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CASE COMMENT

COMMERCIAL SPEECH: MANDATORY DISCLAIMERS IN THE REGULATION OF MISLEADING ATTORNEY ADVERTISING

Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000)*

*Stacy Borisov***

Petitioner¹ filed suit against The Florida Bar, claiming that the imposition of a mandatory disclaimer on his yellow pages advertisement violated his First Amendment rights.² The advertisement stated that Petitioner was "AV Rated, the Highest Rating [in the] Martindale-Hubbell National Law Directory."³ The Florida Bar did not contest the truth of Petitioner's rating,⁴ but rather argued that the advertisement violated Rule 4-7.2(j)⁵ of the Rules Regulating the Florida Bar, which prohibited self-laudatory statements.⁶ The Florida Bar maintained that, in order to avoid misleading the public, Petitioner's statement must be accompanied by an objective explanation of the rating's meaning, such as the basis for including individual attorneys in the rating system and the confidential nature of source opinions used to rate them.⁷ The district court found for The Florida Bar, upholding Rule 4-7.2(j) against Petitioner's constitutional challenge.⁸

* *Editor's Note:* This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Fall 2000.

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1. Petitioner was a criminal defense attorney who had submitted a proof of his advertisement to the Florida Bar for an advisory opinion prior to its publication. *Mason v. Fla. Bar*, 208 F.3d 952, 954 (11th Cir. 2000).

2. *Id.* Petitioner also challenged the rule at issue as void for vagueness under the First Amendment as it applies to the states via the Due Process Clause of the Fourteenth Amendment. *Id.* The district court rejected this argument. *Id.* at 955. The Eleventh Circuit Court of Appeals affirmed the ruling, finding that the rule's broad language was nonetheless plain and gave adequate notice to attorneys. *Id.* at 959.

3. *Id.* at 954.

4. *Id.* Additionally, the state bar did not contest use of the rating or the name of the rating organization, but rather the inclusion of the words "the Highest Rating." *Id.*

5. Rule 4-7.2(j) has since been replaced by Rule 4-7.2(b) with only one minor change, the removal of reference to "self-laudatory" statements. *Id.* at 954 n.2.

6. *Id.* at 954. Rule 4-7.2(j) provides: "A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communications. . . ." Rules Regulating The Florida Bar, Rule 4-7.2(j).

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

8. *Id.* at 955.

On appeal, the Eleventh Circuit Court of Appeals reversed and HELD, The Florida Bar's requirement of a disclaimer explaining the rating was an unconstitutional restriction on commercial speech.⁹

The First Amendment has long protected the free flow of political ideas.¹⁰ Constitutional protection of *commercial* speech developed out of the recognition that consumer interest in commercial information may be greater than many people's concern for the political issues of the day.¹¹ Within the American legal community, however, an old English rule of professional etiquette evolved over the years into a largely uncontested rule of ethics that prohibited commercial advertising of legal services until recently.¹²

The U.S. Supreme Court addressed the unique policy issues raised by the advertising of professionals for the first time, in the mid-1970s, beginning with the medical field.¹³ Thereafter, *Bates v. State Bar of Arizona*,¹⁴ in 1977, was the earliest major challenge to the long-standing ban on attorney advertising. The plaintiffs in *Bates* attacked the validity of a state disciplinary rule that barred lawyers from publicizing themselves in any form of advertisement.¹⁵ The U.S. Supreme Court, agreeing with the plaintiffs' challenge, found that blanket suppression of attorney advertising was unconstitutional.¹⁶ The ruling addressed numerous proffered justifications for the prohibition, including the adverse effects on professionalism,¹⁷ potential degradation of the quality of legal services,¹⁸ and the difficulty of enforcing any restriction less than a complete ban.¹⁹

9. *Id.* at 959.

10. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

11. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the . . . most urgent political debate."); *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) ("[T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.").

12. *Bates*, 433 U.S. at 371.

13. *Va. State Bd. of Pharmacy*, 425 U.S. at 766.

14. 433 U.S. 350 (1977).

15. *Id.* at 355-56. Petitioners conceded their advertisement violated the disciplinary rule but nonetheless challenged the constitutionality of the rule. *Id.* A second claim that the rule violated the Sherman Act due to its tendency to limit competition was rejected by the Court. *Id.* at 363.

16. *Id.* at 383.

17. *See id.* at 368-72.

18. *See id.* at 378.

19. *See id.* at 379. Other proffered justifications included the inherently misleading nature of attorney advertising, adverse effects on the administration of justice, and the undesirable economic effects of advertising. *See id.* at 372-78.

