[26] Additionally, the majority concluded that this holding applied to advertising published by a

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[20] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[21] *Valentine*, 316 U.S. at 55.

[22] *Id.* at 54. The Court explained that previously it had

> unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that . . . states and municipalities . . . may not unduly burden or proscribe its employment in these public thoroughfares . . . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising.

Id.

[23] *See, e.g.*, SHINER, *supra* note 19, at 26-32; Troy, *supra* note 19, at 121. Referring to *Chrestensen*, a prominent constitutional commentator wrote, "Thus, the birth of commercial speech may be compared to an immaculate conception: there was no father—the [*Chrestensen*] Court simply announced the new rule." Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 100 (2002). Another commentator described *Chrestensen* as a "categorical approach" toward commercial speech based on "an untested assumption" that such speech was constitutionally unprotected. An, *supra* note 19, at 217.

[24] *See* Langvardt, *supra* note 19, at 592 ("For more than thirty years, *Valentine v. Chrestensen* provided the controlling rule regarding First Amendment protection for commercial speech: there was none.").

[25] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 378, 385, 391 (1973).

[26] *Id.* at 388.

newspaper without offending the press clause of the First Amendment.[27]

However, the *Pittsburgh Press* ruling did not turn directly on the *Chrestensen* precedent. The Court concluded that the prohibited classified advertising was unprotected speech because it proposed an *unlawful* activity—employment discrimination.[28] Even if commercial speech were eligible for First Amendment protection, the Court suggested that the First Amendment would not, in any event, protect promotion of illegal conduct.[29] Therefore, the Court upheld the city's order as a restriction on *unlawful* commercial speech without having to decide whether the First Amendment ought to be extended to commercial speech promoting a lawful activity such as purchasing legal products and services.[30]

In 1975, in *Bigelow v. Virginia*,[31] the Court began to recognize that restrictions aimed at commercial speech could nonetheless implicate the First Amendment.[32] The *Bigelow* Court ruled, in a five-to-four decision, that Virginia could not constitutionally prosecute a newspaper under a state criminal statute that prohibited abortion advertising.[33] In *Bigelow*, a Virginia newspaper published an advertisement in 1971 for a New York agency that arranged legal abortions in New York for out-of-state women for a

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[27] *Id.* The *Pittsburgh Press* Court also concluded that the order was not a prior restraint on expression because, first, it did not "endanger arguably protected speech," and second, it was "based on a continuing course of repetitive conduct." *Id.* at 389-90. *See also* Robert L. Kerr, *Unconstitutional Review Board? Considering a First Amendment Challenge to IRB Regulation of Journalistic Research Methods*, 11 COMM. L. & POL'Y 393, 425 (2006) (referring to *Pittsburgh Press* as an example of constitutional parameters imposed on the prior restraint doctrine).

[28] *Pittsburgh Press,* 413 U.S. at 389 ("[A] newspaper constitutionally could be forbidden to publish a want ad proposing the sale of narcotics or soliciting prostitutes.").

[29] *Id.*

[30] One commentator said *Pittsburgh Press* "left *Chrestensen* standing, albeit, in a weakened state," and "limit[ed] the potential applicability of the *Chrestensen* holding, by offering a still-used definition of commercial speech: expression that 'd[oes] no more than propose a commercial transaction.'" Langvardt, *supra* note 19, at 595 (quoting *Pittsburgh Press*, 413 U.S. at 385). Langvardt also cited the 1964 decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the United States Supreme Court refused to characterize a paid advertisement by a non-profit civil rights organization for the purpose of soliciting funds as unprotected commercial speech under *Chrestensen*. *Id.* *See also* SHINER, *supra* note 19, at 32-36 (describing *Pittsburgh Press* as part of the "progression" leading to the rejection of *Chrestensen*).

[31] Bigelow v. Virginia, 421 U.S. 809 (1975).

[32] In another case, the Court described *Bigelow* and *Virginia State Board of Pharmacy* as "erod[ing] the 'commercial speech' exception to the First Amendment." Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 92 (1977). *Cf.* Langvardt, *supra* note 19, at 595-96 ("*Bigelow* virtually consigned *Chrestensen* to the scrap heap" and that "[a]fter *Bigelow*, *Chrestensen* remained alive only in a formal sense.").

[33] *Bigelow*, 421 U.S. at 811, 829. The statute made it a misdemeanor for "any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, [to] encourage or prompt the procuring of abortion or miscarriage." *Id.* at 812-13 (quoting VA. CODE ANN. § 18.1-63 (1960)).

fee.[34] At that time, abortions were illegal in Virginia but were permitted in other states, including New York.[35] The newspaper was convicted under the state criminal statute, and the Virginia Supreme Court rejected the newspaper's constitutional defense and upheld the conviction.[36]

Ultimately, the United States Supreme Court reversed the Virginia State Supreme Court's decision, concluding that the abortion advertisement conveyed information of legitimate public concern and could not be constitutionally prosecuted.[37] The Court explained that the advertisement contained non-commercial elements that did more than simply propose a commercial transaction, because these elements served to inform Virginia women about lawful abortion services in New York and about organizations that could arrange for these services.[38] Also, the Court suggested that general readers were likely to be interested in the legal status of abortion in other states—as a political and social issue—even though they might not be interested in obtaining abortion services themselves.[39] The right of the public to receive information about a controversial public issue from a private speaker, without government interference, seemed critical to the Court's decision.[40]

In *Pittsburgh Press*, the Court held that classified advertising related to employment discrimination—an *illegal* activity—was *ineligible* for constitutional protection. In *Bigelow*, the abortion advertising had involved a legal commercial transaction but was deemed eligible for constitutional protection only because it conveyed information about a public issue that the Court deemed significant. Therefore, in *Pittsburgh Press* and *Bigelow*, the Court ruled on the constitutional issues without confronting the continued validity of *Chrestensen*.[41] In other words, it was unnecessary in *Pittsburgh Press* and *Bigelow* to consider extending First Amendment protection to pure commercial speech

[34] *Id.* at 812.

[35] The facts in *Bigelow* arose in 1971, before the United States Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), and constitutionally prohibited categorical government bans on abortions.

[36] *Bigelow*, 421 U.S. at 813-15.

[37] *Id.* at 822-23, 827, 829.

[38] *Id.* at 822.

[39] *Id.* Justice Blackmun wrote:

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only readers possibly in need of the services offered, but also to those with a general curiosity about it, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.

Id.

[40] *Id.* *See also* SHINER, *supra* note 19, at 36.

[41] *See* Langvardt, *supra* note 19, at 594-96.

concerning a lawful activity.[42] In 1976, the year after *Bigelow* was decided, the Court directly confronted the *Chrestensen* rationale—and rejected it—in *Virginia State Board of Pharmacy*.[43]

B. *Price Advertising by Pharmacists: The* Virginia State Board of Pharmacy *Case of 1976*

In *Virginia State Board of Pharmacy*, the Supreme Court concluded that the First Amendment indeed protects purely commercial speech that is *truthful* and *non-misleading*, and promotes a lawful activity.[44] In the decision, a seven-to-one majority of the Court ruled unconstitutional a Virginia statute that effectively prohibited state-licensed pharmacists from advertising prescription drug prices.[45] The statute defined such advertising as professional misconduct subject to disciplinary action, monetary fines, and license suspension or revocation.[46] A consumer group successfully challenged the constitutionality of the ban in federal district court in Virginia[47] and the United States Supreme Court affirmed this ruling.[48]

On appeal, Virginia argued the ban was needed to maintain high professional standards and levels of expertise within the pharmacy profession, to protect consumers from poor service by pharmacists, and to protect the professional image of pharmacists.[49] The State hypothesized that price advertising by pharmacists would prompt discount pricing and lead to reduced levels of consumer service as pharmacists tried to remain price-competitive.[50] The State argued further that consumers who purchased prescription drugs based on lowest-advertised price would be dissatisfied with the presumably low-quality of services

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[42] *Id.*

[43] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 760-61 (1976) (distinguishing *Bigelow* and stating that "the question whether there is a First Amendment exception for 'commercial speech' is [now] squarely before us.").

[44] *Id.* at 760-62, 770-72. For background on the litigation of *Virginia State Board of Pharmacy* as recounted by counsel for plaintiffs, see generally Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189, 1191-99 (2004).

[45] Justice Douglas took no part in the opinion. The lone dissenter was Justice Rehnquist. *Va. State Bd. of Pharmacy*, 425 U.S. at 781-90 (Rehnquist, J., dissenting). Rehnquist concluded that "the societal interest against the promotion of drug use for every ill, real or imaginary, seems . . . extremely strong . . . ." He also wrote that he "[did] not believe that the First Amendment mandates the [majority's] 'open door policy' toward such commercial advertising." *Id.* at 790.

[46] *Id.* at 750-52 (majority opinion).

[47] *See* Va. Citizens Consumer Council, Inc. v. Va. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

[48] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (enjoining enforcement of the statute).

[49] *Id.* at 766-68. The State argued also that price-advertising would not necessarily lower drug prices for consumers. *Id.* at 768.

[50] *Id.* at 767-68.

provided by discount pharmacists and accordingly, would form negative impressions of pharmacists.[51]

The *Virginia State Board of Pharmacy* Court agreed with the State that there was a strong regulatory interest at stake in preserving high levels of professionalism among licensed pharmacists.[52] Nonetheless, the Court concluded that a prophylactic ban on price advertising was too broad a means of achieving that goal.[53] For instance, the Court pointed out that the ban prevented all pharmacists—including those who provided high levels of service and operated with the highest of professional standards—from truthfully advertising non-misleading price information in connection with lawful professional services.[54] Additionally, the Court noted that consumers like the elderly and those on fixed incomes would benefit from knowing where to purchase prescription medications most economically.[55]

Virginia State Board of Pharmacy is a landmark case in that it established the constitutional right of commercial speakers to disseminate truthful, non-misleading information about legal products and services. On this point, Justice Blackmun wrote:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.[56]

Justice Blackmun emphasized that a commercial message did not need to be "publicly 'interesting' or [even] 'important'" to serve this bare commercial function and merit First Amendment protection.[57] In other words, in a break from the holding in *Pittsburgh Press*, the *Virginia State Board of Pharmacy* Court did not condition constitutional protection for commercial speech on the

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[51] *Id.*

[52] *Id.* at 766.

[53] *Id.* at 770.

[54] *Id.*

[55] *Id.* at 763-64.

[56] *Id.* at 765.

[57] *Id.* at 764-65 ("[N]o line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."). One commentator has suggested that constitutional protection for commercial speech ought not to be "defended on the ground that commercial advertising serves the First Amendment value of market efficiency" but instead might be defended on the ground that commercial speech "conveys information of relevance to democratic decision making." Post, *supra* note 5, at 10, 15. *See also* Langvardt, *supra* note 19, at 596-97 (discussing the First Amendment "marketplace of ideas" metaphor in the context of *Virginia State Board of Pharmacy*).

presence of significant non-commercial social and political messages.

The *Virginia State Board of Pharmacy* opinion also established the First Amendment right of consumers to receive commercial information to make lawful purchase decisions.[58] On this point, the Court objected strongly to the Virginia ban because it acted as a means of "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[59] The opinion strongly suggested that the government cannot constitutionally ban commercial speech solely to prevent consumers from making purchase decisions that are entirely legal but perhaps deemed unwise by the government. Instead, the majority suggested, the better approach constitutionally is to facilitate and enhance the flow of commercial information, not restrict it, and hope that well-informed consumers will make sound economic decisions in the aggregate, based on their own self-determined interests.[60]

C. *Price Claims in Attorney Advertising: The 1977* Bates *Case*

The *Virginia State Board of Pharmacy* Court did not extend its ruling beyond the pharmacy industry, and specifically did not address the constitutionality of advertising regulations for other licensed professionals such as lawyers and physicians.[61] The year after *Virginia State Board of Pharmacy*, the Court addressed the constitutionality of a state's regulation of lawyer advertising.[62] In *Bates v. State Bar of Arizona*, a five-to-four majority of the Court held

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[58] *See* An, *supra* note 19, at 221 ("The Court's long-time struggle to define the status of commercial speech finally came into line [in *Virginia State Board of Pharmacy*] with the listener's interest in acquiring information, leaving aside the existence of financial motives on the part of the speaker.").

[59] *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

[60] *Id.* Justice Blackmun wrote:

> [The] alternative [to banning price advertising by pharmacists] is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id.

[61] *Id.* at 773 n.25. Justice Blackmun wrote:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Id. (emphasis added).

[62] Nonetheless, the American Bar Association concluded that *Virginia State Board of Pharmacy* signaled the end of constitutional bans on lawyer advertising. A.B.A. COMM'N ON ADVER., LAWYER ADVERTISING AT THE CROSSROADS 16 (1995) [hereinafter A.B.A. COMM'N ON ADVER.].

unconstitutional a state ban on lawyer advertising to the extent that the ban prohibited truthful, non-misleading price advertising for routine legal services.[63] The *Bates* Court concluded the ban "ke[pt] the public in ignorance," similar to the price advertising ban for pharmacists struck down in *Virginia State Board of Pharmacy*,[64] and again focused on state regulation as an unconstitutional means of prohibiting an advertiser from communicating with consumers.

In *Bates*, Arizona argued that price advertising by lawyers was "*inherently* misleading," and thus unprotected under the First Amendment, because legal services are so individualized that advertising fixed prices for services would be deceptive.[65] The Court rejected this argument and found nothing misleading about the advertising of fixed costs for routine legal services like uncontested divorces, adoptions, or changes of names so long as the "necessary work" was completed at the stated price.[66] Writing for the majority, Justice Blackmun stated, "We are not persuaded that restrained professional advertising by lawyers *inevitably* will be misleading."[67]

Arizona also argued that lawyer advertising would damage the professional image of lawyers in the eyes of the public, and would generate unnecessary litigation, increase litigation costs, and decrease the quality of legal services.[68] The Court rejected these arguments as speculative and unpersuasive because the State presented no supporting evidence.[69] Justice Blackmun characterized the "postulated connection" between price advertising and unprofessional conduct by attorneys as "severely strained."[70]

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63 Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977). Justice Blackmun wrote the majority opinion for the Court, and Justices Brennan, White, Marshall, and Stevens joined to comprise the five-justice majority on the First Amendment holdings. *Id.* at 363-84 (Parts III and IV of the opinion). Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented on the First Amendment holdings in the case. *Id.* at 386-88 (Burger, C.J., concurring in part and dissenting in part); *id.* at 389-404 (Powell, J., joined by Stewart, J., concurring in part and dissenting in part); *id.* at 404-05 (Rehnquist, J., dissenting in part). Justice Rehnquist wrote strongly against incorporating advertising within the scope of First Amendment stating, "I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services." *Id.* at 404.

64 *Id.* at 365 (majority opinion).

65 *Id.* at 372-73 (emphasis added). For the majority, Justice Blackmun wrote, "We are not persuaded that restrained professional advertising by lawyers *inevitably* will be misleading." *Id.* at 372 (emphasis added).

66 *Id.* at 372-73.

67 *Id.* at 372 (emphasis added).

68 *Id.* at 368-72, 375-77, 377-78, 378-79.

69 *Id.* at 368-72, 376-78.

70 *Id.* at 368.

The *Bates* Court limited the scope of its holding to truthful, non-misleading *price* advertising for routine legal services.[71] Justice Blackmun explained that the Court was not determining the extent to which a state could restrict *quality* claims related to legal services or require a disclosure such as a "warning" or "disclaimer" in lawyer advertising to prevent a claim from being misleading to consumers.[72] In addition, the Court did not address advertising by other professionals.[73]

Justice Blackmun raised an important issue in *Bates* regarding the line between protected and unprotected commercial speech under the First Amendment. He reiterated from *Virginia State Board of Pharmacy* that the First Amendment did not protect "false, deceptive, or misleading" advertising, which meant that those categories of commercial speech could be constitutionally "restrained" by the government.[74] However, he cautioned, "many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved."[75] Justice Blackmun muddied these waters in *Bates* himself by using the words "deceptive" and "misleading" seemingly interchangeably and using such terms as "*inherently* misleading" and "*inevitably* misleading" almost synonymously without further explanation.[76]

In 1979, two years after deciding *Bates*, the Court revisited the notion of unprotected misleading advertising in *Friedman v. Rogers*.[77] In *Rogers*, the Court held that Texas could constitutionally prohibit optometrists from practicing under corporate or trade names other than their own licensed names.[78] The Court held that using a trade name for an optometrical practice was a form of commercial speech,[79] but merited no constitutional protection because of the "*significant* possibility" of misleading the public with

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71 *Id.* at 366-68. Justice Blackmun wrote, "The heart of the dispute before us today is whether lawyers . . . may constitutionally advertise the prices at which certain routine services will be performed." *Id.* at 367-68. In addition, he explained the Court was not deciding the extent to which in-person solicitation by lawyers might be regulated, and left open issues regarding the "special problems of advertising on the electronic broadcast media." *Id.* at 366, 383-84.

72 *Id.* at 383-84.

73 *See id.* at 365 ("[D]ifferences among professions might bring different constitutional considerations into play . . . .").

74 *Id.* at 383-84.

75 *Id.* at 384.

76 *Id.* at 372-73, 384.

77 Friedman v. Rogers, 440 U.S. 1 (1979).

78 *Id.* at 15-16. The Texas statute, in relevant portion, stated, "'No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed . . . .'" *Id.* at 5 n.6 (quoting TEX. REV. CIV. STAT. ANN. art. 4552, § 5.13(d) (Vernon 1976)).

79 *Id.* at 11. The Court concluded, "The possibilities for deception [would be] numerous" if optometrists could use trade names. *Id.* at 13.

trade names.[80] For instance, a trade name for an optometrical practice could develop meaning over time but might not reflect the current level of professional services being offered because of turnover in personnel.[81] In this regard, the Court indicated that trade names are distinguishable from factual price advertising like the kind at issue in *Bates* and *Virginia State Board of Pharmacy*.[82] Nonetheless, the *Rogers* opinion did little to illuminate the parameters of unprotected misleading commercial speech.[83]

Both *Virginia State Board of Pharmacy* and *Bates* stand today as the cornerstones of the Supreme Court's commercial speech doctrine, and as the cases that for the first time, placed constitutional limitations on government restrictions of professional services advertising.[84] These cases incorporated purely commercial expression among the forms of speech eligible for First Amendment protection. However, because *Bates* was not clarified in *Rogers*, the line between protected and unprotected commercial speech remained hazy. The *Bates* Court also noted that other issues loomed, including the extent to which disclosure requirements might be constitutional in order to mitigate, under

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80 *Id.* at 12-13 (emphasis added) ("Because . . . ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.").

81 *Id.* at 13 ("[T]he public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice."). In addition, the Court explained, "A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one." *Id.*

82 *Id.* at 16. In addition, it was critical to the Court that Texas was not prohibiting optometrists from advertising their practices, services, and prices, but rather was requiring them to avoid "unstated and ambiguous associations with . . . trade name[s]." *Id.*

83 In 1995, a federal district court in Texas relied on *Rogers* to uphold a similar state rule banning lawyers from using trade names such as "Bankruptcy Clinic." Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1350 (E.D. Tex. 1995), *aff'd without opinion*, 100 F.3d 953 (5th Cir. 1996). In that case, the court concluded that trade names used by lawyers posed a "significant risk[]" of deceiving consumers and the ban did not "infringe the First Amendment's protection for commercial speech." *Id.* at 1348-49, 1350.

84 *See* Terence Shimp & Robert Dyer, *How the Legal Profession Views Legal Service Advertising*, 42 J. MARKETING 74 (1978) (reporting in 1978 that "[f]ollowing the *Bates* decision, advertising bans were removed by the American Dental Association, the American Physical Therapy Association, and the National Society of Public Accountants" and suggesting that others would follow). Shimp and Dyer also noted, that at the time, the Federal Trade Commission (FTC) had pending litigation against the American Medical Association (AMA) over the organizational ban on physician advertising for its members. *Id.* Ultimately, in that litigation, the United States Court of Appeals for the Second Circuit upheld an order entered by the FTC that required the AMA to "cease and desist from . . . restricting the advertising of services, facilities, or prices by physicians or organizations with which physicians are affiliated" as an illegal restraint on trade. Am. Med. Ass'n v. Fed. Trade Comm'n, 638 F.2d 443, 450, 453 (2d Cir. 1980), *aff'd per curiam*, 455 U.S. 676 (1982). Another commentator reported in 1978 that following *Bates*, states began easing restrictions on professional advertising, including New York (doctors and dentists). Dorothy Cohen, *Advertising and the First Amendment*, 42 J. MARKETING 59, 65 (1978).

certain circumstances, potentially misleading commercial speech. In other words, the Court had yet to address more fully the extent to which the government could constitutionally regulate protected commercial speech short of a categorical ban.

D. *The* Central Hudson *Analysis (1980)*

In *Virginia State Board of Pharmacy*, Justice Blackmun suggested that protected commercial speech could be constitutionally regulated but did not expand any further. Blackmun's opinion in *Bates* shed little light on this point, except to suggest that disclosure requirements could be a constitutional alternative to the types of categorical bans struck down by *Virginia State Board of Pharmacy* and *Bates*. However, even after *Bates*, the Court had yet to determine how governmental regulations of protected commercial speech ought to be analyzed for constitutionality.