Ultimately, the Court found that none of these justifications outweighed the public's substantial interest in the free flow of commercial speech.²⁰

Attorney advertising, however, was not left wholly unrestrained.²¹ The Court noted that some regulation would be acceptable because commercial speech is not easily chilled given the economic interest involved.²² Clearly permissible prohibitions included false, deceptive, or facially misleading advertising.²³ But the Court did not decide whether other types of advertising, such as statements regarding the quality of services offered, could be subject to limited regulation.²⁴ The Court suggested such advertising "may be so likely to be misleading as to warrant restriction."²⁵ Specifically, the *Bates* decision expressly left open the door to limited but mandatory supplementation in the form of advertising disclaimers, in order to protect consumers.²⁶

Three years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²⁷ the U.S. Supreme Court formulated a constitutional standard to apply generally to all regulation of commercial speech.²⁸ In deciding whether a complete ban on advertising by a utility company violated the First Amendment, the Court articulated a four-part test.²⁹ The first part asks whether the expression is protected by the First Amendment.³⁰ To be protected at all, the speech must "at least" promote lawful activity and not be misleading.³¹ Second, in order to justify restricting the speech the state interest must be substantial.³² Third, the regulation must directly advance that interest.³³ The Court cited *Bates* on this point, noting how the ban on attorney advertisements did not directly advance the proffered state interest of protecting professional standards.³⁴ Finally, the regulation must be narrowly drawn so that the interest could not

20. *See id.* at 365.

21. *Id.* at 383.

22. *Id.*; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976) ("[C]ommercial speech may be more durable than other kinds . . . [since] there is little likelihood of its being chilled by proper regulation and forgone entirely.").

23. *Bates*, 433 U.S. at 383.

24. *Id.* at 383-84.

25. *Id.*

26. *Id.* at 384.

27. 447 U.S. 557 (1980).

28. *Id.* at 564-66.

29. *Id.* at 566.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 564-65.

be advanced by a "more limited restriction."³⁵ Again, as in *Bates*, the Court suggested limited supplementation, such as a mandatory disclaimer, as an example of a more narrowly drawn regulation.³⁶

Although the Court has regularly applied the *Central Hudson* test since 1980,³⁷ Supreme Court justices have not always agreed upon the proper application of that test in subsequent cases. Disagreement over the definition and exact role of the term "misleading" was a central issue in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*.³⁸ The Court ultimately found that a State cannot censure an attorney's statement of certification as a civil trial specialist.³⁹ The majority, concurring, and dissenting opinions⁴⁰ all agreed that the statement at issue was not *actually* misleading,⁴¹ with the majority noting that the representation was truthful.⁴² However, the Court divided on whether the statement was *inherently* or *potentially* misleading and how such findings would affect the constitutionality of regulating such speech.

The majority resisted finding that the statement of certification was potentially misleading because the statement was a verifiable fact, not an opinion as to quality.⁴³ Nevertheless, the majority opinion asserted that even if the statement was potentially misleading, prohibiting it entirely was too broad a measure when the State may consider a disclaimer as an alternate

35. *Id.* at 564, 566.

36. *Id.* at 565.

37. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (advertisement listing practice areas and courts admitted to practice in, along with announcement cards mailed direct to the public); see also *Shaper v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (direct mailing of advertisement); *Zaunders v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (advertisement geared to persons with specific legal problems and containing illustration).

38. 496 U.S. 91 (1990).

39. *Id.* at 111. The National Board of Trial Advocacy had issued petitioner a "Certificate in Civil Trial Advocacy" based on a set of standards, including trial experience, participation in continuing legal education programs, and an examination. *Id.* at 95-96.

40. Four justices joined in the majority opinion. See *id.* at 93-111. Two justices, one who had joined in the majority opinion and one who had not, joined in a concurring opinion. See *id.* at 111-17 (Marshall, J., concurring). One dissenting opinion was submitted by a single justice. See *id.* at 118-19 (White, J., dissenting). Finally, three justices joined in a second dissenting opinion. See *id.* at 119-27 (O'Connor, J., dissenting).

41. See *id.* at 106, 111 (Marshall, J., concurring), 118 (White, J., dissenting), 120 (O'Connor, J., dissenting).

42. *Id.* at 100-01.