In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court established a four-pronged analysis to test the constitutionality of commercial speech regulations under the First Amendment.[85] The Court concluded that a state utility commission's policy banning promotional advertising by regulated electric utility companies violated the First Amendment.[86] A utility company had challenged the ban on constitutional grounds in state court, but the company lost at the trial level and then again on appeal to both the intermediate appellate court and the state's highest court.[87]

On final appeal, the United States Supreme Court reversed. The Court first characterized the ban as a restriction on pure commercial speech because it targeted speech "related solely to the economic interests of the speaker and its audience."[88] Writing for the majority, Justice Powell set out the following four-part

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[85] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). A prominent First Amendment commentator described *Virginia State Board of Pharmacy* and *Central Hudson* as examples of "subcategorization within the [F]irst [A]mendment." Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1198 (1988). Another noted commentator concluded that the "Court's assumption that 'commercial' speech is really different in kind from 'political' speech is hardly self-evident." Rotunda, *supra* note 23, at 101-03. For further discussion of jurisprudential alternatives to such categorizations of speech under the First Amendment, see generally O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1 (1996).

[86] *Cent. Hudson*, 447 U.S. at 558-60. The Public Service Commission of New York had defined "promotional" advertising by electric utilities as "advertising intended to stimulate the purchase of utility services." *Id.* at 559 (quoting the Commission's Policy Statement of Feb. 25, 1977).

[87] *Id.* at 560-61.

[88] *Id.* at 561. The state utility commission's policies specifically allowed "information" advertising to encourage energy conservation such as encouraging consumers to shift energy consumption to off-peak hours. *Id.*

analysis for testing the constitutionality of commercial speech regulations:

> [First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern a *lawful activity* and not be *misleading*. [Second], we ask whether the asserted *governmental interest is substantial*. If both inquiries yield positive answers, we must [third] determine whether the regulation *directly advances the governmental interest* asserted, and [fourth] whether it is *not more extensive than is necessary* to serve that interest.[89]

Under this analysis, a regulation that only restricts *unprotected* commercial speech can be ruled constitutional without further inquiry. However, a regulation of *protected* commercial speech can be ruled constitutional only if the requirements of each of the last three prongs are met.[90] Otherwise stated, the last three prongs comprise a conjunctive test, and a regulation of *protected* commercial speech can be ruled unconstitutional for failing any one of these three requirements.

Applying Justice Powell's four-pronged analysis, the *Central Hudson* Court struck down the utility advertising ban.[91] Under the first prong, there was no dispute that the ban restricted *protected* commercial speech.[92] Under the second prong, the Court agreed with the State that there was a sufficiently substantial governmental interest in energy conservation, and, under the third prong, assumed that the ban would curb consumer electricity demand sufficiently to conclude that the ban served the State's energy conservation goal directly enough.[93]

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89 *Id.* at 566 (emphasis added).

90 One commentator characterized the analysis as comprising "two tests." Langvardt, *supra* note 19, at 599-600. The first test consists of the first prong of the analysis, which asks whether the regulation restricts protected commercial speech. *Id.* The second test consists of the remaining three prongs. *Id.* In the majority opinion in a 1995 case, Justice O'Connor described the test in a similar fashion as an initial inquiry into whether the regulation restricts commercial speech that "concerns unlawful activity or is misleading" and, if not, whether the regulation "satisfies a test consisting of three related prongs." Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

91 *Cent. Hudson*, 447 U.S. at 571 (1980).

92 *Id.* at 566-68 (noting the State "[did] not claim that the expression at issue is inaccurate or relates to unlawful activity"). The State argued promotional advertising by utility companies that held a monopoly in their service areas—like the Central Hudson company did—should not be considered protected commercial speech under the First Amendment. *Id.* at 566-67. The majority rejected this proposition and concluded, "[e]ven in monopoly markets, the suppression of advertising reduces the information available to consumer decisions and thereby defeats the purpose of the First Amendment." *Id.* at 567.

93 *Id.* at 568-69. The majority assumed an "immediate connection between advertising and demand for electricity" such that banning advertising would prevent the additional demand that would have been caused by advertising. *Id.* at 569. The State also asserted a regulatory interest in curbing promotional advertising by electric utility companies in

However, under the fourth prong, the Court found that the ban failed the narrow-tailoring requirement. Justice Powell wrote: "The [ban] prevents [electric utility companies] from promoting electric services that would reduce energy use by diverting demand from less efficient services, or that would consume roughly the same amount of energy as do alternative sources."[94] He suggested hypothetically, for instance, that the ban would prevent messages that promoted electric-powered heat-pumps over less energy-efficient systems.[95] Banning such messages exceeded the scope of the State's asserted interest in energy conservation and rendered the ban unconstitutional as sweeping too broadly.[96]

Virginia State Board of Pharmacy and *Bates* established that the government could not constitutionally ban pharmacists from advertising the prices of lawful prescription drugs or ban attorneys from advertising the price of routine legal services. When the *Central Hudson* analysis was established in 1980, the Court gave no indication how the analysis would be applied in other commercial speech contexts. Thus, the extent to which the *Central Hudson* analysis might apply to regulations of professional services advertising after 1980 remained undecided. In a series of cases following *Central Hudson*, the Court delved into that issue, and that analysis remains today as the means by which commercial speech regulations are tested for constitutionality under the First Amendment.[97]

III. APPLICATION OF *CENTRAL HUDSON* ANALYSIS: UNITED STATES SUPREME COURT CASES AFTER *BATES*

In 1982, the United States Supreme Court deemed the *Central Hudson* analysis appropriate to test the constitutionality of attorney advertising regulations under the First Amendment.[98] In subsequent cases, the Court continued to apply the test to attorney advertising regulations,[99] and accountant and pharmacist

order to prevent such advertising from stimulating demand during peak consumption hours and, ultimately, driving up overall consumption rates for consumers. *Id.* The majority found this regulatory interest sufficiently substantial but concluded the connection between advertising and the "equity and efficiency" of electricity rates was too "conditional and remote." *Id.* at 569.

94 *Id.* at 570.

95 *Id.* at 569-70.

96 *Id.*

97 *See, e.g.*, Smolla, *supra* note 13, at 11 ("Commercial speech cases continue to be governed by the four-part test articulated by the Court in *Central Hudson*.").

98 *In re* R.M.J., 455 U.S. 191 (1982).

99 *See* A.B.A. COMM'N ON ADVER., *supra* note 62, at 17 (describing the *Central Hudson* analysis as the "standards that have served to govern the constitutionality of commercial free speech and, therefore, lawyer advertising since 1980").

advertising regulations as well.[100] The Court's two most recent professional services advertising cases—one dealing with a state restriction on targeted direct-mail solicitation by lawyers,[101] and the other dealing with a federal ban on direct-to-consumer compounded drug advertising by licensed pharmacists[102]—are significant in that they continued to define the constitutional parameters of official restrictions on professional services advertising. They also significantly strengthened the *Central Hudson* analysis as a mechanism for providing First Amendment protection for commercial speech.

A. *Banned Claims and Compelled Disclosures*

In *In re R.M.J.*, a unanimous Supreme Court ruled in 1982 that Missouri could not constitutionally limit the content of attorney advertising to ten categories of information. These categories included name, address, telephone number, office hours, and fees for routine legal services. The State also predetermined the specific areas of practice that a lawyer could advertise as areas of specialization.[103] The issue in *R.M.J.* was that an attorney, R.M.J., had included within his advertisement the states in which he was licensed to practice law, his admission to appear before the United States Supreme Court, and his primary areas of practice. Although truthful and accurate, the licensing and admission claims were not within the permissible categories of information. Also, some of the practice areas that R.M.J. listed in his advertisement were not approved areas under state rules (i.e., "contracts" and "securities"), and R.M.J. had used unapproved terms for the others (i.e., "real estate" instead of the approved "property").[104] The Missouri Supreme Court found R.M.J. in violation of state rules, rejected his First Amendment challenge and reprimanded him.[105] On appeal, the United States Supreme Court reversed.[106]

The *R.M.J.* Court decided that the *Central Hudson* analysis was appropriate for testing government restrictions on professional services advertising—albeit with a slight caveat.[107] Writing for a unanimous Court, Justice Powell explained that "special

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100 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (pharmacists); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994) (accountants); Edenfield v. Fane, 507 U.S. 761 (1993) (accountants).

101 *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

102 *See Thompson*, 535 U.S. 357.

103 *In re* R.M.J., 455 U.S. 191, 206-07 (1982).

104 *Id.* at 196-97.

105 *Id.* at 197-98.

106 *Id.* at 207.

107 *Id.* at 204.

characteristics of [professional] services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public."[108] Thus, he cautioned, the *Central Hudson* analysis needed to be applied with these distinctions in mind.[109]

Under the first prong, the Court concluded that the claims for which R.M.J. was reprimanded comprised commercial speech.[110] More importantly, the Court found the claims protected under the First Amendment.[111] Justice Powell reiterated the constitutional requirement that advertising be "truthful" and "related to lawful activities" to be eligible for First Amendment protection.[112] He also pointed out, "misleading" advertising could be "prohibited entirely."[113] On this point, he explained, "States retain the authority to [prohibit] advertising that is *inherently* misleading or that has proved to be misleading *in practice*."[114] However, he cautioned, "States may not place an absolute prohibition on certain types of *potentially* misleading information . . . if the information also may be presented in a way that is not deceptive."[115] There was no dispute that the claims at issue in the case involved lawful professional services, and that the State did not prove them to be either false or misleading.[116] Therefore, the reprimand had to withstand scrutiny under each of the remaining *Central Hudson* prongs in order to be upheld.

Under the second prong, the Court found that Missouri had failed to establish a sufficiently substantial governmental interest for reprimanding R.M.J. for protected commercial speech, and found the reprimand unconstitutional on that ground alone.[117] As in prior commercial speech cases, the Court focused on the value of the prohibited information to consumers and noted that facts like the states in which an attorney is licensed to practice would be "highly relevant" to consumers seeking legal representation.[118] Having resolved the constitutional issue at that point, the Court did not proceed through the remainder of the *Central Hudson*

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108 *Id.* at 204 n.15.
109 *Id.*
110 *Id.* at 204 n.17 ("We note that the restrictions placed upon [R.M.J.'s] speech . . . imposed a restriction only upon commercial speech" and that "[b]y describing his services and qualifications, [R.M.J.]'s sole purpose was to encourage members of the public to engage him for personal profit.").
111 *Id.* at 203-04
112 *Id.* at 203.
113 *Id.*
114 *Id.* at 207 (emphasis added).
115 *Id.* at 203 (emphasis added). Justice Powell suggested that listing specialty areas of practice in lawyer advertising could be considered *potentially* misleading. *Id.*
116 *Id.* at 205-07.
117 *Id.* at 205.
118 *Id.*

analysis.

Missouri also had reprimanded R.M.J. for violating the State's rule that required the following disclosure when lawyers advertised specialty areas of practice: "Listing of the above areas of practice does not indicate any certification of expertise therein."[119] R.M.J. did not challenge the constitutionality of the disclosure requirement.[120] Nonetheless, in dicta, Justice Powell reiterated from *Bates* that disclosure requirements are constitutionally preferable to prophylactic bans on *potentially* misleading claims in professional services advertising so long as the requirements are "no broader than reasonably necessary to prevent the deception."[121] Because the disclosure issue was not litigated, the extent to which the government could constitutionally compel disclosures in lawyer advertising remained unclear after *R.M.J.*

The constitutionality of restrictions on lawyer advertising arose again in the 1985 case *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[122] In *Zauderer*, the Supreme Court held that Ohio could not constitutionally ban targeted solicitations or illustrations in lawyer advertising.[123] However, the Court also held that Ohio *could* constitutionally require a disclosure that explained to consumers the distinction between "fees" and "costs" when lawyers advertised their services on a contingency-fee basis.[124]

In *Zauderer*, a state disciplinary rule effectively prohibited attorney advertising that targeted individuals with specific legal problems.[125] Another rule banned illustrations except for the scales of justice and pictures of advertising lawyers and also limited

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119 *Id.* at 195 n.6.

120 *Id.* at 204 n.18.

121 *Id.* at 203. For the Court, Justice Powell wrote:

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

Id. (emphasis added).

122 Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

123 *Id.* at 639-49, 655-56.

124 *Id.* at 650-53, 655-56.

125 "A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

copy content to specified categories of information.[126] Yet another rule required that attorneys who advertised contingency-fee representation had to include a disclosure explaining that clients still could be responsible for "court costs and other expenses" even if no recovery was made on their behalf and they owed no attorney "fees."[127]

In a disciplinary proceeding, the Ohio Supreme Court reprimanded attorney Philip Zauderer for advertising his legal services on a contingency-fee basis to women allegedly injured by a defective intra-uterine device known as the Dalkon Shield, for illustrating the device in the advertisement, and for omitting the mandated costs-disclosure.[128] Zauderer appealed to the United States Supreme Court, which reversed the reprimand on all grounds except for the disclosure violation.[129]

A unanimous Court concluded that the Dalkon Shield statements and illustration in Zauderer's advertisements comprised commercial speech under the First Amendment and his reprimand needed to be tested for constitutionality under the *Central Hudson* analysis.[130] Under the first prong, the Court concluded that the statements and illustration comprised *protected* commercial speech. The Court held there was nothing "false and deceptive"[131] about the statements and the illustration for which Zauderer was disciplined was "accurate" with "no features that [were] likely to deceive, mislead, or confuse the reader."[132] Therefore, the State needed to justify its rules and the reprimand

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Id. at 632 n.3 (quoting OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101(A)).

[126] *Id.* at 632 n.4. Rule 2-101(B) of the *Ohio Code of Professional Responsibility* provided that advertisements must be "'presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except for . . . pictures of the advertising lawyers, or . . . a portrayal of the scales of justice.'" *Id.* (quoting OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101(B)). The rule listed twenty specific categories of permissible information including name, address, and telephone number; age; and date of admission to a state bar. *Id.*

[127] *Id.* at 633-34 (citing OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101(B)(15)).

[128] *Id.* at 631-34. The Ohio Supreme Court determined that the rules as applied to Zauderer's advertisements were constitutional. *Id.* at 636.

[129] *Id.* at 655-56.

[130] *Id.* at 637-38. For the majority, Justice White wrote:

> [Zauderer's] advertising contains statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context would be fully protected speech. That this is so does not alter the status of the advertisements as commercial speech.
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> . . . .
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> In this case, Ohio has placed no general restrictions on [Zauderer's] right to publish facts or express opinions regarding Dalkon Shield litigation; Ohio's Disciplinary rules prevent him only from conveying those facts and opinions in the form of advertisements of his services as an attorney.

Id. at 637 n.7.

[131] *Id.* at 641.

[132] *Id.* at 647.

under the remainder of the *Central Hudson* analysis.[133]

In a five-to-three decision,[134] the Court concluded that Ohio's categorical ban on targeted advertising and illustrations was too broad a means of serving the asserted governmental interests in preventing lawyers from using false and misleading claims to generate frivolous litigation[135] or protecting the public from misleading illustrations in lawyer advertising.[136] The State argued that the bans were necessary because policing false and misleading claims and illustrations in attorney advertising on a case-by-case basis would be too difficult and burdensome.[137] The Court rejected this proposition. For the majority, Justice White wrote that an "assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity."[138] In addition, "identifying deceptive or manipulative uses of visual media in advertising is [not] so intrinsically burdensome that [Ohio] is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations."[139]

The *Zauderer* majority found that Ohio had unconstitutionally impeded the flow of important commercial information to consumers. "[I]ndeed, insofar as [Zauderer's] advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising."[140] As in previous commercial speech cases, the *Zauderer* majority strongly weighed the value of the prohibited commercial information to the intended recipients, which in this case meant women with potential legal claims related to their use of the Dalkon Shield.

On the other hand, the *Zauderer* Court ruled six-to-two that Ohio *could* constitutionally require attorney Zauderer to disclose

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133 *Id.* at 641, 647.

134 Justice Powell took no part in the opinion. *Id.* at 656.

135 *Id.* at 643-44 ("The State's argument that it may apply a prophylactic rule to punish [Zauderer] notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted.").

136 *Id.* at 648-49 ("Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, [Zauderer] may not be disciplined for his use of an accurate and nondeceptive illustration.").

137 *Id.* at 644, 648-49.

138 *Id.* at 645-46.

139 *Id.* at 649. The majority concluded the State could not "suppress[] . . . truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false and deceptive advertising." *Id.* at 646.

140 *Id.*

costs when advertising contingency-fee representation.[141] Specifically, Justice White explained, the disclosure would provide consumers with "factual and uncontroversial information" about the terms and conditions of proposed legal representation.[142] Providing this information to consumers was consistent with the rationale established in *Virginia State Board of Pharmacy* and the strong right of the public to receive commercial information related to their marketplace decisions.[143] Conversely, he explained, any First Amendment right of advertisers to withhold "factual information" from consumers in their advertising was "minimal" by comparison if it existed at all.[144]

In *Zauderer*, the State presented no evidence that contingency-fee claims in lawyer advertising were misleading *without* the required costs disclosure but the Court found that unnecessary.[145] For the majority, Justice White presumed few consumers would know the distinction between legal "fees" and "costs" in litigation, and therefore, found the "*possibility* of deception" without the required disclosure "self-evident" and "not speculative."[146] Ohio did not need to "'conduct a survey'" to prove that contingency-fee advertising was *potentially* misleading without the required disclosure.[147]

Justice White cautioned that "*unjustified* or *unduly burdensome* disclosure requirements might offend the First Amendment by chilling protected commercial speech."[148] In addition, he said, a

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141 *Id.* at 650. Zauderer had included the following statements in his advertisement: "The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The required disclosure would have explained whether contingency fee percentages were calculated before or after deduction of court costs and expenses from the amount recovered, explained the distinction between attorney "fees" and litigation "costs," and explained that clients could be liable for "costs" even when no recovery was made in their cases and they owed no "fees." *Id.* at 650-53.

142 *Id.* at 651. Justice White explained, "[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* He concluded that "the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under [the First Amendment]." *Id.* at 652.

143 *Id.* at 651. Justice White explained that the State was "not attempt[ing] to prevent attorneys from conveying information to the public" but instead "has only required them to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650.

144 *Id.* at 651.

145 *Id.* at 650. Justice White summarized Zauderer's argument on this point as follows: "[H]e suggests that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception . . . ." *Id.*

146 *Id.* at 652 (emphasis added). Justice White wrote, "[I]t is a commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'—terms that, in ordinary usage, might well be virtually interchangeable." *Id.*

147 *Id.* at 652-53 (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965)).

148 *Id.* at 651 (emphasis added). The Court found no "factual basis for finding that

disclosure requirement should be "*reasonably* related to the [government's] interest in preventing deception" in order to protect the First Amendment rights of advertisers.[149] However, the opinion did not explain these requirements or their relationship to the requirements in the *Central Hudson* analysis. Nonetheless, the opinion clearly confirmed that disclosure requirements for professional services advertising did not rise to the same level of constitutional concern as content bans and could be constitutionally employed in response to *potentially* misleading claims in professional services advertising.[150]

Five years after *Zauderer*, the Court decided a case that turned on the allegedly misleading nature of attorney specialist certifications. In the 1990 decision, *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, the Supreme Court ruled that Illinois could not constitutionally prohibit an attorney from printing a specialist certification issued to him by the National Board of Trial Advocacy (NBTA), a private national legal organization, on his letterhead.[151] In *Peel*, an Illinois rule generally prohibited lawyers from promoting themselves as a "specialist" in any field other than patent, trademark or admiralty law.[152] The Illinois Supreme Court had censured attorney Gary Peel under the rule because his letterhead included the title "Certified Trial Specialist," a credential issued by the NBTA.[153] On appeal, the United States Supreme Court found the censure unconstitutional under the First Amendment.[154]

The *Peel* plurality[155] found that Illinois failed to submit empirical evidence proving that the NBTA certification was *actually* or *inherently* misleading and, thus, unprotected under the First Amendment."[156] For instance, there was no evidence that actual consumers had mistakenly assumed that the NBTA certification was government-issued.[157] The plurality concluded

Ohio's disclosure requirements are unduly burdensome." *Id.* at 653 n.15.

149 *Id.* at 651.

150 *Id.* at 650-51. The Court rejected Zauderer's argument that the disclosure requirement compelled speech and should be subject to strict constitutional scrutiny. *Id.* at 650-51, 651 n.14.

151 Peel v. Attorney & Disciplinary Comm'n of Ill., 496 U.S. 91, 110-11 (1990).

152 *Id.* at 97 n.8 (setting out the provisions in ILL. DISCIPLINARY RULE 2-105 (1988)).

153 *Id.* at 99-100. Peel's letterhead identified him as a "Certified Civil Trial Specialist By the National Board of Trial Advocacy" and indicated he was licensed in Illinois, Missouri, and Arizona. *Id.* at 96.

154 *Id.* at 110-11.

155 *Id.* Justice Stevens wrote the majority opinion joined by Justices Brennan, Blackmun and Kennedy. Justice Marshall wrote the concurrence joined by Justice White. *Id.* at 111 (Marshall, J., concurring in the judgment).

156 *Id.* at 103-05 (majority opinion).

157 *Id.* at 102-03, 105-06. Without contrary evidence, the plurality assumed the public could distinguish privately-issued certifications from government licenses. *Id.* at 102-03.

that Illinois likewise failed to demonstrate that the NBTA certification was "*potentially* misleading," which still would have required the State to demonstrate a "sufficiently substantial" governmental interest "to justify [its] categorical ban."[158] The plurality summarized that there was simply "no empirical evidence to support the State's claim of deception" and justify Peel's censure for using the NBTA certification.[159]

The State had another route to validate the censure but failed there as well. The *Peel* plurality stated that illegitimate or "sham" certifications would not merit First Amendment protection and could be constitutionally banned.[160] However, there was no evidence in the case that the NBTA certification was illegitimate. To the contrary, the plurality characterized the NBTA as a bona fide legal organization that had been endorsed by professional legal organizations and even state supreme courts.[161] In addition, the plurality noted that the "Certified Trial Specialist" certification was reflective of clearly-stated and rigorous criteria that were available for verification by consumers.[162]

Clearly, the *Peel* plurality recognized the potential dangers to consumers posed by lawyers advertising sham certifications; however, the Court concluded that states like Missouri could not constitutionally impose a categorical ban on privately-issued certifications as a means of protecting the public from these potential harms.[163] Instead, the State could police lawyer advertising on a case-by-case basis and take action against any individual lawyer who advertised a sham certification.[164] This would allow others to truthfully advertise bona fide privately-issued certifications.[165]

The plurality also concluded the NBTA certification had no more potential to mislead than "Registered Patent Attorney" or "Proctor in Admiralty," both of which were allowed by state rule. *Id.* at 107 (referring to ILL. DISCIPLINARY RULE 2-105(a) (1988)).

158 *Id.* at 100 (emphasis added).

159 *Id.* at 108. The State did not contend actual consumers had been misled and presented no such evidence of "actual deception or misunderstanding." *Id.* at 100-01.

160 *Id.* at 109. Justice Stevens wrote, "A lawyer's truthful statement that 'XYZ Board' has 'certified' him [or her] as a 'specialist in admiralty law' would not necessarily be entitled to First Amendment protection if the certification was a sham." *Id.* The opinion defined "sham" certifications as credentials issued by organizations without "objective and consistently applied standards relevant to practice in a particular area of law." *Id.*

161 *Id.* at 95-96, 102.

162 *Id.* at 100-02, 109.

163 *Id.* at 109.

164 *Id.* ("[N]o showing—indeed no suggestion—that the burden of distinguishing between certifying boards that are bona fide and those that are bogus would be significant, or that bar associations and official disciplinary committees cannot police deceptive practices effectively.").

165 *Id.* (noting the "heavy burden" of government to justify a "categorical prohibition against dissemination of accurate factual information to the public," and the "presumption favoring disclosure over concealment" and "presumption that members of a respected profession are unlikely to engage in practice that deceive their clients and

The extent to which Illinois could have constitutionally required Peel to include a disclosure with his NBTA certification was not an issue in the case, and, in a footnote, the *Peel* plurality said its holding did not "necessarily preclude less restrictive regulation of commercial speech."[166] In a concurrence joined by Justice Brennan, Justice Marshall took the position that states could constitutionally require that disclosures accompany privately-issued certifications when used by lawyers in their public communications.[167] Although Marshall agreed with the plurality that the NBTA certification was not *actually* or *inherently* misleading and could not be constitutionally banned, he found the credential *potentially* misleading without a disclosure that the credential was not government-issued.[168]

In 1993, the Court addressed the constitutionality of an in-person solicitation ban for licensed accountants in *Edenfield v. Fane*.[169] In a previous case, *Ohralik v. Ohio State Bar Ass'n*,[170] the Court had already upheld a similar ban for attorneys on the ground that in-person solicitation by attorneys posed an inherent threat of unchecked overreaching and undue influence, especially when targeting vulnerable individuals like accident victims.[171] In

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potential clients"). The plurality opinion said the "possibility of deception in hypothetical cases" was not sufficient to ban otherwise truthful commercial speech. *Id.* at 111. One commentator concluded the *Peel* decision served to "encourage[] the use of [truthful and verifiable claims of certification]." W. Thier, Peel v. Attorney Registration & Disciplinary Commission*: Allowing Claims of Certification in Lawyer Advertising*, 65 TUL. L. REV. 687, 695 (1991).

166 *Peel*, 496 U.S. at 110 n.17.

167 *Id.* at 111-12, 116-17 (Marshall, J., concurring in the judgment). In a dissenting opinion, Justice White agreed with Justice Marshall but would have allowed Illinois to prohibit Peel from using the NBTA certification without an accompanying disclosure. *Id.* at 118 (White, J., dissenting). In a dissenting opinion joined by Justices Rehnquist and Scalia, Justice O'Connor found the NBTA certification *inherently* misleading, and the dissenters would have upheld the Illinois rule at issue. *Id.* at 121-22, 127 (O'Connor, J., dissenting).

168 *Id.* at 111 (Marshall, J., concurring in the judgment).

169 Edenfield v. Fane, 507 U.S. 761 (1993).

170 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 448-49 (1978). One commentator characterized *Ohralik* as "somewhat limit[ing] the growing power of attorneys to advertise by prohibiting in person solicitation of potential clients." John Phillips, *Six Years After* Florida Bar v. Went For It, Inc.*: The Continual Erosion of First Amendment Rights*, 14 GEO. J. LEGAL ETHICS 197, 199 (2000). Another commentator criticized *Ohralik* as "manifestly at odds with the mode of analysis exemplified by *Bates*" because the Court seemingly "ignored the burden that *Bates* imposed on regulators to demonstrate a true problem with commercial speech that their restrictions would solve." McChesney, *supra* note 6, at 96-97.

171 *Ohralik*, 436 U.S. at 457-58, 466-67. The *Ohralik* opinion described in-person solicitation as biased and leading to "speedy and perhaps uninformed decisionmaking," as compared with advertising that "simply provides information and leaves the recipient free to act upon it or not." *Id.* at 457. In addition, the Court concluded, in-person solicitation claims can be more difficult for the state to verify and scrutinize because often there are no witnesses other than the soliciting lawyer and person being solicited. *Id.* at 466-67. The Court also concluded that regulating in-person solicitation focused more on *conduct* then *speech*. *Id.* at 459, 463.

Edenfield, the Court refused to extend *Ohralik* to accountants,[172] and took the opportunity to tighten the third prong of the *Central Hudson* analysis. The *Edenfield* Court struck down Florida's ban on in-person commercial solicitation by licensed certified public accounts (CPAs) on constitutional grounds.[173] Applying the *Central Hudson* analysis, under the first prong, the majority found the ban applied to protected speech because it prevented "truthful and non-deceptive" offers for lawful professional services and had to be tested under the remaining three prongs.[174] Under the second prong, the majority agreed with Florida that there were substantial governmental interests in protecting consumers from overreaching and fraud by CPAs and ensuring that CPAs remained free of conflicts of interest.[175]

However, under the third prong, the *Edenfield* majority concluded that Florida failed to prove that the ban advanced the asserted interests "in a direct and *material* way."[176] The Court explained that the third prong required more than "mere speculation or conjecture," and required "a governmental body seeking to sustain a restriction on commercial speech [to] demonstrate that the *harms it recites are real* and [the] *restriction will in fact alleviate them to a material degree.*"[177] The Court found that Florida had not met this burden. For the majority, Justice Kennedy wrote, "The [State] present[ed] no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the [State] claims to fear" nor any "anecdotal evidence" to "validate[] the [State's] suppositions."[178] Having found the ban unconstitutional under the third prong, the *Edenfield* Court found it unnecessary to address the narrow-tailoring requirement of the fourth prong. The *Edenfield* opinion primarily is significant for tightening the third prong of the *Central Hudson* analysis and strengthening First Amendment protection for commercial speech.[179]

The first professional services advertising case following

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172 *Edenfield*, 507 U.S. at 774-75 (concluding that in-person solicitation by accountants did not present the same dangers of overreaching as in-person solicitation by lawyers because lawyers, unlike CPAs, are professionally-trained advocates).

173 *Id.* at 763.

174 *Id.* at 765.

175 *Id.* at 768-70.

176 *Id.* at 771 (emphasis added).

177 *Id.* at 770-71 (emphasis added).

178 *Id.* at 771.

179 *See* A.B.A. COMM'N ON ADVER., *supra* note 62, at 22 ("[A]pplication of the *Central Hudson* test [in *Edenfield*] seems far more difficult for the state to meet than the same test as it was set out by the Court in *Zauderer*, pertaining to the contingency fee disclosure requirement.").

Edenfield was *Florida Department of Business and Professional Regulation v. Ibanez* in 1994.[180] In *Ibanez*, the Court held that Florida's accounting board could not constitutionally prohibit a practicing *lawyer* from truthfully promoting herself as a state-licensed CPA or a privately-certified "Certified Financial Planner" (CFP).[181] The CFP credential was issued by the Certified Financial Planner Board of Standards, a national non-government accounting organization. For the first and only time to date, the Court found a state-mandated disclosure requirement for professional services advertising to be unconstitutional.[182]

In *Ibanez*, practicing attorney Silvia Ibanez, who was a licensed but non-practicing accountant, was reprimanded by the state accounting board for including her CPA and CFP certifications in a yellow-pages listing for her law office and listing the certifications on her law firm business cards and letterhead.[183] State accounting regulations effectively prohibited non-practicing accountants from promoting themselves publicly as CPAs. In addition, the accounting board concluded that the CFP certification was *inherently* misleading.[184] The Florida district court of appeals upheld the reprimand, but on direct appeal, the United States Supreme Court reversed.[185]

In reversing, a unanimous Court agreed with Ibanez that listing her state-issued CPA certification in promotional materials for her law firm was constitutionally protected as truthful and non-misleading commercial speech.[186] For the Court, Justice Ginsburg wrote, "[A]s long as Ibanez holds an active CPA license from the [state] we cannot imagine how consumers can be misled by her truthful representation to that effect."[187] Thus, the Court concluded, the accounting board could not constitutionally reprimand her for including her valid CPA certification in promotional materials for her law firm.[188]

Relying on *Peel*, the *Ibanez* Court also concluded that the state accounting board could not constitutionally ban Ibanez from truthfully promoting her CFP certification without proving the

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180 Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994).

181 *Id.* at 138-39. For discussion of the commercial speech doctrine from 1942 through *Ibanez*, see generally Karl A. Boedecker et al., *The Evolution of First Amendment Protection for Commercial Speech*, 59 J. MKTG. 38 (1995).

182 *Ibanez*, 512 U.S. at 146-47.

183 *Id.* at 138-40.

184 *Id.* at 141-42.

185 *Id.* at 142 (citing Ibanez v. State Dep't of Bus. & Prof'l Regulation Bd. Accountancy, 621 So. 2d 435 (Fla. 1st Dist. Ct. App. 1993), *rev'd*, 512 U.S. 136 (1994)).

186 *Id.* at 144.

187 *Id.*

188 *Id.* at 143-44 (finding the state accounting board presented no "specific evidence of noncompliance" by Ibanez).

certification was *actually* or *inherently* misleading, or demonstrating that the certification was a sham.[189] The Court held that the board failed to prove either of these.[190] For instance, there was no "evidence that any member of the public had been misled by the use of the CFP designation."[191] Also, much like the certification at issue in *Peel*, the CFP certification in *Ibanez* had been issued by a well-respected professional organization with clearly-stated, rigorous and verifiable criteria that were available to consumers.[192] In other words, the facts did not fit the "caveat" established in *Peel* that allowed states to constitutionally punish licensed professionals who promoted sham certifications.[193]

The *Ibanez* Court also found no evidence to support Florida's alternative argument that the CFP certification was *potentially* misleading and should be subject to state accounting rules that required a disclosure when accountants promoted non-governmental "specialist" designations.[194] The disclosure was required to explain that the designation was not government-issued, to identify the issuing organization, and to list the certification requirements.[195] The Court found these disclosure requirements "unjustified" and therefore unconstitutional.[196] The State had failed to "point to any harm that is potentially real [and] not purely hypothetical," as required by *Edenfield*,[197] and

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189 *Id.* at 145-46. *See also* Boedecker et al., *supra* note 181, at 42 (concluding that the decision of the United States Supreme Court in *Ibanez* is "compatible with earlier rulings allowing professionals to advertise and recognize[s] the legitimacy of promoting professional organization memberships other than state-sponsored ones").

190 *Ibanez*, 512 U.S. at 144-45, 145 n.10, 146-47. However, in an opinion joined by Justice Rehnquist, Justice O'Connor concluded that the lawyer's use of the CFP designation was *inherently* misleading. *Id.* at 149-51 (O'Connor, J., concurring in part, dissenting in part) (emphasis added).

191 *Id.* at 145 n.10 (majority opinion).

192 *Id.* The Court suggested interested consumers could call the CFP Board of Standards to obtain the certification criteria and also noted that state rules required lawyers to furnish educational and professional credentials in writing on demand by anyone. *Id.* at 145 n.9.

193 *Id.* at 148. Justice Ginsburg wrote, "Noteworthy in this connection, 'Certified Financial Planner' and 'CFP' are well-established, protected federal trademarks that have been described as 'the most recognized designations in the planning field.'" *Id.* at 147 (citation omitted). At least one commentator has criticized the Court's conclusion on this point and suggested that the "lack of widespread knowledge about the CFP designation, coupled with the close placement of the CFP and CPA designations on Ibanez's advertisements, created just the type of potential for confusion that the Court had contemplated in *Peel*, as justification for requiring an identifying disclaimer." Edward L. Birk, *Protecting Truthful Advertising by Attorney-CPAs*—Ibanez v. Florida Department of Business & Professional Regulation*,* Board of Accountancy, 23 FLA. ST. U. L. REV. 77, 100 (1995).

194 *Ibanez*, 512 U.S. at 146-47.

195 *Id.* at 146.

196 *Id.*

197 *Id.* Justice Ginsburg wrote, "[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.*

specifically failed to "back up its alleged concern that the designation CFP would mislead rather than inform."[198] The Court also suggested that the required disclosure would be ruled "unduly burdensome" under *Zauderer* because it was so lengthy and complex and would operate as a de facto ban on "specialist" designations in limited spaces like yellow pages listings, but did not directly rule as such.[199] The Court limited the holding to the facts and suggested that "in other situations or on a different record, . . . a [disclosure] might serve as an appropriately tailored check against deception or confusion."[200] Therefore, the opinion left largely undefined the constitutional parameters of compelled disclosures in professional services advertising.

The holdings in *R.M.J.*, *Zauderer*, *Peel*, and *Ibanez* clearly indicated that government bans on truthful, fact-based claims in lawful professional services advertising could be ruled unconstitutional when the government fails to prove that the regulated claims are *actually* or *inherently* misleading, and thus, unprotected under the First Amendment.[201] Both *Peel* and *Ibanez* strongly suggested that the government could not meet the burden to prove that privately issued specialist certifications and other such credentials are *actually* or *inherently* misleading based merely on consumer unfamiliarity, so long as the credentials are issued by a legitimate professional organization with verifiable criteria that are available to consumers.[202] Moreover, this seems to remain true regardless of whether consumers take affirmative steps to learn about unfamiliar credentials or certifications in professional services advertising.[203]

On the other hand, it seems equally clear, when claims in

(quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

198 *Id.* Justice Ginsburg wrote, "We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here." *Id.*

199 *Id.* at 147-48.

200 *Id.* at 146.

201 *See id.* at 145; Peel v. Attorney Reg. & Disciplinary Comm'n of Ill., 496 U.S. 91, 108 (1990); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 641, 643-44 (1985); *In re* R.M.J., 455 U.S. 191, 205 (1982).

202 *See Peel*, 496 U.S. at 102-03 (stating "there is no evidence that . . . consumers . . . are misled if they do not inform themselves of the precise standards under which claims of certification are allowed"); *Ibanez*, 512 U.S. at 147 (finding that the State failed to "back its alleged concern that the [certification in question] would mislead rather than inform"); *see also* Thier, *supra* note 165, at 696 (stating the *Peel* Court "assumed that the consuming public is capable of making intelligent decisions regarding legal services" and "strongly suggested that attorneys' professional qualifications should be made available to consumers to enable them to make such decisions").

203 *See Ibanez*, 512 U.S. at 145 n.9 (suggesting that consumers unfamiliar with the CFP certification could "call the CFP Board of Standards," and noting also that Florida Bar Rules required licensed attorneys, such as Ibanez, to provide information on any of their credentials upon request by anyone).

professional services advertising are *potentially* misleading and not *actually* or *inherently* misleading, they cannot be constitutionally banned merely on grounds of preventing the *possibility* of consumer deception. Almost always, it seems, the government will have a more narrowly-tailored and less speech-restrictive regulatory option—like requiring an effective and reasonable disclosure—than imposing a categorical ban.

Even though these principles seem fairly clear and established in the Court's commercial speech jurisprudence, other questions remain unresolved. For instance, what is necessary to prove that a regulated claim in professional services advertising is *actually* or *inherently* misleading to consumers? If neither of those standards is proven, what then is needed to demonstrate that a regulated claim has the *potential* to be misleading? These terms have remained largely undefined, and the line between protected and unprotected commercial speech based on its misleading nature remains almost as unclear in the Court's commercial speech jurisprudence as when Justice Blackmun first raised the issue in *Bates* in 1977.[204]

In addition, the Court's commercial speech jurisprudence remains unclear regarding the extent to which states may constitutionally require disclosures in professional services advertising. The *Zauderer* Court suggested that "unjustified" or "unduly burdensome" disclosure requirements could be ruled unconstitutional because of their chilling effect on protected commercial speech,[205] but did not explain those standards in any detail or specifically explain how these requirements might relate to the requirements of the *Central Hudson* analysis, as it was unnecessary to the holding in the case.

In addition, the *Zauderer* Court suggested that a disclosure requirement needs to be "reasonably related" to the government's goal of preventing consumer deception, which seems to demand proof that a regulated claim is misleading without the required disclosure and also call into question whether other governmental interests can be asserted successfully to justify a disclosure requirement.[206] But, again, the Court did little to explain any of this or the relationship of the *Zauderer* requirements to the prongs of the *Central Hudson* analysis. Even though the Court upheld the disclosure requirement in *Zauderer* without evidence that contingency-fee advertising was misleading to consumers without the required disclosure, the case was decided before the *Edenfield*

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[204] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977).
[205] *Zauderer*, 471 U.S. at 651.
[206] *Id.*

decision. As explained above, the Court strengthened the third prong of the *Central Hudson* analysis to require states to prove the "harms it recites are real," and that the challenged restriction "will in fact alleviate [those harms] to a material degree."[207]

In *Ibanez*, the Court seemingly rejected Florida's proposed disclosure as "unjustified" because the State had failed to prove with evidence that the fear of consumers being misled by the privately-issued CFP designation without a disclosure was "potentially real" and not "purely hypothetical."[208] In addition, the *Ibanez* Court concluded that the required disclosure itself was "unduly burdensome" because it was not practical in limited spaces, and therefore operated as a de facto ban.[209] However, the *Ibanez* Court did not give guidance for deciding these issues under different facts and circumstances nor did the Court explain whether the "unjustified" and "unduly burdensome" standards should be considered distinctly from the requirements of the *Central Hudson* analysis or part of the same. The nature and extent of an evidentiary record needed for the government to successfully defend a disclosure requirement in professional services advertising against a constitutional challenge remains unexplored by the Court since *Ibanez*.

B. *Revisiting the Direct-Advancement and Narrow-Tailoring Requirements*

Although *Edenfield* strengthened the third prong of the *Central Hudson* analysis, the opinion left undecided the type and quantity of evidence needed to demonstrate direct-and-material advancement under the *Central Hudson* analysis. The Court revisited that issue in *Florida Bar v. Went For It, Inc.*, a 1995 case addressing the constitutionality of state restrictions on direct-mail solicitation by lawyers.[210] The case is significant as the first in which the Court found the government's evidentiary record sufficient under the third prong of the *Central Hudson* analysis as strengthened by *Edenfield*.

In *Went For It*, a five-to-four majority of the Court held that Florida could constitutionally restrict lawyers from sending targeted, direct-mail solicitations to accident victims within thirty days of their accidents.[211] In a previous case, the Court had ruled

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[207] Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

[208] *Ibanez*, 512 U.S. at 146.

[209] *See id.* at 146-47.

[210] Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

[211] *Id.* at 620. Justice O'Connor wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer. Justice Kennedy wrote the dissenting opinion, joined by Justices Ginsburg, Souter, and Stevens. *Id.* at 635 (Kennedy, J.,

that states could not categorically ban targeted, direct-mail solicitations from lawyers to potential clients with specific legal problems.[212] However, in that case, the Court did not address less restrictive regulations such as the thirty-day ban at issue in *Went For It*.

The *Went For It* Court found that the thirty-day ban applied to protected commercial speech under the first prong of the *Central Hudson* analysis.[213] Thus, the ban needed to withstand scrutiny under the remaining three prongs. Under the second prong, the majority agreed with Florida that there were sufficiently substantial regulatory interests in protecting the privacy of accident victims and preventing erosion of the professional reputation of attorneys.[214]

Under the third *Central Hudson* prong, the majority found that Florida had sufficiently demonstrated that the thirty-day ban directly and materially advanced the asserted interests as required by *Edenfield*.[215] In its case, Florida presented a summary of its two-year study of lawyer advertising, including anecdotal evidence and the results of two empirical studies that the State had commissioned.[216] One study surveyed adults in Florida and, among the findings, found that fifty-four percent agreed that contacting accident victims was a privacy violation.[217] Another study randomly sampled past recipients of direct-mail solicitations from lawyers and found, among other things, that twenty-six percent of those sampled thought direct-mailings from lawyers invaded their privacy and that twenty-seven percent agreed that receiving these mailings lowered their regard for lawyers and the judicial process.[218] For the majority, Justice O'Connor found Florida's summary sufficient to conclude that "direct-mail solicitation in the immediate aftermath of accidents . . . targets a

dissenting). For discussion of *Went For It* and its legal impact, see generally Phillips, *supra* note 170. For a broader discussion of waiting periods in the context of lawyer solicitation, see generally Kandi L. Birdsell & Joshua D. Janow, *Legal Advertising: Finding Timely Direction in the World of Direct Solicitation, Waiting Periods and Electronic Communication*, 15 GEO. J. LEGAL ETHICS 671 (2002).