43. *Id.* at 101 ("A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success . . . but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.").

form of regulation.⁴⁴ The concurrence, on the other hand, clearly found that the statement was potentially misleading because facts, when not accompanied with adequate information, can lead to multiple and sometimes false inferences.⁴⁵ The concurrence also noted that a mandatory disclaimer itself should be narrowly tailored to avoid imposing an effective ban through burdensome language requirements.⁴⁶ As for the dissents, both agreed that the statement was at least potentially misleading.⁴⁷ Three dissenting Justices added that if potentially misleading speech cannot be presented in a non-deceptive manner without the added problems of a burdensome disclaimer then it should be prohibited.⁴⁸ The same three Justices also asserted that the statement was "inherently" misleading and, therefore, unprotected by the First Amendment because the meaning of the certification was not common knowledge, readily verifiable, or understandable on its face.⁴⁹

Following *Peel*, the Court upheld two additional constitutional challenges to the regulation of attorney advertising,⁵⁰ thereby establishing a clear trend toward non-regulation and less deference to the State. Surprisingly then, in *Florida Bar v. Went for It, Inc.*,⁵¹ the most recent Supreme Court ruling on attorney advertising, the Court found in favor of challenged state regulation by a narrow 5-4 majority.⁵² *Went for It* involved a constitutional challenge to a prohibition against direct mail solicitation of

44. *Id.* at 106, 110.

45. *Id.* at 115 (Marshall, J., concurring).

46. *Id.* at 117-18 n.2 (Marshall, J., concurring); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 663-64 (1985) ("[A] requirement . . . that would fill far more space than the advertisement itself[] would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception.").

47. *Peel*, 496 U.S. at 118 (White, J., dissenting), 125 (O'Connor, J., dissenting).

48. *Id.* at 125 (O'Connor, J., dissenting) ("If the information cannot be presented in a way that is not deceptive, even statements that are merely potentially misleading may be regulated with an absolute prohibition."). The dissent noted that it would be difficult to reasonably fit all the information the bar found necessary to prevent deception in this case into the letterhead on which this statement was printed. *Id.*

49. *Id.* at 122-23 (O'Connor, J., dissenting). The dissent noted that nothing in the letterhead revealed how one might verify the certification. *Id.* at 122.

50. See *Edenfield v. Fane*, 507 U.S. 761 (1993) (in-person solicitation); *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation* 512 U.S. 136 (1994) (advertising of CPA and CFP credentials).

51. 515 U.S. 618 (1995).

52. *Id.* at 619, 635.

victims or their families within thirty days of an accident.⁵³ The proffered state interest was protecting the reputations of Florida lawyers by preventing conduct that the public deems deplorable.⁵⁴

The majority and dissenting opinions in *Went for It* differed on whether the state interest was substantial.⁵⁵ But disagreement over the third part of the *Central Hudson* test, whether the restriction directly advanced the state interest, generated the most discussion within the opinion.⁵⁶ The majority found that the state bar satisfactorily proved that a concrete, non-speculative harm existed and that the regulation would in fact alleviate that harm to a material degree, thereby directly advancing the state interest.⁵⁷ This conclusion was based largely on evidence submitted by the state bar, specifically a 106-page summary of statistical and anecdotal data derived from a two-year study of public views on attorney advertising and solicitation.⁵⁸ The dissent, on the other hand, asserted that this evidence did not prove the existence of actual harm.⁵⁹ In particular, the study neither included actual surveys, nor indicated sample size, methodology used, or what data was excluded from the record.⁶⁰ The dissent urged that in order to show that a regulation directly and materially advances the state interest "require[s] something more than a few pages of self-serving and unsupported statements by the State."⁶¹

In the instant case, Petitioner filed a claim in federal court after exhausting his administrative appeals of The Florida Bar's decision to

53. *Id.* at 620-21.

54. *Id.* at 624-25.

55. The Court accepted as a substantial interest the state bar's argument that "because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive . . . the reputation of the legal profession in the eyes of Floridians has suffered commensurately." *Id.* at 625. The dissent, however, rejected this argument and asserted "we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener." *Id.* at 638 (Kennedy, J., dissenting). Indeed, whether this amounts to a substantial state interest is doubtful in light of previous holdings. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) ("[T]he mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it").

56. *Went for It*, 515 U.S. at 626-32.

57. *Id.* at 626; see also *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.").

58. *Went for It*, 515 U.S. at 626-27. The Florida Bar conducted this two-year study, which included hearings, commissioned surveys, and review of extensive public commentary. *Id.* at 620.

59. *Id.* at 640 (Kennedy, J., dissenting).

60. *Id.* (Kennedy, J., dissenting).