212 *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 470-71, 479-80 (1988). In *Shapero*, the Court concluded that direct-mail solicitation by lawyers was more akin to mass media advertising than in-person solicitation and ruled states could not constitutionally ban direct-mail solicitation as they could in-person solicitation by lawyers. *Id.* at 472-73 (contrasting the case with the holding in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Court upheld a ban on in-person solicitation by lawyers).

213 *Went For It*, 515 U.S. at 624 (finding that the "advertising at issue" did not fall into the category of "commercial speech that concerns unlawful activity or is misleading").

214 *Id.* at 624-25.

215 *Id.* at 625-26, 628.

216 *Id.* at 625-32.

217 *Id.* at 626-27 (discussing the results of the survey commissioned by the Florida Bar Association and conducted by Magid Associates as summarized by the Florida Bar).

218 *Id.* at 627.

concrete, non-speculative harm" under the third prong of the *Central Hudson* analysis as modified by *Edenfield*.[219]

Under the final *Central Hudson* prong, the *Went For It* majority found the thirty-day ban sufficiently narrow and thus constitutional.[220] Justice O'Connor called the rule a "short temporal ban" that allowed targeted, direct-mail solicitation to accident victims after the waiting period had expired.[221] In addition, Justice O'Connor noted that Florida attorneys had "ample alternative channels" available to communicate to potential clients, including mass media advertising and untargeted letters to the general population.[222]

Justice Kennedy, joined by Justices Stevens, Souter, and Ginsburg, dissented in *Went For It*. They found that Florida's summary was insufficient under the third *Central Hudson* prong to establish direct-and-material advancement.[223] Justice Kennedy wrote, "[The State summary] includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results."[224] In the majority opinion, Justice O'Connor countered this criticism by concluding that empirical data need not be accompanied by the "surfeit of information" that the dissenters would have required.[225] Clearly, the Court was split on the sufficiency of the State's evidentiary record under the third prong.

The decision in *Went For It* turned on the application of the direct-and-material advancement prong of the *Central Hudson* analysis—the third prong.[226] However, the fourth prong was critical in the Court's next professional services advertising case,

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219 *Id.* at 629. For a more detailed discussion of the Florida Bar report submitted in *Went For It*, and relied upon by the majority, see generally McChesney, *supra* note 6, at 129-33 (characterizing survey results in the report as "describ[ing] a half-full glass as half empty," and noting the State's summary of the various studies "omitted findings adverse to the Bar's position" as suggested by the dissent). Another commentator concluded that the Court's ruling in *Went For It* was "largely dependent on a rather questionable and extremely narrow survey." Phillips, *supra* note 170, at 197.

220 *Went For It*, 515 U.S. at 632-34.

221 *Id.* at 633.

222 *Id.* at 633-34. In 2000, a commentator reported that ten states had similar thirty-day bans. *See* Phillips, *supra* note 170, at 203-09. This commentator concluded, "The Supreme Court's decision in . . . *Went For It, Inc.* has paved the way for many other states to enact similar bans on direct mail solicitation on the basis of little or no empirical data supporting such a ban." *Id.* at 214.

223 *Went For It*, 515 U.S. at 640-41 (Kennedy, J., dissenting).

224 *Id.* at 641.

225 *Id.* at 628 (majority opinion).

226 For further discussion of the evidentiary issue under the direct-advancement prong of the *Central Hudson* analysis, see Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L & POL'Y 267, 276-80 (2003); Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 350, 373-75 (2000).

the 2002 decision in *Thompson v. Western States Medical Center*.[227] In a prior case, the Court had held that the fourth prong required a "reasonable fit" between the challenged regulation and the asserted governmental interest, but did not require the "least severe [regulation] that will achieve the desired end."[228] In other words, the Court did not equate the fourth prong with the more stringent "least-restrictive means" requirement in strict constitutional scrutiny.[229]

In *Western States*, the Court ruled unconstitutional federal Food and Drug Administration Modernization Act (FDAMA) provisions prohibiting pharmacies from advertising compounded prescription drugs to consumers.[230] Justice O'Connor, who wrote for the majority, described drug compounding as the "process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient."[231] Among other requirements, the FDAMA allowed a pharmacy to dispense compounded drugs made of individual ingredients approved by the Food and Drug Administration (FDA)—the federal agency that regulates manufacturing, marketing and distribution of drugs—to patients with a valid medical prescription.[232] The compounded drugs themselves, however, were exempted from the new drug approval process. The FDAMA also indicated that prescriptions for compounded drugs had to be "unsolicited," or, in other words, not generated by advertising.[233]

In *Western States*, a group of pharmacies providing

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227 Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

228 Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477, 480 (1989). In *Fox*, the Court rejected the "least-restrictive-means standard" for the narrow-tailoring prong of the *Central Hudson* analysis. *Id.* at 476-77.

229 *Id.* at 477. The Court in *Fox* said its previous dicta had seemingly caused confusion on the scope of the narrow-tailoring prong, and was clearing up that issue "for the first time" in *Fox*. *Id.* For a discussion of the interpretation of the narrow-tailoring prong of the *Central Hudson* analysis and application in various commercial speech cases more broadly, see Hoefges, *supra* note 226, at 280-82, 297-99.

230 *Thompson*, 535 U.S. at 366-78, 368-72, 377. According to the *Thompson* Court, provisions in the FDAMA specified that pharmacies, licensed pharmacists, and licensed physicians could "not advertise or promote the compounding of any particular drug, class of drug, or type of drug." *Id.* at 364 (quoting the FDAMA, 21 U.S.C. § 353a(c) (2006)). However, the Court noted, the FDAMA permitted these parties to "advertise and promote the compounding service." *Id.*

231 *Id.* at 360-61. For the majority, Justice O'Connor wrote, "Compounding is typically used to prepare medications that are not commercially available, such as a medication for a patient who is allergic to an ingredient in a mass-produced product." *Id.* at 361.

232 *Id.* at 364-65 (explaining federal regulation of drug compounding in the FDAMA). Also, FDAMA provisions prohibited pharmacists from preparing compounded drugs in advance of receiving prescriptions for patients unless a patient or prescribing physician had an established history of utilizing a particular compounded drug. *Id.* (citing the FDAMA, 21 U.S.C. § 353a(a)).

233 *Id.* at 364-65 (quoting the FDAMA, 21 U.S.C. § 353a(c)).

compounding services sued the federal government in federal district court and challenged the FDAMA ban on First Amendment grounds. The district court found the ban unconstitutional and on appeal, the United States Court of Appeals for the Ninth Circuit affirmed.[234] The Supreme Court affirmed the Ninth Circuit's ruling on the constitutional issue by a five-to-four vote.[235]

The parties in *Western States* agreed that the *Central Hudson* analysis was appropriate to decide the constitutional issue, and, under the first prong, the ban applied to protected commercial speech and needed to be tested under the remaining three prongs.[236] Under the second prong, the *Western States* majority agreed with the government that there were substantial interests in "[p]reserving the effectiveness and integrity of the . . . new drug approval process" and "permitting continuation of the practice of compounding so that patients with particular needs may obtain medications suited to those needs."[237]

Under the third prong, the government argued the advertising ban was needed to prevent drug manufacturers and pharmacies from creating large-scale markets for compounded prescription drugs.[238] The government argued that compounded drugs should be individualized for specific patients and dispensed in small quantities, not mass-marketed with advertising, and were exempted from the new drug approval process for that reason.[239] On this point, the Court concluded that the FDAMA advertising ban "might" directly advance this interest if one assumed that advertising is a necessary condition to creating large-scale markets for products.[240] However, the Court refused to make that assumption and struck down the ban instead under the narrow-tailoring requirement of the fourth prong of the *Central Hudson* analysis.

The *Western States* Court held the ban was not narrowly tailored because "[s]everal non-speech" alternatives were available to prevent development of large-scale markets for compounded drugs.[241] For instance, the Court suggested the government could impose legal limits on the quantity of compounded drugs that

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[234] *Id.* at 365-66.
[235] Only the constitutionality of the FDAMA provisions restricting compounded drug advertising was at issue. *Id.* at 365.
[236] *Id.* at 366-68.
[237] *Id.* at 369.
[238] *Id.* at 371.
[239] *Id.*
[240] *Id.*
[241] *Id.* at 372-73.

licensed pharmacies could dispense.[242] For the majority, Justice O'Connor wrote, "In previous cases addressing [the] final prong of the *Central Hudson* test, we have made clear that if the [g]overnment could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the [g]overnment must do so."[243] In *Western States*, she explained, the government failed to demonstrate that less restrictive alternatives could not effectively prevent large-scale markets for compounded drugs.[244]

The opinions in *Went For It* and *Western States* have implications for regulating professional services advertising. The Court's opinion in *Went For It* indicated that the First Amendment tolerates restrictions that leave alternate channels open for licensed professionals to communicate with the public but do not operate as a categorical ban on protected commercial speech. However, the opinion also raised questions. Most significantly, the decision left unclear the parameters of a sufficient evidentiary record necessary to establish direct-and-material advancement under the third prong of the *Central Hudson* analysis as strengthened by *Edenfield*.[245] As explored in the next Part of the

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242 *Id.*

243 *Id.* at 371. On this point, Justice O'Conner cited previous decisions of the Court in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 476 (1996). *Id.* at 371-72. In *Coors Brewing*, the Court utilized the narrow-tailoring prong to find a federal statutory ban on alcohol percentage information on beer labels unconstitutional because the government could have directly limited alcohol content in beer without banning protected commercial speech as a means of curbing marketing of high-alcohol beer products. *Coors Brewing*, 514 U.S. at 490-91. Similarly, in *44 Liquormart*, a plurality of the Court found a state ban on alcoholic beverage price advertising was not a narrowly-tailored means of curbing liquor sales and consumption because the State could have utilized direct regulatory means, such as taxes, to prevent liquor prices from dropping too low as a result of price-competition among retailers and, purportedly, increasing sales and consumption. *44 Liquormart*, 517 U.S. at 507. For a discussion of these two cases and their impact on the *Central Hudson* analysis, see Hoefges & Rivera-Sanchez, *supra* note 226, at 363-73. For a detailed discussion of the *44 Liquormart* opinion within the context of the commercial speech doctrine as it had developed from 1976 in *Virginia State Board of Pharmacy*, see generally Jef I. Richards, *Is* 44 Liquormart *a Turning Point?*, 16 J. MARKETING 156 (1997).

244 Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002). As examples, the Court suggested the government could "limit the amount of compounded drugs, either by volume or by numbers of prescriptions, that a given pharmacist or pharmacy sells out of state" or could "cap[] the amount of any particular compounded drug, either by drug volume, number of prescriptions, gross revenue, or profit that a pharmacist or pharmacy may make or sell in a given period of time." *Id.* at 372.

245 In 2001, the Court split on the evidentiary issue again in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In *Lorillard*, a narrow five-to-four majority of the Court concluded that a government-compiled summary of empirical and anecdotal research was sufficient under the direct-advancement prong of the *Central Hudson* analysis in a case dealing with state restrictions that prohibited most outdoor tobacco advertising within a 1,000-foot radius of such locations as schools and playgrounds. *Id.* at 557-61. Nonetheless, the Court ultimately struck down the restrictions under the fourth prong—the narrow-tailoring requirement—because the 1,000-foot requirement likely would operate as a ban in densely-populated cities, such as Boston, because there were no locations that were not within 1,000 feet of a school, playground or other location specified in the regulations. *Id.* at 561-64. For a detailed analysis and discussion of

article, as states have produced more extensive evidentiary records, including empirical studies in support of restrictions on professional services advertising, lower courts have addressed the weight and sufficiency of these records under the *Central Hudson* analysis with varying results.

Nonetheless, the Court's decision in *Western States* clearly continued a trend of strengthening the narrow-tailoring requirement of the fourth prong of the *Central Hudson* analysis, and specifically, in the context of professional services advertising.[246] Under the fourth prong, it seems clear after *Western States* that government regulation of protected commercial speech can be ruled unconstitutional if an effective but less speech-restrictive regulatory regime is available. Arguably, this tightened version of the narrow-tailoring requirement has pushed the fourth prong of the *Central Hudson* analysis closer than ever before to the least-restrictive-means requirement of strict constitutional scrutiny.[247]

IV. PROFESSIONAL SERVICES ADVERTISING: LOWER FEDERAL AND STATE COURTS

In order to determine how the issues raised in this article have been handled by lower courts, this study surveyed reported lower court opinions and orders in cases where restrictions on professional services advertising were challenged on constitutional grounds. The search was limited to cases that ended with an opinion or order issued by a federal appeals court, a federal district court, or a state supreme court beginning with the year 1990—the year that *Peel* was decided—to the present.[248] The discussion and analysis that follows utilizes the key United States Supreme Court opinions already discussed for context and

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Lorillard and its impact on the commercial speech doctrine and influence on lower court opinions, see Hoefges, *supra* note 226. Discussing *Lorillard*, a prominent commentator wrote, "What *Lorillard* demonstrates is the Supreme Court's gathering antipathy toward overly broad advertising regulations which are not backed by plausible evidence to support them." Smolla, *supra* note 13, at 15. Professor Smolla suggested that *Lorillard* signaled increased protection for lawyer advertising as well, and found it "difficult to believe that the Constitution regards attorneys as more toxic than cigarettes." *Id.*

[246] *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (finding a federal ban on broadcast gambling advertising unconstitutional); *44 Liquormart,* 517 U.S. 484 (finding a state ban on retail price advertising for liquor unconstitutional); *Rubin*, 514 U.S. 476 (finding federal restriction on alcohol percentage information on beer labels unconstitutional).

[247] *See 44 Liquormart*, 517 U.S. at 524-26 (Thomas, J., concurring).

[248] This time period encompasses the United States Supreme Court's opinions in *Peel v. Attorney & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (striking down a state ban on privately-issued specialist certifications in lawyer advertising) and *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994) (striking down a state restriction on certain uses of state and private-issued certifications by accountants and a disclosure requirement), along with the Court's most recent commercial speech cases.

reference points. First, this Part looks at cases dealing with restrictions on content in professional services advertising including specialization and certification claims, and quality-of-services and expected-results claims. The Part concludes by reviewing cases in which the constitutionality of a disclosure requirement in professional services advertising was at issue.[249]

A. *Restrictions on Content: Specialization and Certification Claims*

The United States Supreme Court opinions in *R.M.J.*, *Peel*, and *Ibanez* all dealt with the constitutionality of government restrictions on certifications or specializations used for promotion by licensed professionals. These cases support the proposition that typically, the government cannot constitutionally ban certification and specialization claims in professional services advertising unless the claims are proven to be illegitimate, or *inherently* or *actually* misleading. Since 1990, a number of federal appeals and district courts as well as state supreme courts have addressed issues arising in this context.

Looking first at the federal courts of appeals, in *Abramson v. Gonzalez*, the Eleventh Circuit held in 1992 that a state statute that effectively banned unlicensed psychologists from promoting themselves publicly as "psychologists," was unconstitutional.[250] Under an odd statutory scheme that existed at the time, Florida had optional licensing procedures for psychologists, yet the State allowed unlicensed psychologists to practice[251] without advertising themselves as "psychologists."[252]

Under the first prong of the *Central Hudson* analysis, the Eleventh Circuit found the statute restricted protected commercial speech to the extent that it prevented unlicensed psychologists from advertising themselves as "psychologists," so long as they did not also claim to be licensed.[253] Therefore, the

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[249] This approach was suggested by a 1990 analysis of lawyer advertising regulations, which categorized "the most frequently raised issues" as involving advertising claims regarding: (1) "Fields of Practice, Specialization, Expertise, and Experience;" (2) "Fees;" (3) "Endorsements and Testimonials;" (4) "Self-Laudition;" (5) "Dignity;" (6) "Firm name;" (7) "Disclaimers, Disclosures and Warnings;" and (8) "Coercion, Duress, Harassment, Overreaching and Invasions of Privacy." Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429, 467-95 (1990) (published after the United States Supreme Court accepted certiorari in *Peel* but before the opinion was issued).

[250] Abramson v. Gonzalez, 949 F.2d 1567, 1576 (11th Cir. 1992).

[251] *Id.* at 1575-76, 1578. The court found this regulatory scheme "curious" but noted impending legislation would limit psychology practice to licensed psychologists effective October 1, 1995. *Id.* at 1578.

[252] *Id.* at 1575.

[253] *Id.* at 1576-77. On this point, the appeals court wrote, "As long as [unlicensed psychologists] do not hold themselves out as *licensed* professionals, they are not saying anything untruthful, for they are in fact psychologists and are permitted to practice that

ban needed to be tested under the remaining three prongs for constitutionality.[254] Under the second prong, the court found that Florida had a substantial interest in protecting the public from incompetent health care professionals.[255]

Without directly addressing the third prong, the *Abramson* court found the statute failed the narrow-tailoring requirement of the fourth prong because Florida could have required a disclosure instead of banning non-licensed psychologists from using the term "psychologist."[256] Quoting from *Bates*, the court wrote, "When the [F]irst [A]mendment is at issue, 'the preferred remedy is more disclosure not less.'"[257] Relying on the right of consumers to receive "truthful information about the psychological services available to them,"[258] the court held that Florida could not constitutionally prohibit unlicensed psychologists from truthfully advertising their lawful *albeit* unlicensed psychological practices.[259] The court found the ban similar to the California ban on privately issued certification claims in *Peel*, in that both regulations prevented protected commercial speech from reaching consumers.[260]

In 1997, the Eleventh Circuit again ruled unconstitutional a Florida restriction on accountant advertising in *Miller v. Stuart*.[261] Stephen Miller, a state-licensed CPA, and his employer, American Express, challenged state statutory provisions prohibiting CPAs from advertising their CPA licenses unless employed by a CPA-owned firm.[262] American Express was not CPA-owned and had employed Miller to perform tax and accounting services that did not require a CPA license.[263] American Express wanted to advertise the fact that it employed licensed CPAs like Miller but was statutorily prohibited from doing so.[264] A federal trial court ruled the statutory provisions unconstitutional under the *Central*

profession under current state law." *Id.* at 1576. The court added, unlicensed psychologists "clearly would enjoy no right falsely to hold themselves out as 'licensed psychologists.'" *Id.* at 1577.

254 *Id.* at 1577-78.

255 *Id.* at 1578.

256 *Id.* at 1577-78.

257 *Id.* at 1577 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977)).

258 *Id.*

259 *Id.*

260 *Id.* ("[T]he plaintiff psychologists are engaged in professional activity permitted under state law" and that "their right to disseminate truthful commercial speech may be restricted, but not be cut off completely.").

261 Miller v. Stuart, 117 F.3d 1376, 1378-79 (11th Cir. 1997).

262 *Id.* Miller and American Express challenged Florida Statute sections 473.309 and 473.302(5)(b) (1993 & Supp. 1994). *Id.* at 1379-80.

263 *Id.* at 1379-80, 1383.

264 *Id.*

Hudson analysis, and the State appealed.[265]

On appeal, the Eleventh Circuit found that truthfully advertising Miller's CPA license comprised protected commercial speech under the first prong of the *Central Hudson* analysis, and the provisions needed to be tested under the remaining three prongs.[266] In doing so, the court rejected the State's argument that promoting Miller as a CPA when he was performing general accounting services that did not require a CPA license was *inherently* misleading commercial speech and, thus, constitutionally unprotected.[267] The appeals court found that the State failed to present supporting empirical evidence on this point and proceeded to the remaining prongs of the analysis.[268]

Under the second prong, the *Miller* court "assumed without deciding" that the State had substantial governmental interests in protecting consumers from unqualified accountants and ensuring that consumers receive accurate commercial information.[269] In addition, the court again assumed without deciding that Florida had carried its burden of proving the ban advanced these interests directly and materially under the third prong.[270] However, the court found the statutory provisions unconstitutional because they failed the narrow-tailoring requirement of the fourth prong.[271] The court found that Florida could achieve its goals more directly by policing individual instances of misconduct by CPAs and firms that provide tax and accounting services, rather than imposing a categorical ban on protected commercial speech.[272]

More recently, in 2004, the United States Court of Appeals

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[265] *Id.* at 1380-81.

[266] *Id.* at 1381-83. The appeals court noted that the United States Supreme Court in *Ibanez* specifically reserved the issue of whether the First Amendment would be implicated if a CPA was providing tax and accounting services in a non-CPA firm yet was advertising his or her CPA credentials. *Id.* at 1381-82. On that point, the appeals court in *Miller* concluded that the Florida statutory scheme at hand indeed implicated the First Amendment as a commercial speech restriction. *Id.* at 1382.

[267] *Id.* at 1382-83.

[268] *Id.* at 1383.

[269] *Id.*

[270] *Id.*

[271] *Id.* at 1383-84.

[272] *Id.* The State argued it could have gone so far as to prohibit CPAs from working at non-CPA firms and providing public accounting services, and the advertising restriction was, instead, a less restrictive regulatory step. *Id.* However, the appeals court responded that the State "may not justify its regulation of speech as a 'reasonable choice' by comparing it to a more intrusive non-speech regulatory alternative." *Id.* The appeals court characterized this argument as "faulty" and the type of "greater-includes-the-lesser" reasoning that had been rejected by the United States Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), in which the Court struck down a state ban on price advertising by liquor retailers, despite the fact that the State had not elected more intrusive non-speech alternatives such as banning liquor sales altogether, and in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), in which the Court struck down a federal ban on alcohol percentages on beer labels, even though more intrusive non-speech alternatives were available, including directly limiting the alcohol content of beer products. *Id.*

for the Ninth Circuit, in *American Academy of Pain Management v. Joseph*, upheld a California statute prohibiting state-licensed physicians from claiming to be "board certified" in a specialization unless they were certified by a state-sanctioned professional organization that had met various statutory criteria.[273] The American Academy of Pain Management (AAPM), a non-sanctioned certification organization, and two of its board-certified physicians challenged the provisions on First Amendment grounds.[274] The federal district court upheld the statute and granted summary judgment for California, and on appeal, the Ninth Circuit affirmed.

First, the Ninth Circuit concluded that certification claims in physician advertising comprised commercial speech, and therefore, the regulation triggered the *Central Hudson* analysis.[275] However, the court agreed with the State that using the term "board certified" in physician advertising was *inherently* misleading and constitutionally unprotected, when used to describe a certification that did not meet the statutory criteria.[276] The court stated that consumers should be able to rely on a "board certified" claim in physician advertising as having met the statutory guidelines.[277] Therefore, the regulation was a constitutional

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[273] Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1101 (9th Cir. 2004). Plaintiffs sued Ronald Joseph in his official capacity as the executive director of the Medical Board of California, a state agency. Under the statute in question, state-licensed health care providers could advertise that they were "board certified" only if the certifying organization was a member of the American Board of Medical Specialties or had an equivalent certification program as determined by the California Medical Board, or the certifying organization had a post-graduate educational program that was approved by the Accreditation Council for Graduate Medical Education and provided a complete regimen of training for a particular specialty area of practice. *Id.* at 1102 (citing CAL. BUS. & PROF. CODE § 651(h)(5)(B)).

[274] *Id.* at 1102-03. The Medical Board of California denied the AAPM's application for certification status under the statutory criteria on February 7, 1997, after the case was filed in the federal district court. *Id.* at 1103. Acting on AAPM's certification petition, the Medical Board of California concluded the AAPM certification only required two years of experience treating patients with pain and a two-hour examination consisting of one hundred multiple choice questions. *Id.* In addition, the Board found that approximately eighty percent of the AAPM-certified physicians had not taken the examination at all but were "grandfathered" into the organization. *Id.* In contrast, both the Medical Board of California and the American Board of Medical Specialties required that certification exams be at least sixteen hours in length, among other requirements. *Id.*

[275] *Id.* at 1106. The appeals court utilized a three-factor analysis from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), to determine that the regulation impacted commercial speech. *Id.* First, the regulation admittedly applied to advertising by the physicians; second, the regulation applied to advertising for a specific "product" (medical services); and third, the advertising physicians had an "economic motive" for their speech (solicit patients for payment). *Id.*

[276] *Id.* at 1108.

[277] *Id.* On this point, the appeals court wrote:

> The State of California has by statute given the term "board certified" a special and particular meaning. The use of that term in advertising by a board or individual physicians who do not meet the statutory requirements for doing so, is misleading. The advertisement represents to the physicians, hospitals, health

restriction on *inherently* misleading commercial speech as applied in the case.[278]

Although finding it unnecessary to the holding of the case, the *American Academy* court demonstrated that the regulation at issue satisfied the *Central Hudson* analysis nonetheless.[279] Under the second prong, the court found the State had a substantial governmental interest in "protecting consumers from misleading advertising by medical professionals."[280] Under the third prong, the court found the statutory provisions advanced this interest directly and materially.[281] As evidence, the court determined that the district court below properly relied on the legislative history of the statute, which included testimony about the differing certification criteria in use by various private medical certification boards.[282] That testimony also included anecdotal accounts of consumers having relied, to their detriment, on "board certified" credentials in physician advertising when the credentials were issued by organizations with less rigorous criteria than those specified in the statute.[283]

Under the final *Central Hudson* prong, the *American Academy* court found the California statute to be narrowly tailored.[284] First, the statute did not operate as a categorical ban because it allowed the term "board certified" when the statutory criteria were met. Second, the statute applied only to the term "board certified," and would not prevent physicians from advertising memberships or training with non-sanctioned professional organizations without using the term "board certified."[285] Therefore, to the extent that the statute applied to protected commercial speech, the court concluded it was constitutional under the *Central Hudson* analysis.[286]

The *American Academy* court distinguished the United States Supreme Court's rulings in *Peel* and *Ibanez*.[287] In *Peel*, the appeals

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> care providers and the general public that the statutory standards have been met, when, in fact, they have not.

Id.

278 *Id.* at 1108.

279 *Id.*

280 *Id.* at 1108-09.

281 *Id.* at 1109-11.

282 *Id.* at 1110-11.

283 *Id.*

284 *Id.* at 1111.

285 *Id.*

286 In addition, the Ninth Circuit rejected arguments by the AAPM and physicians that the statutory provisions were unconstitutionally overbroad and vague. *Id.* at 1111-12. The court also rejected their arguments that the provisions violated the First Amendment right of association and constitutional due process and operated as an unconstitutional prior restraint. *Id.* at 1112-13.

287 *Id.* at 1107-08.

court explained, Illinois had banned all privately issued certifications in attorney advertising.[288] In contrast, the California statute prohibited the specific term "board certified" when not used in compliance with the statutory criteria. In *Ibanez*, the appeals court explained further, Florida had determined that a specific accounting credential was misleading to consumers but had reached that conclusion in an ad hoc disciplinary proceeding.[289] In contrast, the *American Academy* court explained, California specified concrete criteria for allowable use of the term "board certified" by all physicians, and the AAPM simply had not met those criteria.

Turning to the federal district courts, in 1992, in *Gandee v. Glaser*, an Ohio district court upheld a state statute that prohibited everyone but state-licensed audiologists from advertising audiology services.[290] With no evidence, the court concluded that hearing aid dealers, for which there were no educational or training requirements, advertising services under the trademark "Certified Hearing Aid Audiologist," would be "likely to deceive consumers into believing" that such dealers were state-licensed audiologists.[291] The court did not consider the statute a ban because it allowed licensed audiologists to advertise audiology services.

In more recent cases, federal district courts have consistently found content bans for professional services advertising to be unconstitutional. For instance, in *Strang v. Satz*, decided in 1995, a federal district court struck down a Florida statute that banned the use of academic degrees and titles such as "doctor" and "Ph.D." in

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288 *Id.* at 1107 (characterizing the ban in *Peel* as "absolute" and noting that the United States Supreme Court in that case had specifically suggested that an alternative to such a ban was providing a means of screening non-governmental certification organizations).

289 *Id.* The United States Supreme Court denied certiorari in the case. Am. Acad. of Pain Mgmt. v. Joseph, 526 U.S. 1005 (1999).

290 Gandee v. Glaser, 785 F. Supp. 684, 688 (S.D. Ohio 1992). The statute read: "No person shall practice or offer to practice the profession of . . . audiology, or use in connection with his name, or otherwise assume, use or advertise any title or description tending to convey the impression that he is a[n] . . . audiologist unless . . . licensed under this chapter." *Id.* at 688 (quoting OHIO REV. CODE § 4753.02 (1976)). Another provision defined "audiologist" as anyone offering services to the public as an "audiologist," "hearing clinician," and "hearing therapist," among other terms listed in the statute. *Id.* (quoting OHIO REV. CODE § 4753.01(C)). The plaintiffs in the case were licensed hearing aid fitters—but not licensed audiologists—and were ordered by the state to stop advertising their services under the mark "Certified Hearing Aid Audiologist." *Id.* at 685-86, 688.

291 *Id.* at 689-90. The court noted that licensed "audiologists" under the statute had to achieve certain levels of education, training and experience but the same was not true for hearing aid fitters and dealers. *Id.* The court did not rely on evidence for the assumption that the trademark "Certified Hearing Aid Audiologist" was likely to deceive consumers on the issue of training and education when used by hearing aid fitters and dealers who were not licensed audiologists. Instead, the court cited similar conclusions by other courts in previous cases, such as *Florida Hearing Society v. State*, 399 So. 2d 1035 (Fla. 1st Dist. Ct. App. 1981) and *National Hearing Aid Society v. Commonwealth*, 551 S.W.2d 247 (Ky. Ct. App. 1977). *Id.*

professional services advertising unless issued by an accredited institution defined in the statute.[292] The *Strang* court agreed with the State that non-accredited academic degrees *potentially* could mislead consumers, and that restricting their use would directly and materially serve a substantial governmental interest in protecting the public from unqualified or incompetent health care professionals under the *Central Hudson* analysis.[293] However, relying on *Peel*, the court held the statute was not narrowly tailored, because Florida could have required a disclosure, instead of banning non-accredited degrees in professional services advertising.[294]

Similarly, in 1996, in *Tsatsos v. Zollar*, a federal district court in Illinois found unconstitutional a state regulation that prevented podiatrists from advertising specialist certifications that were not issued by the state-approved Counsel on Podiatric Medical Education.[295] The court found the ban prohibited a licensed podiatrist from truthfully advertising a legitimate specialization certification issued by a different professional organization in violation of the First Amendment.[296] The State had failed to prove that such certifications were *actually* or *inherently* misleading—or even *potentially* misleading—according to the court.[297]

In two recent federal district court cases, California dentists successfully challenged state regulations prohibiting them from truthfully advertising legitimate specialty credentials in implant dentistry issued by the American Academy of Implant Dentistry

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292 Strang v. Satz, 884 F. Supp. 504, 510 (S.D. Fla. 1995).

293 *Id.* at 509.

294 *Id.* at 510. On this point, the court stated, "Disclosure that a person's Ph.D. or title such as 'doctor' is from an institution unrecognized by the State of Florida or by the Federal Government would be more likely to make a positive contribution to . . . aid in decisionmaking than concealment of such information." *Id.* (citing Peel v. Attorney Reg. & Disciplinary Comm'n of Ill., 496 U.S. 91, 108 (1990)).

295 Tsatsos v. Zollar, 943 F. Supp. 945, 947-48, 951-52 (N.D. Ill. 1996). Under the challenged regulations, podiatrists only could advertise certifications issued by the Counsel on Podiatric Medical Education. *Id.* at 947-48, 949. The plaintiff in the case was a podiatrist who wanted to advertise that he was a "Board Certified Foot and Ankle Surgeon" by the American Podiatric Medical Specialty Board (APMSB), a private professional organization that also was a plaintiff in the case. *Id.* at 947-48. The State did not argue that the podiatrist's certification claim was *actually* or *inherently* misleading, nor did the state present evidence that the certification claim was *potentially* misleading. *Id.* at 950. The district court concluded that the United States Supreme Court's holding in *Peel* required that such claims be actually or inherently misleading to be constitutionally banned or potentially misleading to the extent that there is a substantial governmental interest in banning such claims. *Id.* (citing Peel v. Attorney Reg. & Disciplinary Comm'n of Ill., 496 U.S. 91, 100 (1990)).

296 *Id.*

297 *Id.* The State had failed to respond to requests for admission that the specific non-sanctioned certification at issue in the case was "not actually misleading to Illinois residents" and "not potentially misleading to Illinois residents," and the court deemed the lack of responses as admissions and sufficient to establish the claim was neither *actually* nor *potentially* misleading. *Id.* at 950 nn.6-7.

(AAID), a private professional organization. In 2000, in *Bingham v. Hamilton*, a California district court ruled the State could not constitutionally ban dentists from advertising certifications like the AAID certification, which were not sanctioned by the state dental board or the American Dental Association (ADA).[298] Relying on *Peel*, the district court ruled the AAID certifications were not *actually* or *inherently* misleading,[299] and further found the State presented no evidence of "any *potential* for consumer deception [that] cannot be addressed by disclosure requirements rather than prohibition."[300]

In 2004, in *Potts v. Hamilton*, the same California district court that decided *Bingham* also found the State's revised, but similar, regulatory scheme unconstitutional to the extent that it still prevented dentists from truthfully advertising legitimate specialty credentials issued by the AAID and its certification board.[301] As in *Bingham*, the *Potts* court again found that the State had failed to prove the banned AAID credentials were *actually* or *inherently* misleading.[302] In addition, the court found that the State had *probably* failed to prove that the AAID credentials even were *potentially* misleading.[303]

In *Potts*, the State submitted two consumer surveys, but the court found both surveys unreliable because of the flawed methodologies used therein.[304] Regardless, the court concluded, even if the surveys sufficiently proved that the AAID credentials were *potentially* misleading to consumers, the ban on all non-sanctioned credentials failed the narrow-tailoring requirement of

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298 Bingham v. Hamilton, 100 F. Supp. 2d 1233, 1241 (E.D. Cal. 2000). The plaintiff dentist wanted to advertise his credentials of "Fellow" and "Diplomate" in implant dentistry issued by the American Academy of Implant Dentistry (AAID), a non-sanctioned professional organization that also was a plaintiff in the lawsuit. *Id.* at 1235-37. The state statutory provisions and regulations proposed by the state dental board would have prevented the dentist from advertising these credentials. *Id.* at 1236-37.

299 *Id.* at 1240-41.

300 *Id.* at 1241 (emphasis added). The court wrote, "The only evidence that the [state] offers that the advertising of AAID credentials would be misleading is conclusory, anecdotal, and speculative." *Id.* at 1240.

301 Potts v. Hamilton, 334 F. Supp. 2d 1206, 1208 (E.D. Cal. 2004). Plaintiffs challenged the constitutionality of state code provisions prohibiting dentists from advertising credentials issued by private or public organizations not recognized by the state dental board or the American Dental Association. *Id.* at 1210 (referring to CAL. BUS. & PROF. CODE § 651(h)(5)(A) (Deering 2002)).

302 *Id.* at 1215-16.

303 *Id.* at 1216-17.

304 *Id.* One survey polled two hundred respondents in a mall, and the other interviewed two hundred respondents on the telephone. *Id.* The court concluded there was "selection bias in the sampling procedure" in the mall survey, that "no reliable extrapolation can be made from the results of this convenience sample to the general population of California," and that both surveys utilized "leading compound questions." *Id.* at 1217. According to the court, "[e]ach [survey] suffers from serious deficiencies that render its significance open to question" on the issue of whether the "AAID . . . credentials are potentially misleading." *Id.* at 1216-17.

the *Central Hudson* analysis because the State could have utilized a disclosure requirement rather than a ban.[305] Finally, the *Potts* court distinguished the Ninth Circuit ruling in *American Academy*, which had upheld the California statute restricting the term "board certified" in physician advertising.[306] The *Potts* court said California had demonstrated with evidence in *American Academy* that the restricted term—"board certified"—had "acquired a fixed, technical meaning within the medical profession," that was clearly codified in the statute.[307] That was not the case with the State's ban on privately-issued specialty credentials in *Potts*.

State supreme courts have been more reluctant to strike down restrictions on content in professional services advertising than the federal courts. For instance, in 1991, in *Trumbull County Bar Association v. Joseph*, the Ohio Supreme Court held that the State could constitutionally prohibit attorney Michael D. Joseph from advertising himself as "specializing in" medical malpractice under a disciplinary rule that prohibited specialization claims other than those sanctioned in the rule.[308] The court concluded under the facts of the case that the "specializing in" claim in the lawyer's advertising was "misleading in fact," because he did not have "formal recognition" or "even experience" in medical malpractice law.[309] Instead, the court concluded, the "specializing in" claim represented the lawyer's "personal aspirations."[310]

In 1992, in *Moore v. California State Board of Accountancy*, the California Supreme Court held the State could constitutionally prohibit non-licensed individuals from using terms like "public accountant," or "certified public accountant," in their advertising unless they were state-licensed to provide public accountancy services.[311] The State could constitutionally reserve these terms for

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305 *Id.* at 1219-20. The district court summarized that "if an advertisement is inherently misleading or has in actual practice misled members of the consuming public, it is not protected by the First Amendment and may be absolutely prohibited" without meeting the remaining requirements of the *Central Hudson* analysis. *Id.* at 1212. The court further summarized that if an advertisement is "merely potentially misleading," a ban would violate the First Amendment, and a disclosure requirement would as well, unless it met the remaining requirements of the *Central Hudson* analysis. *Id.*

306 *Id.* at 1214.

307 *Id.*

308 Trumbull County Bar Ass'n v. Joseph, 569 N.E.2d 883, 884 (Ohio 1991). The rule prohibited "specialization" certifications in all but patent, trademark or admiralty law unless issued by a state-sanctioned organization. *Id.* (referring to OHIO CODE OF PROF'L RESPONSIBILITY DR 2-105(A)(5) (1988)).

309 *Id.*

310 *Id.*

311 Moore v. Cal. State Bd. of Accountancy, 831 P.2d 798, 805-07, 813-14 (Cal. 1992). The code prohibited terms like "certified public accountant," among others, in advertising by non-licensed individuals. *Id.* at 800 (quoting CAL. BUS. & PROF. CODE § 5058). A regulation adopted by California's State Board of Accountancy went further and prohibited non-licensed individuals from advertising as an "accountant" who

those who met the "rigorous educational, experience, and examination requirements prior to obtaining licensure."[312] In other words, the terms were not banned, but rather limited for advertising purposes to those who qualified by statute.

On the other hand, the *Moore* court ruled that California could not similarly restrict generic terms such as "accountant" or "accounting services" because unlicensed individuals could lawfully provide general accounting and bookkeeping services, and these terms in advertising would accurately describe those services.[313] Instead, the court concluded, the State could constitutionally compel a disclosure of licensure status when unlicensed individuals used such terms in their advertising.[314] The *Moore* court based its holding on a survey of Californians submitted by the State in which fifty-five percent of the respondents said they thought people who advertised themselves as "accountants" had to be state-licensed, and fifty-three percent concluded that people who advertised "accounting services" were required to be state-licensed.[315] This evidence convinced the court that use of such terms by unlicensed individuals had the *potential* to mislead without the recommended disclosure.[316]

In 1996, in *In re Robbins*, the Georgia Supreme Court upheld a state bar rule that prohibited attorneys from advertising as a "specialist" in any area of law except for criminal and civil trial advocacy.[317] With minimal explanation, the court found that when used in lawyer advertising, the term "specialist," and variations of

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performed "accounting." *Id.*

312 *Id.* at 804, 810.

313 *Id.* at 803, 813-14.

314 *Id.* The court suggested such a disclosure should advise consumers that services being offered did not require a license. *Id.* On this point, the California Supreme Court modified an injunction entered by the court of appeal to "prohibit only the use of the terms 'accountant' or 'accounting' without a modifier, qualifier, disclaimer, or warning stating either that the advertiser is not licensed by the state or that the services provided to not require a state license." *Id.* at 803.

315 *Id.* at 802. The California Supreme Court reported that the survey was performed by an independent research firm and described the survey as "an ongoing survey of Californians that attempts to measure public attitudes on various unrelated topics." *Id.*

316 *Id.* at 813 (concluding the State could "constitutionally ban only those uses of generic terms 'accountant' and 'accounting' that stand to potentially mislead the public regarding the use of the user's licensee or nonlicensee status"). The court modified the state code provisions and board regulation to prohibit the State from banning the use of "generic terms" "accountant" and "accounting" when "used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion—for example, an express disclaimer stating that the 'accounting' services being offered do not require a state license." *Id.*

317 *In re* Robbins, 469 S.E.2d 191, 192 (Ga. 1996). The plaintiff was reprimanded for claiming to "specialize" in "automobile accidents, motorcycles accidents, bicycle accidents, medical malpractice, workers' compensation and social security cases." *Id.* at 192-93. As summarized by the court, state bar rules and guidelines allowed specialization claims in criminal and civil trial advocacy but allowed lawyers to advertise that their practices were limited to a specific type of law without using the word "specialist." *Id.*

that term, were "*potentially* misleading," and concluded that the State could constitutionally reprimand an attorney for advertising an area of "specialization" not permitted by the rule and guidelines.[318] The lawyer had claimed in his advertisement to "specialize" in "automobile accidents, motorcycle accidents, bicycle accidents, medical malpractice, workers' compensation, and social security cases."[319] The court concluded that the rule would still allow lawyers to advertise their areas of practice so long as they did not use the regulated term "specialist" or some variation of the term.[320]

Similarly, in 1997, in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Wherry*, the Iowa Supreme Court ruled that the State could constitutionally reprimand an attorney for violating a state bar rule prohibiting attorneys from advertising an area of practice unless they met the training and experience requirements in the rule.[321] The court found that the requirement "easily satisfie[d]" the *Central Hudson* analysis.[322] The court also found that the State had a "clear responsibility to protect the public interest in *informed* selection of legal representation," and concluded that the rule struck a "reasonable accommodation" between protecting the "public's right to have a lawyer qualified in the field advertised" and avoiding "onerous" training requirements for lawyers who wished to advertise in a particular field of law.[323] Whether the regulations upheld in *Joseph*, *Trumbull County*, *Robbins*, or *Wherry* would withstand the seemingly more stringent version of the *Central Hudson* analysis applied in more recent decisions by the United States Supreme Court seems

[318] *Id.* at 193 (emphasis added). The court explained that "First Amendment protection [for advertising] is not absolute, and the government may prohibit entirely advertising that is misleading, per se, and may regulate advertising that is potentially misleading." *Id.* (citing *In re* R.M.J., 455 U.S. 191, 202-03 (1982); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977)). The court explained, "In the latter case, the government must assert a substantial interest in regulation and may only interfere with speech to the extent reasonably necessary to prevent the perceived evil from *potentially* misleading advertising." *Id.* at 193 (citing Peel v. Attorney & Disciplinary Comm'n of Ill., 469 U.S. 91, 107 (1990); *R.M.J.*, 455 U.S. at 202-03)).

[319] *Id.* at 192-93.

[320] *Id.*

[321] Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wherry, 569 N.W.2d 822, 824 (Iowa 1997). The rule specified that lawyers who advertised an "area of practice" had to certify they "'devoted the greater of 200 hours or twenty percent of [their] time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years,'" and also had "'completed at least ten hours of accredited Continuing Legal Education courses of study in each separate indicated field of practice during the preceding calendar year.'" *Id.* at 824 n.1 (quoting IOWA CODE OF PROF. RESP., DR 2-105(A)(4); IOWA CODE ANN. R. 32:7.4).

[322] *Id.* at 825.

[323] *Id.* ("False claims of expertise are a real danger to those who need and are searching for legal services."). The court characterized the rule as a "carefully considered attempt to protect the public interest in making [an] informed decision" when selecting a lawyer. *Id.*

questionable.

The cases reviewed in this Part indicate that courts have struck down categorical bans on the promotional use of generic terms that describe lawful services that unlicensed individuals can provide to the public, such as general "accounting services."[324] However, courts have permitted states to limit the use of statutorily-defined terms like "board certified" and "specialist" to those who meet specified criteria.[325] In addition, courts have allowed states to prohibit unlicensed individuals from using terms reserved for licensed professionals like "audiologist," "public accountant," and "certified public accountant."[326]

Consistent with the requirements of *Peel* and *Ibanez*, lower courts have consistently ruled that states cannot constitutionally ban the use of privately issued certification credentials without demonstrating they are *actually* or *inherently* misleading or illegitimate.[327] Also consistent with *Ibanez*, the Eleventh Circuit concluded that Florida could not constitutionally prohibit licensed CPAs from truthfully promoting their CPA license even when employed by a non-CPA firm and providing services that did not require a CPA license.[328] Furthermore, the cases reviewed in this Part indicate that lower courts consistently have struck down categorical bans on claims in professional services advertising when more narrowly tailored regulatory means such as disclosure requirements exist to prevent claims from being presented in a misleading manner.[329]

B. *Restrictions on Content: Quality-of-Service Claims Including Expected Results*

The *Bates* Court did not address the "peculiar problems associated with advertising claims related to the quality of legal

[324] *See* Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) ("psychologist" at a time when a license to practice psychology was not required by state); Moore v. Cal. State Bd. of Accountancy, 831 P.2d 798 (Cal. 1992) ("accountant" and "accounting services").

[325] *See* Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099 (9th Cir. 2004) ("board certified"); *Wherry*, 569 N.W.2d 822 ("specialist"); *In re* Robbins, 469 S.E.2d 191 (Ga. 1996) ("specialist"); *Moore,* 831 P.2d 798 ("public accountant"); *see also* Trumbull County Bar Ass'n v. Joseph, 569 N.E.2d 883 (Ohio 1991) (use of "specializing in" medical malpractice claim by attorney with no demonstrated relevant expertise).

[326] *See* Gandee v. Glaser, 785 F. Supp. 684 (S.D. Ohio 1992) ("audiologist"); *Moore*, 831 P.2d 798 ("public accountant" and "certified public accountant").

[327] *See* Potts v. Hamilton, F. Supp. 2d 1206 (E.D. Cal. 2004) (non-approved certification in implant dentistry); Bingham v. Hamilton, 100 F. Supp. 2d 1233 (E.D. Cal. 2000) (non-approved certification in implant dentistry); Tsatsos v. Zollar, 943 F. Supp. 945 (N.D. Ill. 1996) (non-approved podiatrist certifications); Strang v. Satz, 884 F. Supp. 504 (S.D. Fla. 1995) (doctoral degrees from non-accredited institutions).

[328] *See* Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997).

[329] *See Abramson*, 949 F.2d 1567; *Potts*, 334 F. Supp. 2d 1206; *Bingham*, 100 F. Supp. 2d 1233; *Strang*, 884 F. Supp. 504; *Moore*, 831 P.2d 798; *see also Miller*, 117 F.3d 1376 (direct regulation of accountants was alternative to banning protected commercial speech).

services" and decided to "leave that issue for another day."[330] The Court suggested that quality-of-services claims in professional services advertising might be constitutionally restrained when they are "not susceptible of measurement or verification" and "so likely to be misleading as to warrant restriction."[331] Therefore, the implicit message from *Bates* is that quality-of-service claims cannot be constitutionally banned unless demonstrated to be immeasurable or unverifiable, and *actually* or *inherently* misleading. Neither the United States Supreme Court nor seemingly any of the federal circuits have directly addressed this issue in the context of professional services advertising to date. However, the issue has surfaced in cases that ended with a federal district or state supreme court opinion since 1990.

In 1995, in *Texans Against Censorship, Inc. v. State Bar of Texas*, a federal district court in Texas upheld a state disciplinary rule for lawyers prohibiting "'false or misleading communication about the qualifications or services of any lawyer or firm.'"[332] Relying on *Ibanez, Zauderer, R.M.J.*, and *Central Hudson*, the court concluded the rule only applied to unprotected commercial speech and was constitutional on that ground alone without regard to the remainder of the *Central Hudson* analysis.[333] The court also upheld a state rule that required lawyers to substantiate any claims in their advertising that compared their services to those of other lawyers.[334] The court held the rule comprised a "reasonable fit[]" with the State's asserted interest in preventing false and misleading claims in lawyer advertising, and stated that the rule allowed lawyers to make comparison claims as long as they are substantiated.[335]

More recently, in *Farrin v. Thigpen*, decided in 2001, a federal district court in North Carolina held the state bar could constitutionally prohibit lawyers from broadcasting a specific television commercial under threat of disciplinary proceedings because it featured a fictional dramatization that was deemed *inherently* misleading.[336] A national marketing firm had produced the advertisement, referred to as the "Strategy Session" commercial, which depicted a fictional group of insurance adjusters discussing their response to a serious accident claim.[337]

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[330] Bates v. State Bar of Ariz., 433 U.S. 350, 366 (1977).
[331] *Id.* at 383.
[332] Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1350 (E.D. Tex. 1995) (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02(a) (1995)).
[333] *Id.*
[334] *Id.* at 1350-51 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02(a)(3)).
[335] *Id.*
[336] Farrin v. Thigpen, 173 F. Supp. 2d 427, 447 (M.D.N.C. 2001).
[337] *Id.* at 448-49.

The dramatization ended with a senior adjuster recommending settlement upon learning the identity of the law firm representing the fictional claimant.[338] The commercial contained a printed disclosure advising viewers the vignette was a dramatization and implied no specific result.[339]

The "Strategy Session" commercial could be individualized for a personal injury firm by inserting its name into the vignette as the firm prompting the settlement decision in the fictionalized strategy session.[340] Two law firms had purchased the spot for use in North Carolina, and ultimately, the state bar adopted a formal ethics opinion advising that any firm broadcasting the spot was subject to disciplinary proceedings for violating the state rule against "'false or misleading communication about [a] lawyer or the lawyer's services'" including "'unjustified expectation[s] about the results the lawyer can achieve.'"[341] The two law firms and the marketing firm that produced the commercial challenged the opinion on constitutional grounds in federal district court but lost the challenge.

The *Farrin* court found the "Strategy Session" commercial to be *inherently* misleading "on its face" because the dramatization created the impression that insurance companies would settle cases at the "mere mention" of a particular law firm's name.[342] The court concluded the misleading nature of the dramatization was "self-evident"[343]—the same term employed by the United States Supreme Court in *Zauderer*[344]—and that the State did not need to provide corroborating evidence like consumer studies or expert

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338 *Id.* at 435. The advertisement also included a paid celebrity, Robert Vaughn, who appeared as a spokesperson for the advertising law firm. *Id.* at 434.

339 *Id.* at 434, 434 n.3. In addition, the disclosure stated the celebrity appearing in the advertisement was a "paid spokesperson" for the advertising law firm. *Id.* One commentator referred to this advertisement as a "relatively comic and innocuous fictional vignette." Smolla, *supra* note 13, at 16.

340 *Farrin*, 173 F. Supp. 2d at 427, 435 n.4.

341 *Id.* at 432-33 (quoting N.C. R. PROF'L CONDUCT 7.1). The proposed opinion of the Ethics Committee found the commercial to be false or misleading for leaving the impression that an insurance company would settle a claim based solely on the identity of the opposing law firm, without regard to many other factors including the strength of the underlying claim itself. *Id.* at 433.

342 *Id.* at 436-38, 442, 443, 447.

343 *Id.* at 437. The court wrote, "Put simply, the ad creates the impression that insurance companies . . . will decide to settle at the mere mention of a certain attorney's name." *Id.* at 443. The court also pointed to testimony in the case by insurance company experts who said settlement decisions were based on many factors and these factors and the merits of each particular case weighed more than the identity of the opposing law firm. *Id.* at 440-42.

344 One commentator concluded the *Farrin* court was "relying on a somewhat casual statement by the Supreme Court" in the *Zauderer* case. Smolla, *supra* note 13, at 16 n.79 (citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652 (1985)).

witness testimony.[345] In addition, the court concluded the content of the printed disclosure was insufficient to render the commercial non-misleading and was too inconspicuous and brief in duration to be an effective disclaimer.[346] Because the commercial was ruled *inherently* misleading, the court did not require the bar to prove that the commercial was also *actually* misleading by submitting documentation of instances of actual harm to consumers. The court concluded that commercial speech could be ruled unprotected if found either *inherently* or *actually* misleading.[347]

Turning to state supreme court decisions, in 1992, the Illinois Supreme Court ruled in *Ardt v. Illinois Department of Professional Regulation* that the State could constitutionally sanction a dentist for advertising "quality dentistry" in violation of the state statutory provision prohibiting "'claims of superior quality of care'" by licensed dentists.[348] The court said that quality of dental care is a matter of opinion to be decided by each patient *after* care was rendered, and therefore, an *advance* claim of superior care was an "empty claim" and *inherently* misleading.[349] In addition, the *Ardt* court concluded, the dentist in the case could be sanctioned for his claim that there was "[t]otal comfort available with anesthetic techniques," in violation of provisions that prohibited advertising pain-free dentistry.[350] The court ruled that the "total comfort" claim was equivalent to promising pain-free dentistry and was *inherently* misleading.[351]

More recently, in 2003, the Indiana Supreme Court in *In re Keller*[352] reprimanded a law firm for using versions of the same "Strategy Session" commercial found to be *inherently* misleading in *Farrin*. In *Keller*, the state supreme court concluded that the

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345 *Farrin*, 173 F. Supp. 2d at 437, 442-43.

346 *Id.* at 445.

347 *Id.* at 436-37. The *Farrin* court concluded the United States Supreme Court's 1982 decision in *R.M.J.* made it clear that commercial speech could be ruled constitutionally unprotected as *inherently* misleading or *actually* misleading without the need to prove both. *Id.* at 436 (citing *In re* R.M.J., 455 U.S. 191, 203 (1982)). One commentator concluded the *Farrin* court's ruling came "despite an utter lack of any empirical data demonstrating that consumers were actually misled, or that any client of the firm was less than satisfied with the zeal or ethics of the attorneys who purchased the advertising." Smolla, *supra* note 13, at 16.

348 Ardt v. Ill. Dep't of Prof'l Regulation, 607 N.E.2d 1226, 1233 (Ill. 1992) (quoting ILL. REV. STAT., ch. 111, ¶ 2345(h)(1) (1987)). The court also concluded that the State could not constitutionally prohibit non-sanctioned terms like "family dentistry," but the State previously took care of that problem by changing the regulations to allow the use of such terms with a disclosure stating the advertising dentist was licensed in the state as a general dentist. *Id.* at 1232-33.

349 *Id.* at 1233.

350 *Id.* at 1233-34 (referring to ILL. REV. STAT., ch. 111, ¶ 2345(h)(2)).

351 *Id.*

352 *In re* Keller, 792 N.E.2d 865 (Ind. 2003).

"Strategy Session" commercials violated a state rule against quality claims in public communication by lawyers.[353] For similar reasons as those set out in *Farrin*, the *Keller* court found that the "Strategy Session" commercials "unfairly impl[ied] a particular favorable result in cases involving insurance companies,"[354] and was "'more likely to deceive the public than to inform it.'"[355] Because the commercial was deceptive and misleading, it was unprotected commercial expression under the First Amendment.[356] Like the *Farrin* court, the *Keller* court held that evidence of *actual* instances of consumer deception was unnecessary[357] and refused to give the printed disclosure in the commercial any legal effect.[358]

In 2005, in *In re PRB*, the Vermont Supreme Court agreed that the state bar could constitutionally admonish a law firm for a Yellow Pages advertisement that included the headline "INJURY EXPERTS" and a caption that described the firm as "experts" in three specified legal areas.[359] A state disciplinary panel found that the advertisement violated the state's rule prohibiting lawyers from creating "unjustified expectation[s] about results," and from comparing their services to those of other lawyers without factual substantiation.[360] In affirming the state disciplinary panel, the court concluded that the "expert" claims were unverifiable

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353 *Id.* at 866, 867-68. The rule prohibited any "public communication" that "contain[ed] a statement or opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services." *Id.* at 868 (quoting IND. PROF'L CONDUCT R. 7.1(d)(4)). The firm also was reprimanded for the celebrity endorsement in the advertisement. *Id.* at 870.

354 *Id.* at 869. The court pointed to its finding in two previous cases that involved similar claims. *Id.* at 868. In *In re Wamsley*, 725 N.E.2d 75, 75 (Ind. 2000), the court had found claims like "[m]y reputation, experience and integrity . . . result in most or our cases being settled," violated the rule against quality-of-service claims in attorney advertising. In *In re Anonymous*, 689 N.E.2d 442, 443-44 (Ind. 1997), the court found that claims, including "premier personal injury law firm" and "the track record and resources you need to win a settlement," were violative. *Id.* The court in *Keller*, 792 N.E.2d at 868 n.2, also pointed to the similar conclusions by the federal district court about the "Strategy Session" commercial in *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 440 (M.D.N.C. 2001)). *Id.* at 868 n.2.

355 *Keller*, 792 N.E.2d at 869 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980)).

356 *Id.*

357 *Id.* at 869 n.3.

358 *Id.* at 868.

359 *In re* PRB, 868 A.2d 709, 709-10 (Vt. 2005).

360 *Id.* at 709-10, 712. The panel concluded the "expert" claims implied comparisons to services of other lawyers and made an "implicit statement of superiority." *Id.* at 710. The law firm did not dispute the panel's finding that the "expert" claims included implicit comparisons but instead argued that the "expert" claims should have been treated as "specialty" claims. *Id.* at 712. Although state bar rules allowed lawyers to advertise areas of "specialty" in a particular field of law, the Vermont Supreme Court concluded that claiming "expertise" in a field of law was not the same as indicating that one merely "specializes" in an area of law. *Id.* at 712-13. In addition, although not at issue in the case, the state supreme court took the opportunity to state its position that "specialty" claims in advertising would require a disclosure when the advertising lawyer was not certified by a "recognized organization." *Id.* at 713 (citing *In re* R.M.J., 455 U.S. 191, 201 (1982)).

qualitative claims and noted that the United States Supreme Court in *Bates* and *R.M.J.* had suggested that states could constitutionally restrict subjective quality claims in lawyer advertising.[361]

In *Florida Bar v. Pape*, also decided in 2005, the Florida Supreme Court ruled that two attorneys could be constitutionally reprimanded for television advertisements featuring a pit bull dog in their firm logo and the telephone number "1-800-PIT-BULL."[362] The state bar had started proceedings against the attorneys and alleged that the attorneys had violated rules prohibiting quality-of-service claims in lawyer advertising and requiring visual and verbal content to "'be objectively relevant to the selection of an attorney.'"[363] The *Pape* court found that the advertising violated these rules, assuming that consumers would interpret the "pit bull" references as a description of quality of legal services being advertised.[364] Specifically, the court presumed that most consumers would think the lawyers were offering "'pit bull'-style representation" and would "achieve results . . . and engage in a combative style of advocacy."[365] The court found that such claims were "*inherently* deceptive" and unverifiable "because there is no way to measure whether . . . attorneys in fact conduct themselves like pit bulls."[366] The court disagreed with the referee from the initial proceedings, who had concluded that the "pit bull" references were not quality-of-service claims, but instead merely described "characteristics" of the lawyers themselves.[367]

In rejecting First Amendment protection for the pit bull logo and telephone number in the lawyers' advertising, the *Pape* court distinguished the Dalkon shield illustration in *Zauderer*.[368] The Dalkon shield illustration was an accurate depiction used to inform consumers of the type of cases being solicited, whereas the pit bull references were an "advertising device" intended to

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361 *Id.* at 711-12 (citing *R.M.J.*, 455 U.S. at 205; Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977)). The Vermont Supreme Court concluded that an "expert" claim "falls squarely within that category of qualitative advertising claims that are not susceptible of measurement or verification." *Id.* at 712.

362 Fla. Bar v. Pape, 918 So. 2d 240, 242, 250 (Fla. 2005), *cert. denied*, 126 S. Ct. 1632 (2006).

363 *Id.* at 242 (quoting R. REGULATING FLA. BAR 4-7.2(b)(3)-(4)). One rule prohibited "statements describing or characterizing the quality of the lawyer's services in advertisements and written communications" and another required "[v]isual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney." *Id.*

364 *Id.* at 244. The *Pape* court concluded that the "image and words 'pit bull' are intended to convey an image about the nature of the lawyers' litigation tactics." *Id.* at 249.

365 *Id.* at 244.

366 *Id.* (emphasis added). The Florida Supreme Court said it would not "condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar, or harm the opposing party." *Id.* at 246.

367 *Id.* at 242-43.

368 *Id.* at 249.

connote a vicious and combative litigation style.[369] Absent "verifiable factual information," the court concluded such claims were constitutionally unprotected.[370] In early 2006, the United States Supreme Court declined to review the Florida Supreme Court's ruling in *Pape*.[371]

The cases reviewed in this Part indicate that regulating quality-of-service and expected-results claims is perhaps the most undeveloped area of law in the context of professional services advertising regulation and the First Amendment. A critical issue here involves determining the appropriate process with which courts interpret content to determine whether a quality-of-services or expected-results claim is being made in a particular advertisement. For instance, interpreting the term "quality dentistry" as a claim of superior care compared with other dentists,[372] or interpreting images of a pit bull in lawyer advertising as a promise by lawyers to litigate like aggressive animals,[373] presumes the anticipated beliefs consumers will take from such advertising and how they will react. Determining these beliefs seems like a prerequisite to deciding ultimately whether the message itself is misleading to the degree that it can be constitutionally prohibited or otherwise restricted.[374] The courts have yet to develop a consistent jurisprudential approach to handling such issues in the context of regulating quality-of-service and expected-results claims in professional services advertising.

C. *Compelled Disclosures in Professional Services Advertising*

After the United States Supreme Court decided *Peel* in 1990, a number of federal appeals and district courts, as well as state supreme courts, have addressed the constitutionality of disclosure requirements in professional services advertising. This Part identifies and reviews those cases. In 2002, the United States Supreme Court declined to review a controversial ruling by the United States Court of Appeals of the Eleventh Circuit,[375] with Justice Thomas dissenting and asserting that the case presented an opportunity to clarify the Court's constitutional jurisprudence with regard to disclosure requirements for professional services

369 *Id.*

370 *Id.*

371 Pape v. Fla. Bar, 126 S. Ct. 1632 (2006).

372 *See* Ardt v. Ill. Dep't of Prof'l Regulation, 607 N.E.2d 1226 (Ill. 1992).

373 *See Pape*, 918 So. 2d 240.

374 Consumer research experts have suggested that determining whether an advertisement is misleading or not "focuses exclusively on consumer beliefs" generated by an advertising message and not upon the actual message itself. J. Edward Russo et al., *Identifying Misleading Advertising*, 8 J. CONSUMER RES. 119, 120 (1981).

375 Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080 (2002).

advertising.[376]

Among the federal appeals decisions, in *Tillman v. Miller*, the Eleventh Circuit in 1998 ruled unconstitutional a Georgia statute that required workers' compensation attorneys to include a statement in their television advertising that filing fraudulent workers' compensation claims was a crime.[377] A workers' compensation lawyer who advertised on television successfully challenged the requirement on constitutional grounds in federal district court.[378] On appeal, the Eleventh Circuit affirmed and concluded that "Georgia has failed to show that [the disclosure requirement] is justified and not too burdensome" under the "principles" the United States Supreme Court established in *Zauderer*.[379] Therefore, the appeals court said it was unnecessary to consider whether the "seemingly more stringent" *Central Hudson* analysis should have applied because the State could not have met that more difficult burden in any event.[380]

The *Tillman* court also found it unnecessary to decide whether the State's asserted interest in preventing fraudulent workers' compensation claims was constitutionally sufficient to justify the disclosure requirement.[381] Even if it was, the *Tillman* court assumed the State could not justify the disclosure requirement because it had not proven "that the television advertising of legal services caused fraudulent workers' compensation claims to be filed or that including the pertinent compelled disclosure would likely significantly reduce fraudulent claims in Georgia.[382] In addition to being unjustified, the court concluded the disclosure requirement presented an "undue burden" because the required message would consume approximately five seconds in a typical thirty-second television spot.[383]

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376 *Id.* (Thomas, J., dissenting).

377 Tillman v. Miller, 133 F.3d 1402, 1403 (11th Cir. 1998). The provisions were part of the Georgia Workers' Compensation Truth in Advertising Act and required the following disclosure in attorney television advertising for workers' compensation-related services as of July 1995: "Willfully making a false or misleading statement or representation to obtain or deny workers' compensation benefits is a crime carrying a penalty of imprisonment and/or a fine of up to $10,000." *Id.* at 1403 n.1 (quoting GA. CODE ANN. § 34-9-31 (1995)).

378 *Id.* at 1403.

379 *Id.* at 1403, 1404 n.4.

380 *Id.*

381 *Id.* at 1403. The court questioned whether "a state may compel some disclosure in a commercial advertisement for a reason other than preventing the ad from deceiving or misleading consumers," but, nonetheless, found the disclosure requirement unconstitutional even if so. *Id.*

382 *Id.*

383 *Id.* at 1404 n.4. The court characterized the disclosure requirement as an unconstitutional attempt to pass along the costs of educating the public about the criminal ramifications of filing fraudulent workers' compensation claims. *Id.* at 1403-04.

Two years after deciding *Tillman*, the Eleventh Circuit in 2000, in *Mason v. Florida Bar*, struck down another state disclosure requirement for lack of evidence, but this time did indeed apply the *Central Hudson* analysis.[384] In *Mason*, the appeals court held that Florida could not constitutionally require an attorney to include a state-scripted disclosure in an advertisement describing his rating from a national law directory as the "highest rating."[385] In *Mason*, Attorney Steven Mason had received the highest possible rating ("AV") from the widely-respected Martindale-Hubbell directory, which utilized an attorney rating system based on peer evaluations. In 1998, he submitted to the Florida Bar for approval a proposed yellow pages advertisement that included his "AV" rating and the phrase "Highest Rating Martindale-Hubbell National Law Directory."[386] The Bar found the "Highest Rating" claim in potential violation of a rule against "merely self-laudatory" claims in advertising,[387] and ordered Mason to include a "full explanation" of the rating including "that the ratings and participation are based 'exclusively on . . . opinions expressed by . . . confidential sources' and that these publications do not undertake to rate all Florida attorneys."[388]

Mason challenged the disclosure order on constitutional grounds but lost in federal district court.[389] On appeal, the Eleventh Circuit applied the *Central Hudson* analysis and reversed. Under the first prong, the *Mason* court found the "highest rating" claims comprised protected commercial speech,[390] and the court proceeded to the remaining three prongs.[391] Under the second

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384 Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000). For further information regarding *Mason v. Florida Bar*, see generally Stacy Borisov, *Commercial Speech: Mandatory Disclaimers in the Regulation of Misleading Attorney Advertising*, 12 U. FLA. J.L. & PUB. POL'Y 377 (2001).

385 *Mason*, 208 F.3d at 954.

386 *Id.*

387 *Id.* (quoting then-current Rule 4-7.2(j) of the RULES REGULATING THE FLA. BAR). The Eleventh Circuit noted that while the case was on appeal, the Florida Supreme Court revised the rule to remove the prohibition against "merely self-laudatory" statements but continued to prohibit "'statements describing or characterizing the quality of the lawyer's services in advertisements or written communication.'" *Id.* at 954 n.2 (quoting AMENDMENTS TO RULES REGULATING THE FLORIDA BAR—ADVERTISING RULES, 762 So. 2d 392 (1999)). The appeals court also noted that the revised rule had been renumbered. *Id.*

388 *Id.* (quoting Florida Bar opinion). The Florida Bar had informed Mason that he needed to provide a "'full explanation as to the meaning of the [Martindale-Hubbell] AV rating and how the publication chooses the participating attorneys.'" *Id.* (quoting Florida Bar opinion).

389 Mason v. Fla. Bar, 29 F. Supp. 2d 1329 (M.D. Fla. 1998), *aff'd in part and rev'd in part by* 208 F.3d 952 (11th Cir. 2000).

390 *Mason*, 208 F.3d at 956.

391 *Id.* The appeals court summarized that it needed to determine: "(1) whether the state's interests in limiting speech are substantial; (2) whether the challenged regulation advances these interests in a direct and material way; and (3) whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Id.* at 955-56 (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

prong, the court concluded that Florida had substantial governmental interests in protecting the public from misleading attorney advertising and providing the public with information to compare and select attorneys for hire.[392]

Under the third *Central Hudson* prong, the *Mason* court found that Florida had failed to provide the necessary evidence to prove that the disclosure order targeted an "identifiable harm" and mitigated that harm in a "direct and effective manner" as required by *Ibanez* and *Edenfield*.[393] The Florida Bar had argued that the "Highest Rating" claim in Mason's advertisement would mislead consumers who were unfamiliar with Martindale-Hubbell ratings.[394] However, the State failed to submit corroborating evidence, including empirical studies,[395] and the appeals court rejected the State's argument accordingly as "speculation" and "unsupported conjecture."[396] On this point, the *Mason* court reiterated the lessons from *Ibanez* that "'[u]nfamiliarity is not synonymous with misinformation,'"[397] and from *Peel* that consumers are not necessarily misled because they encounter an unfamiliar certification claim in professional advertising.[398] Because the disclosure order was found unconstitutional under the third prong, the court found it unnecessary to address the narrow-tailoring requirement of the fourth prong.[399]

Two years after deciding *Mason*, the Eleventh Circuit addressed yet another Florida disclosure requirement but with the opposite result than *Tillman* and *Mason*. In addition, the appeals court seemingly melded the *Zauderer* requirements with the third and fourth prongs of the *Central Hudson* analysis. In *Borgner v.*

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392 *Id.* at 956. The appeals court rejected the State's asserted interest in "encouraging attorney rating services to use objective criteria." *Id.* ("The Florida Bar offers no reason for its [stated] preference for objective criteria over subjective criteria . . . .").

393 *Id.* at 956-57.

394 *Id.*

395 *Id.* at 957-58. The Florida Bar argued unsuccessfully that the court should accept its position as "simple common sense," without the need for additional evidence. *Id.*

396 *Id.* at 958 ("This court is unwilling to sustain restrictions on constitutionally protected speech based on a record so bare as the one relied upon by the [Florida] Bar here.").

397 *Id.* at 957 (quoting Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 147 (1994)).

398 *Id.* (citing Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 102-03 (1990)).

399 *Id.* at 958. The appeals court wrote: "Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm. Accordingly, we hold that the Bar is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban on Mason's speech." *Id.* One commentator concluded after *Mason* that "it is difficult to imagine a case in which a State could effectively demonstrate an identifiable harm that results from potentially misleading speech without presenting empirical data," and suggested that regulators in the states of the Eleventh Circuit must perform "a great deal of homework first," before they "engage in any prophylactic regulation of attorney advertising." Borisov, *supra* note 384, at 385.

Brooks, decided in 2002, the Eleventh Circuit upheld a Florida statute that required dentists to include a disclosure when they advertised a specialty area of practice or a certification that was not recognized by the Florida Board of Dentistry or the American Dental Association (ADA).[400] Specifically, under the statute, dentists who advertised a non-approved area of specialization also had to state that the specialty was "NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."[401] Also under the statute, dentists who advertised a certification that was issued by a non-approved organization had to state in the advertisement that the organization was "NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."[402]

Dentist Richard Borgner had been advertising his specialty of implant dentistry and his certifications from the American Academy of Implant Dentistry (AAID) and its certifying board, the American Board of Oral Implantology/Implant Dentistry (ABOI/ID), neither of which was recognized by the state board or the ADA.[403] Both Borgner and the AAID sued the state board in federal district court challenging the statutory disclosure requirements on First Amendment grounds, and the court granted summary judgment in their favor.[404] However, on appeal, the Eleventh Circuit reversed and upheld the disclosure requirements under the *Central Hudson* analysis.[405]

Under the first prong of *Central Hudson*, the *Borgner* court concluded that Borgner's proposed advertising claims were not *inherently* or *actually* misleading, but only *potentially* misleading, and, therefore, comprised protected commercial speech.[406] The

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400 Borgner v. Brooks, 284 F.3d 1204 (11th Cir. 2002) (upholding FLA. STAT. § 466.0282 (1998)).

401 *Id.* at 1209 n.5 (quoting FLA. STAT. § 466.0282(3)).

402 *Id.* A previous version of the statute that prohibited dentists from advertising a specialty practice already had been struck down as unconstitutional by a federal district court. *Id.* at 1207 (citing Borgner v. Cook, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998)). Subsequently, the Florida legislature amended the statute to the version at issue in the instant case. *Id.*

403 *Id.*

404 *Id.*

405 *Id.* at 1216. Before applying the *Central Hudson* analysis, the Eleventh Circuit concluded that the statutory provisions did not operate as a ban but allowed dentists to advertise unapproved areas of specialty or credentials from unapproved organizations "so long as these statements are accompanied by the appropriate disclaimers." *Id.* at 1210.

406 *Id.* The appeals court noted that "the Supreme Court has . . . drawn a distinction between 'potentially' and 'inherently' misleading advertising." *Id.* (citing *In re* R.M.J., 455 U.S. 191, 203 (1982); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). There was no issue in the case about the legality of the professional services being advertised by Borgner. *Id.*

disclosure requirements then had to be tested under the remainder of the *Central Hudson* analysis.[407] Under the second prong, the court agreed with the Florida Board that it had sufficiently substantial governmental interests in protecting the public from "'unqualified and incompetent health care professionals'" and "ensur[ing] that professional advertisements do not mislead consumers about which practitioners enjoy state approval and recognition."[408]

Under the third prong, the *Borgner* court explained that Florida needed to prove the disclosure requirement advanced the asserted interests directly and materially,[409] as *Edenfield* required, which included demonstrating both an identifiable harm and that the compelled disclosure would mitigate this harm to a "material degree."[410] Generally, the court explained, *Peel* and *Ibanez* required Florida to provide "tangible evidence" demonstrating the advertising in question would be "misleading and harmful to consumers" without the required disclosures.[411] Ultimately, the appeals court found that Florida had met this burden by submitting two surveys of Florida residents that the state had commissioned in 2000 and 1998.[412]

Among other findings, the 2000 survey found that approximately sixty-four percent of five hundred respondents assumed dentists who claim to be "certified by a board" in a specialty area of dentistry are either directly or indirectly state-certified.[413] In addition, the 2000 survey found that approximately fifty-eight percent of the respondents assumed dentists who hold themselves out as "specialist[s]" in some field of dentistry are directly or indirectly state-certified in that field.[414] Among other findings, the 1998 survey found that a substantial majority of the one thousand respondents expressed that they were more willing to trust an ADA-certified dentist (seventy-nine percent), more likely to visit an ADA-certified dentist (eighty-one percent), and more likely to have confidence in an ADA-certified dentist (more

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[407] *Id.* ("Borgner's proposed advertisement[] is only potentially misleading advertising, and is thus commercial speech subject to the latter three prongs of the *Central Hudson* test.").

[408] *Id.* at 1211 (quoting Strang v. Satz, 884 F. Supp. 504, 508 (S.D. Fla. 1995)).

[409] *Id.* at 1210-11 (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995)).

[410] *Id.* at 1210 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995)).

[411] *Id.* (citing Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 147 (1994); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 108-09 (1990)). The appeals court noted the federal district court had concluded the state failed to establish "identifiable harm" related to Borgner's advertising. *Id.* at 1210 n.7.

[412] *Id.* at 1212-13.

[413] *Id.* at 1212.

[414] *Id.*

than eighty percent).[415] These findings led the appeals court to conclude that the required disclosures served to prevent consumers from assuming erroneously that the state and ADA had approved the specialty of implant dentistry and also had sanctioned the AAID and ABOI/ID.[416]

Under the fourth prong of *Central Hudson*, the *Borgner* court concluded that the disclosure requirements were sufficiently narrow, and therefore, constitutional.[417] The appeals court reiterated the lesson from *Peel* that mandatory disclosures are less constitutionally problematic than outright bans when applied to protected commercial speech, and noted specifically that Borgner was not precluded from advertising his specialty or certification in implant dentistry so long as he included the required disclosures.[418] In addition, the court reiterated the constitutional requirement from *Zauderer* that disclosures not be "unduly burdensome."[419] The *Borgner* court concluded that the required disclosures passed muster under this standard[420] because they were less lengthy and complex than the required disclosure at issue in *Ibanez*.[421]

In 2002, the United States Supreme Court denied certiorari in *Borgner* by a seven-to-two vote.[422] In a dissenting opinion joined by Justice Ginsburg, Justice Thomas disagreed strongly with the denial, and characterized the case as "an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech and to provide lower courts with guidance

415 *Id.* at 1212-13. The survey was submitted with an affidavit of a researcher with a doctorate in political science, whom the court accepted as an "expert in survey research." *Id.*

416 *Id.* at 1213. The court stated that "through these surveys, the state has demonstrated the actual harm that could come from Borgner's proposed advertisements that do not include disclaimers," and that "[w]ithout a disclaimer, consumers are led into thinking that implant dentistry is a state-recognized specialty and that AAID and ABOI enjoy state approval, when in reality, they do not." *Id.*

417 *Id.* at 1213-14.

418 *Id.* at 1214-15 (citing Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 110 (1990)). The *Borgner* court quoted from *Peel*, "To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.* at 1214-15 (quoting *Peel*, 496 U.S. at 110).

419 *Id.* at 1214 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

420 *Id.* at 1215. The court stated, "[T]he disclaimer . . . only requires the plaintiff to mention that implant dentistry is not a recognized specialty area by the ADA or the Board and/or that the dentist's membership in an organization that recognizes this specialty is not recognized as a specialty accrediting organization by the ADA." *Id.* In contrast, the court concluded, the disclosure in *Ibanez* required explanation of various certification criteria. *Id.*

421 *Id.* In addition, the *Borgner* court noted that the State had presented no evidence that the claim at issue in *Ibanez* would be misleading without a disclosure. *Id.*

422 Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080 (2002).

on the subject of state-mandated disclaimers."[423] He concluded that there were "serious questions about the validity" of the surveys on which the Eleventh Circuit had relied, and he expressed "doubts" that the *Borgner* ruling complied with *Peel* and *Ibanez*.[424]

Justice Thomas generally questioned the constitutionality of "government-scripted" disclosures such as the one upheld by the Eleventh Circuit in *Borgner*. He contrasted the Florida disclosure requirements in the case with the Ohio disclosure requirement ruled constitutional in *Zauderer*. The *Borgner* disclosure requirement mandated the format and specific language while the *Zauderer* disclosure requirement did not.[425] Justice Thomas suggested that government-scripted disclosures themselves could be misleading,[426] which suggested that the extent to which states must prove the communicative effects of scripted disclosures could be an issue in future constitutional challenges.

Among the federal district courts, in 1995, a district court in Texas upheld three of four disclosure requirements in the state's disciplinary rules for lawyers in *Texans Against Censorship, Inc. v. State Bar of Texas* under the *Central Hudson* analysis.[427] The court upheld a state rule requiring attorneys to include a disclosure when they advertised an area of specialization that was not recognized by the state for certification,[428] or was an area recognized by the state in which the advertising attorney was not certified.[429] In addition, relying on *Zauderer*, the court ruled the

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423 *Id.* at 1080 (Thomas, J., dissenting). One First Amendment commentator described the *Borgner* appeal as a "chance [for the Court] to clarify the law on disclaimers in professionals' advertising cases," and concluded "[t]he issue remains an important one in the area of commercial speech" and "[i]t may take another U.S. Supreme Court case to clarify this still-sticky issue." David L. Hudson Jr., *Advertising & First Amendment in Speech—What's on the Horizon*, FIRST AMENDMENT CENTER ONLINE, http://www.firstamendmentcenter.org/Speech/advertising/horizon.aspx?topic=advertising (last visited Dec. 25, 2006).

424 *Borgner*, 537 U.S. at 1080 (Thomas, J., dissenting).

425 *Id.*

426 *Id.* at 1082 (questioning whether a disclosure stating that an advertised specialty credential is not "bona fide" might lead consumers to assume, unjustifiably, that the credential is "bogus"). Justice Thomas wrote, "If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Id.*

427 Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1354-59 (E.D. Tex. 1995), *aff'd without opinion*, 100 F.3d 953 (5th Cir. 1996).

428 *Id.* at 1354-56. The required disclosure stated, "'Not Board Certified by the Texas Board of Legal Specialization.'" *Id.* at 1354 (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04(b)(3) (1995)).

429 *Id.* at 1354-56. The required disclosure stated, "'No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.'" *Id.* at 1354 (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04(b)(3)). Lawyers certified by the state or a state-sanctioned private professional organization could advertise their specialization certifications without a disclosure by stating "Board Certified [area of specialization]—Texas Board of Legal Specialization" or "'Certified [area of specialization] [name of certifying organization].'" *Id.* (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04(a)(2), 7.04(2)(i)-(ii)).

state could constitutionally require attorneys who advertised contingency-fee representation to include a disclosure explaining client responsibility for court costs and other expenses.[430] The court also upheld a rule that required lawyers who routinely referred cases to other attorneys to disclose that practice in their advertising.[431] The court found none of these disclosure requirements to be unduly burdensome on advertising lawyers.[432] However, the court struck down a state rule that prohibited lawyers from advertising branch office locations in which they were not present at least three days per week unless they disclosed the days and hours that the branch office was staffed by a lawyer.[433]

By contrast, in *Schwartz v. Welch*, also decided in 1995, a federal district court in Mississippi found disclosure requirements for attorney advertisements to be unconstitutional because the State failed to meet the "heavy burden of vindicating [the requirements] under the *Central Hudson* standard."[434] The state supreme court had promulgated amendments to professional conduct rules and required lawyers to include disclosures in their advertising, warning consumers not to base the decision to hire a lawyer on advertising.[435] The rules also required disclosures when lawyer advertisements listed a specialty area of practice,[436] included information about fees,[437] referred to the advertising lawyers as "juris doctors,"[438] or used an unaffiliated spokesperson.[439]

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430 *Id.* at 1356-57.

431 *Id.* at 1359.

432 *Id.* at 1355, 1357, 1359.

433 *Id.* at 1357-58.

434 Schwartz v. Welch, 890 F. Supp. 565, 574-75 (S.D. Miss. 1995). The court noted that the State had insisted on treating the case as a facial challenge under the First Amendment. *Id.* at 575. Accordingly, the court held that the "challenged rules, as a total package, violate . . . First Amendment rights to engage in commercial speech." *Id.*

435 *Id.* at 568. The proposed rule would have required all attorney advertising to disclose that the "'Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements.'" *Id.* (quoting MISS. R. PROF'L CONDUCT 7.2(d) (1994)). Also, amendments to the rules required advertising lawyers to identify the geographic location of their offices. *Id.* (citing MISS. R. PROF'L CONDUCT 7.2(1)).

436 *Id.* The required disclosure stated that a "'[l]isting of these previously mentioned area(s) of practice does not indicate any certification or expertise therein.'" *Id.* (quoting MISS. R. PROF'L CONDUCT 7.6(a)). In 1995, the Supreme Court of Mississippi held that a similar disclosure requirement in a prior version of the rule could be applied constitutionally to an attorney who listed areas of practice in his yellow pages advertisements including "auto accidents," "faulty products," and "medical negligence." Miss. Bar v. An Attorney, 649 So. 2d 820, 825 (Miss. 1995). The state supreme court held in that case the disclaimer was intended "to prevent misleading statements to the public and to prevent a disservice to all the attorneys who comply with the rule." *Id.* at 823-24.

437 *Schwartz*, 890 F. Supp. at 568. The rule required that "'[e]very advertisement and written communication that contains information about the lawyer's fees, including those which indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.'" *Id.* (quoting MISS. R. PROF'L CONDUCT § 7.2(h)).

438 *Id.* The rule prohibited an "'advertisement for a law firm which states that all of the

More recently, federal district courts have upheld disclosure requirements for professional services advertising. For instance, in 2002, in *Simm v. Louisiana State Board of Dentistry*, a federal district court upheld state rules requiring a dentist to include the terms "General Dentistry" or "Family Dentistry" when he advertised a non-sanctioned area of specialization and also required him to fully explain certifications issued to him by a non-sanctioned private professional organization.[440] The *Simm* court concluded that the disclosure requirements passed constitutional muster under the *Central Hudson* analysis.[441] In doing so, the court relied on two state-submitted consumer surveys to support the conclusion that the required disclosures would effectively guard against *potential* consumer deception, yet still allow dentists to advertise non-approved specializations and credentials.[442] In one

firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort.'" *Id.* (quoting MISS. R. PROF'L CONDUCT 7.1(a)).

439 *Id.* The rule required the term "'"Actor portrayal'" and/or "'Paid Endorsement"'" to "'be prominently displayed at the beginning and end of [the] advertisement either orally or in writing.'" *Id.* (quoting MISS. R. PROF'L CONDUCT 7.2(b)).

440 Simm v. La. State Bd. of Dentistry, 2002 U.S. Dist. LEXIS 3195, at *2-5, *29 (E.D. La. Feb. 22, 2002). Dentists who advertised a non-sanctioned area of specialty practice—such as implant dentistry, which the plaintiff had advertised—were required to "'disclose "General Dentistry" or "Family Dentistry" in print larger and/or bolder and noticeably more prominent than any area of practice or service advertised.'" *Id.* at *4 (quoting 46 LA. ADMIN. CODE tit. 46, § 301(H)(3) (2000)). In addition, another rule stated that "'dentists may only use [specified] abbreviations or appendages . . . or other degrees earned from accredited colleges or universities after their names,'" and that "'[f]ellowships, awards, membership in academies, or non-degreed boards may be spelled out in their entirety under one's name, but not appended to the name so as to avoid confusion to the consumer.'" *Id.* (quoting LA. ADMIN. CODE tit. 46, § 301(K)). In *Simm*, the plaintiff had included the initials "M.A.G.D." after his name and DDS credentials in his advertising to signify that he had earned a "Mastership" from the Academy of General Dentistry, a non-profit professional organization for dentists. *Id.* at *2. The initials "M.A.G.D." were not a state-sanctioned appendage and needed to be spelled out entirely under the rules. *Id.* at *4-5. In addition, the plaintiff advertised a specialty in implant dentistry, which was not one of the state-approved areas of specialization. *Id.* at *3-4. Thus, under the rules, plaintiff should have included either the terms "General Dentistry" or "Family Dentistry" in his advertisement in larger and more noticeable type than the implant dentistry specialty. *Id.*

441 *Id.* at *24-28.

442 *Id.* at *14-15, *22, *25-27. The surveys included a random telephone survey of 501 consumers, and three mall intercept surveys of 601 total consumers. *Id.* at *19-20. The surveys were conducted under the direction of a university associate professor in political science. *Id.* at *15-16. According to his affidavit, eighty-seven percent of the respondents in the telephone survey indicated they did not know that the appended initials in question—M.A.G.D.—indicated a Mastership from the Academy of General Dentistry. *Id.* at *15 n.3. According to the affidavit, in the same survey, more than half of the respondents indicated that they believed that "M.A.G.D." indicated an advanced degree or area of specialization. *Id.* According to the affidavit, well over half of the respondents in the mall intercept surveys concluded that a sample yellow pages advertisement with the term "Family Dentistry" printed in larger type than specialty services also listed in the advertisement was an advertisement for a "general dentist." *Id.* at *15 n.4. In addition, according to the affidavit, nearly half of the respondents in the mall intercept studies concluded that a sample yellow pages advertisement in which the term "Dentures" was printed in larger type than the term "General Dentist" was an advertisement for a

of the surveys, mock advertisements that included the actual required disclosures were utilized.[443] In addition, the *Simms* court found that the disclosures required by the rules were less burdensome than the disclosure that was struck down by the United States Supreme Court in *Ibanez* as "unduly burdensome" under the *Zauderer* standard.[444]

Similarly, in 2004, in *Hayes v. Zakia*, a federal district court in New York granted summary judgment for the State in a facial constitutional challenge to a disciplinary rule that allowed attorneys to advertise certifications issued by private organizations accredited by the American Bar Association so long as they included a state-scripted disclosure.[445] The required disclosure had to be prominent and inform consumers that the certifying organization was not government-affiliated.[446] The disclosure also had to advise consumers that the certification was not legally required for the practice of law and did not necessarily indicate a level of expertise exceeding that of other lawyers who also practiced in that area of law.[447] Relying on *Peel*, but without citing any corroborating evidence, the district court concluded that non-governmental certifications in lawyer advertising were *potentially* misleading, and the state's disclosure requirement was a constitutional response under the *Central Hudson* analysis.[448] The court found that the State had a substantial governmental interest in mitigating *potential* deception in attorney advertising and the disclosure requirement was a sufficiently effective and narrow means of serving that interest.[449]

Since *Peel* was decided in 1990, disclosure requirements in

"specialist." *Id.*

[443] *Id.*

[444] *Id.* at *24-26.

[445] Hayes v. Zakia, 327 F. Supp. 2d 224, 225-26 (W.D.N.Y. 2004). The plaintiff was an attorney who advertised his board certification in trial advocacy issued by the National Board of Trial Advocacy, a private professional organization sanctioned by the American Bar Association. *Id.* at 226.

[446] *Id.* at 226-27.

[447] *Id.* The required disclosure stated: "'The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.'" *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.10(C)(1) (1999)). Before the lawsuit was filed, a state grievance committee had launched an investigation and alleged that the plaintiff, attorney J. Michael Hayes, had violated this rule by including the term "Board Certified Civil Trial Advocate National Board of Trial Advocacy" on his letterhead without the required disclosure. *Id.* at 227-28. The committee had closed its investigation after Hayes agreed to remove the certification claim from his letterhead, and Hayes commenced his constitutional challenge to the rule in federal district court. *Id.*

[448] *Id.* at 229-30.

[449] *Id.* The plaintiff attorney in the case also challenged the "prominently made" requirement on vagueness grounds. *Id.* at 230-31. The district court denied the State's motion for summary judgment on that issue and scheduled it for trial. *Id.* at 231-33.

professional advertising cases also have withstood constitutional challenges in reported cases ending with a state supreme court decision.[450] Most significantly, two decisions by the Tennessee Supreme Court merit discussion because the court tested the disclosure requirements under the *Zauderer* requirements as distinct from the *Central Hudson* analysis. In 1996, in *Douglas v. Tennessee*, the Tennessee Supreme Court upheld a state rule that required dentists who advertised a specialty area in which they were not state-certified to disclose in their advertisements that "'the [advertised] services are being performed by a general dentist.'"[451] A policy statement in the preamble to the state's administrative regulations indicated the State's intent to prevent consumer deception in the context of dentist advertising and provide consumers with "useful, meaningful, and relevant information."[452] The rule had been challenged on constitutional grounds by a general dentist who practiced orthodontics but was not certified in that field and had been reprimanded for advertising his orthodontics practice without the required disclosure.[453] A state court of appeals vacated the reprimand, and the State appealed to the Supreme Court of Tennessee.[454]

Before the state supreme court, the dentist argued that the disclosure rule should be declared unconstitutional because the State had not presented any evidence to demonstrate that advertising a specialty in orthodontics, without the required disclosure, would be misleading to consumers to any degree.[455] Therefore, he argued, the State had not met its burden under the third prong of the *Central Hudson* analysis, as modified by *Edenfield*, to prove a real and identifiable harm that the disclosure requirement served to mitigate in a direct and material way. The dentist argued further that the United States Supreme Court's opinion in *Ibanez* required the *Edenfield* requirements to be met when a state disclosure requirement was challenged on

[450] Walker v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 38 S.W.3d 540 (Tenn. 2001); Douglas v. State of Tenn., 921 S.W.2d 180 (Tenn. 1996); Miss. Bar v. An Attorney, 649 So. 2d 820 (Miss. 1995).

[451] *Douglas*, 921 S.W.2d at 181 (quoting TENN. STATE BD. OF DENTISTRY R. 0460-2-10(5)(b)). The court relied on *Zauderer* for the proposition that disclosure requirements are less problematic constitutionally than bans on claims in professional advertising. *Id.* at 185. In addition, the court found the state-scripted disclosure "scarcely burdensome at all," when compared with the more extensive disclosure struck down by the United States Supreme Court in *Ibanez*, and concluded that "[g]eneral dentists are merely required to include a one-sentence explanation in their advertisements of specialty branches." *Id.* at 188.

[452] *Id.* at 182 (quoting the Tennessee State Board of Dentistry "Policy Statement").

[453] *Id.*

[454] *Id.*

[455] *Id.* at 184.

constitutional grounds.[456] On the other hand, the State argued that the "more deferential[]" requirements of *Zauderer* should apply to disclosure requirements and asserted that the disclosure requirement was justified and not burdensome under those requirements and, therefore, constitutional as applied to the dentist in the case.[457]

The *Douglas* court agreed with the State[458] and found the disclosure requirement sufficiently justified by the policy statement in the preamble[459] and not burdensome[460] under the *Zauderer* requirements. The *Douglas* court specifically rejected the dentist's argument that *Ibanez* had "repudiated" *Zauderer* in terms of imposing the *Edenfield* requirements on the state in disclosure cases and instead concluded that *Ibanez* was merely an "extension" of *Zauderer*.[461] Indeed, the court suggested that the *Ibanez* case could be viewed as not involving a disclosure at all because the *Ibanez* Court had seemingly treated the disclosure requirement in that case as a "*de facto* prohibition" or ban.[462]

In 2001, in *Walker v. Board of Professional Responsibility*, the Tennessee Supreme Court found constitutional a state rule that required attorneys who advertised a specialty area of practice to include a state-scripted disclosure, if they were not state-certified in that area.[463] In upholding the requirement, the court reiterated from its *Douglas* opinion that "the [State's] burden is lower [in a disclosure case] than it would be had it prohibited [an attorney] from advertising truthful information."[464] The court relied on *Douglas*, which involved dentist advertising, without any apparent hesitation, stating that "the case law does not make distinctions

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456 *Id.*
457 *Id.* at 185.
458 *Id.* at 188.
459 *Id.* at 184, 188.
460 *Id.* at 188.
461 *Id.*
462 *Id.*
463 Walker v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 38 S.W.3d 540 (Tenn. 2001). The required disclosure stated, "'Not certified as a (area of practice) specialist by the Tennessee Commission on Continuing Legal Education and Specialization.'" *Id.* (quoting TENN. CODE OF PROF'L RESPONSIBILITY DR 2-101(C)(3)).

The Supreme Court of Mississippi upheld a similar disclosure requirement for lawyer advertisements in 1995. Miss. Bar v. An Attorney, 649 So. 2d 820, 822-25 (Miss. 1995). In the Mississippi case, the required disclosure stated, "'Listing of these . . . area(s) of practice does not indicate any certification of expertise therein.'" *Id.* at 822 (quoting MISS. R. PROF'L CONDUCT 7.2(f)). The court concluded summarily that the "disclaimer is to prevent misleading statements to the public and to prevent a disservice to all the attorneys who comply with the rule." *Id.* at 823-34. In a subsequent case decided the same year, a federal district court concluded that the state had failed to meet its burden of proving the constitutionality of a similar revised rule and other rules as well. Schwartz v. Welch, 890 F. Supp. 565 (S.D. Miss. 1995). *See supra* notes 434-39 and accompanying text.
464 *Walker*, 38 S.W.3d at 547.

among the professions."[465]

The *Walker* court first found the disclosure requirement was justified under *Zauderer*, based on a study that the State had conducted, which indicated that attorneys who were advertising specialty areas but were not state-certified in those areas tended to have less continuing legal education on average than the non-advertising "leading practitioners" in those areas.[466] In addition, the State relied on a prior survey conducted by the American Bar Association, which indicated that consumers tend to conclude that attorneys who advertise specialty areas of practice have higher levels of education in those areas than other lawyers.[467] Therefore, the court held, "[t]he required disclaimer is . . . reasonably related to promoting the substantial interest of helping consumers to make informed judgments about which attorneys they should entrust with their legal needs."[468]

Secondly, under the *Zauderer* analysis, the *Walker* court concluded that the required disclosure was not unduly burdensome because it required advertising lawyers to include only the words "not certified as a specialist by the Tennessee Commission on Certification and Specialization."[469] The court characterized the content as a "basic fact of non-certification" with "no extraneous information or lengthy detail."[470] In addition, the court characterized the required disclosure language as "perfectly clear" and, therefore, impervious to constitutional attack merely because it was state-scripted.[471]

The cases reviewed in this Part indicate that the constitutionality of disclosure requirements in the context of professional services advertising remains an unsettled area of constitutional law, which has yet to be revisited by the Supreme Court since deciding *Ibanez* in 1994. There appears to be some ambivalence among the lower courts as to whether the *Zauderer* requirements and the *Central Hudson* analysis are distinct constitutional tests and, if so, under what circumstances either or both apply in First Amendment challenges to disclosure requirements in the context of professional services advertising.

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465 *Id.* at 544.

466 *Id.* at 548 n.2. The survey had been conducted by the state Commission on Continuing Legal Education and submitted to the state supreme court when the disclosure requirement was considered and adopted. *Id.*

467 *Id.* at 547.

468 *Id.* at 548.

469 *Id.* at 548-49.

470 *Id.* at 548.

471 *Id.* at 548-49. The court concluded that the State had a "significant" interest in utilizing a consistent disclosure so that consumers would not have to compare various versions in lawyer advertising and also so the State could more easily police lawyer advertising for compliance with the disclosure requirement. *Id.* at 549.

Although the Tennessee Supreme Court has found the *Central Hudson* analysis distinct from the *Zauderer* requirements, and inapplicable in First Amendment challenges to disclosure requirements for dentist[472] and attorney advertising,[473] that approach appears to be an aberration among courts based on the cases reviewed in this Part. Nonetheless, clarification from the Supreme Court on this issue is warranted.

In addition, there seems to be ambivalence among lower courts over the necessity for the government to come forward with evidence indicating that regulated advertising is misleading without a required disclosure, in order for a disclosure requirement to sustain constitutional challenge. Finally, an issue that none of the courts in these cases has addressed is the extent to which a state must demonstrate that a government-scripted disclosure in professional services advertising informs as intended and is not itself misleading to consumers in some fashion as a part of its burden in a constitutional challenge. That issue was raised by Justice Thomas in his dissent to the denial of certiorari in *Borgner*, and seems likely to reoccur in future cases.

V. CONCLUSION

In its landmark decisions in *Virginia State Board of Pharmacy* and *Bates*, the Supreme Court extended First Amendment protection to purely commercial speech for the first time and, specifically, to advertising by licensed pharmacists and attorneys.[474] In those cases, the Court struck down state bans on price advertising by pharmacists and lawyers based on the value of the restricted information to consumers when deciding, for instance, which pharmacists to utilize for filling medical prescriptions or which lawyer to hire for routine legal services, such as name changes and divorces. The *Virginia State Board of Pharmacy* Court in particular recognized a significant public interest in preventing states from disrupting the "dissemination of information" through professional services advertising, which allows consumers to make "intelligent and well informed" purchase and other economic decisions within the context of a market-based economy.[475]

On the other hand, the Court refused in *Virginia State Board of Pharmacy* and *Bates* to extend First Amendment protection to false or misleading commercial speech, or to commercial speech

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472 *See* Douglas v. Tennessee, 921 S.W.2d 180 (Tenn. 1996).

473 *See Walker*, 38 S.W.3d 540.

474 *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

475 *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

involving illegal transactions, on grounds that these categories of unprotected expression have little if any constitutional value in the economic marketplace, and can be detrimental to consumers when making purchase decisions. Among these categories of unprotected commercial speech, the *Bates* Court in particular noted that defining the boundary between misleading and non-misleading commercial speech in professional services advertising was a critical and problematic issue to be explored in future cases,[476] and a prominent First Amendment scholar recently identified this issue as one of the significant "battles in contemporary commercial speech litigation."[477] In addition, the *Bates* Court noted that issues remained to be resolved regarding the extent to which states could constitutionally regulate subjective claims in professional services advertising, such as claims regarding quality of legal services, for instance, and the extent to which states could constitutionally require affirmative disclosures in professional services advertising to alleviate the potential of consumers being misled.[478] The cases identified and reviewed in this article indicate that these issues remain mostly unsettled within the commercial speech jurisprudence of the Supreme Court and, thus, the lower federal and state supreme courts as well.

The distinction between misleading and non-misleading commercial claims remains perhaps the most critical issue in First Amendment commercial speech decisions involving the constitutionality of regulations of professional services advertising as indicated by the cases reviewed in this article. The Supreme Court has held that states may not constitutionally impose categorical bans on claims in professional services advertising without demonstrating that the regulated claims are misleading, which includes claims that are *inherently* misleading on their face or *actually* misleading to consumers in the marketplace in practice.[479] In the context of quality-of-service claims, the *Bates* Court suggested that states cannot categorically ban such claims constitutionally unless they are unverifiable and "so likely to be misleading as to warrant restriction."[480] However, the extent to which states can constitutionally regulate quality-of-service claims remains completely uncharted in the Court's commercial speech jurisprudence as the Court has yet to squarely address the issue

[476] *Bates*, 433 U.S. at 384.
[477] Smolla, *supra* note 13, at 11-12.
[478] *Bates*, 433 U.S. at 383.
[479] *In re* R.M.J., 455 U.S. 191, 202, 204 (1982).
[480] *Bates,* 433 U.S. at 383.

since raising it in *Bates* in 1977.

In addition, the Supreme Court has made it clear that states cannot constitutionally ban claims in professional services advertising merely because they are *potentially* misleading to consumers. *Potentially* misleading claims are those that might be presented in a misleading format but also are capable of presentation in a non-misleading manner, the Court has explained.[481] Such claims can be constitutionally regulated as long as the regulation "serve[s] as an appropriately tailored check against deception or confusion."[482]

As reviewed in this article, all of these issues have added significance since 1980, when the Court established the *Central Hudson* analysis, the four-pronged test used to determine the constitutionality of commercial speech regulations. The important first prong of the *Central Hudson* analysis determines whether a regulated commercial claim is protected under the First Amendment, which in turn asks whether the regulated advertising "at least concern[s] a lawful activity and is not misleading."[483] As indicated in this article, a positive response at this juncture requires the regulation to be tested under the remaining three prongs.

The remaining prongs of the *Central Hudson* analysis require the government to demonstrate that a substantial regulatory interest is at stake, that the challenged regulation advances that interest directly and materially, and that the challenged regulation is narrowly-tailored.[484] As reviewed in this article, the Supreme Court has significantly tightened the requirements of the third and fourth prongs of the *Central Hudson* analysis in its more recent commercial decisions. Under the third prong, the government now must "demonstrate that the harms it recites are real and [the] restriction will in fact alleviate them to a material degree,"[485] and under the fourth prong, the government now must demonstrate that it could not alleviate these harms with a less speech-burdensome regulation, meaning a regulation that either "does not restrict speech, or that restricts speech less [than the challenged regulation]."[486] In addition, the Court clearly requires a sufficient evidentiary record under the pivotal third prong, and not mere speculation or conjecture on the efficacy of a challenged

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481 *In re* R.M.J., 455 U.S. at 203.

482 Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation Bd., 512 U.S. 136, 147 (1994).

483 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

484 *Id.*

485 Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

486 Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002).

regulation.

Since establishing the *Central Hudson* analysis in 1980, the Court has struck down categorical bans that prohibited lawyers from advertising such facts as their states of licensure and primary areas of practice;[487] prohibited lawyers from targeting potential clients with specific legal problems and utilizing illustrations in their advertising;[488] prohibited lawyers from advertising bona fide specialization certifications issued by private professional organizations;[489] and prohibited accountants from advertising their state-issued CPA license when not engaged in the practice of accounting.[490] However, since that time, the Court has yet to find a regulated claim in professional services advertising either *inherently* or *actually* misleading and, accordingly, devoid of First Amendment protection. Nonetheless, as demonstrated in this article, the line between misleading and non-misleading claims in professional services advertising remains largely unexplored and therefore murky in the Court's commercial speech jurisprudence, as does the extent to which states must present empirical or other evidence on that issue in a constitutional challenge to a ban on claims in professional services advertising.

In addition, the Supreme Court's commercial speech jurisprudence remains unclear regarding the extent to which states may constitutionally require disclosures in professional services advertising to prevent a *potentially* misleading claim from being presented in a misleading format to consumers. The Court has stated that disclosure requirements can be ruled unconstitutional if "unjustified" or "unduly burdensome."[491] However, as demonstrated in this article, the Court has not clearly defined these requirements, nor has the Court clearly explained whether these requirements operate independently from the requirements of the *Central Hudson* analysis. Arguably, the First Amendment would be better served if the Court would definitively establish the *Central Hudson* analysis as the appropriate constitutional test for disclosure requirements in the context of professional services advertising, and this seems especially important when a state-scripted disclosure is compelled. Under such an approach, states should be required to demonstrate that a regulated claim is misleading—either *inherently* or *actually*—without the required disclosure, and demonstrate with evidence

[487] *In re* R.M.J., 455 U.S. 191 (1982).
[488] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).
[489] Peel v. Attorney & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990).
[490] Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 145 (1994).
[491] *Zauderer*, 471 U.S. at 651.

that the required disclosure meets the efficacy and efficiency requirements of the invigorated third and fourth prongs of the *Central Hudson* analysis.

Nearly three decades after deciding *Virginia State Board of Pharmacy* and then *Bates*, the Supreme Court's commercial speech jurisprudence remains relatively undeveloped with regard to the three critical issues that were raised by the *Bates* Court as areas of future concern: distinguishing between misleading and non-misleading claims, determining the extent to which states may constitutionally regulate quality-of-service claims, and determining the extent to which states may constitutionally require disclosures in the context of professional services advertising. The review of lower federal and state court opinions in this article has demonstrated ambiguity and inconsistent results in constitutional commercial speech litigation on these issues particularly with regard to the constitutionality of state regulations of quality-of-service claims and state disclosure requirements. It is relatively clear that guidance from the Supreme Court is warranted and necessary to prevent excessive regulations from chilling protected commercial speech by licensed professionals while still allowing states to protect consumers from clearly false or misleading claims in professional services advertising, which lack First Amendment protection and cause harm in the economic marketplace that the rulings in *Virginia State Board of Pharmacy* and *Bates* sought to protect.