61. *Id.* at 641 (Kennedy, J., dissenting).

require a disclaimer on his advertisement.⁶² Petitioner alleged that the State⁶³ had no substantial interest in requiring him to include a disclaimer about the Martindale-Hubbell rating system and, in the alternative, that the state bar had failed to produce sufficient evidence to justify such regulation.⁶⁴ The ultimate issue was whether the disclaimer requirement, as the regulation of commercial speech, was permissible under the four-part *Central Hudson* test.⁶⁵ The Eleventh Circuit Court of Appeals found that the state bar did not meet all the requirements of the test and, therefore, the proposed regulation of the attorney's commercial speech was unconstitutional.⁶⁶

Regarding the first and second parts of the *Central Hudson* test, the Eleventh Circuit found that the statement was protected speech within the First Amendment and that the state interests were substantial.⁶⁷ With respect to the former conclusion, the court noted that Petitioner's advertisement was truthful.⁶⁸ With respect to the latter, two of the proffered interests were upheld as substantial: to ensure that advertisements by attorneys are not misleading⁶⁹ and that the public has access to relevant information for comparing and selecting legal representation.⁷⁰ Both are derived from the general state interest of protecting consumers and the state bar's duty to regulate attorneys.⁷¹

However, in the court's opinion, the state bar failed to satisfy the third part of the *Central Hudson* test,⁷² which requires that the substantial interest be directly advanced by the proposed regulation. The court asserted that the burden placed on the State is to demonstrate an identifiable harm that is mitigated in a direct and effective manner by the regulation.⁷³ Under this analysis, it is presumed that if an identifiable harm is not demonstrated, the effectiveness of the regulation becomes moot.⁷⁴ In the instant case, the

62. *Mason v. Fla. Bar*, 208 F.3d 952, 954 (11th Cir. 2000); see also *supra* text accompanying notes 3-7.

63. In this context, action by a state bar is attributable to the State and therefore the two terms may be used interchangeably.

64. *Mason*, 208 F.3d at 954-55.

65. *Id.* at 955.

66. *Id.* at 958-59.

67. *Id.* at 955-56.

68. *Id.* at 955.

69. *Id.* at 956.

70. *Id.*

71. *Id.*

72. *Id.* at 958.

73. *Id.* at 956.

74. See *id.*

state bar's mere assertion, without further evidence, that the language of the advertisement was "potentially misleading" did not demonstrate to the court that an identifiable harm existed.⁷⁵ On that point, the state bar argued that "simple common sense" dictates that the general public's unfamiliarity with the Martindale-Hubbell rating system will lead to an overvaluation of the phrase "'AV' Rated, the Highest Rating."⁷⁶ But the court found that the record lacked proof of actual harm to the general public as a result of Petitioner's or similar advertisements.⁷⁷ A review of the record indicated that it contained neither factual findings, in the form of studies and empirical evidence, nor anecdotal accounts of public harm.⁷⁸ In response to the state bar's argument that the general public would be misled due to its unfamiliarity with Martindale-Hubbell's rating system, the court declared that "[u]nfamiliarity is not synonymous with misinformation."⁷⁹

The state bar also advanced the argument that because it required only a disclaimer, rather than imposing a complete ban, such speech regulation was permissible based merely on a statement's potential for harm.⁸⁰ The court rejected this argument as well and asserted that even partial restrictions must be justified by some identifiable harm.⁸¹ Therefore, since all four parts of the *Central Hudson* test must be satisfied for any regulation of commercial speech to be found constitutional and since the State failed to meet its burden under the third part, any further analysis by the court as to the fourth part was unnecessary.⁸²

Despite what appeared to be a shift in direction by the U.S. Supreme Court, the Eleventh Circuit in the instant case clearly did not take the *Went for It* decision⁸³ as an indication that States should be accorded more deference than they had received in the past. In fact, the instant case illustrates the way in which *Went for It*, although upholding a state

75. *Id.* at 956-58; *see also* *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) ("[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the [State's] burden. . . .").

76. *Mason*, 208 F. 3d at 956-57. The state bar's only evidence in support of its position was an affidavit and testimony by the bar's director of advertising and ethics, along with text from the Introduction to the Martindale-Hubbell National Law Directory which stated that the directory's objective was to meet the needs of the legal community. *Id.* at 957.

77. *Id.* at 957-58.

78. *Id.*

79. *Id.* at 957; *see also* *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 102-03 (1990) ("[T]here is no evidence that the consumers . . . are misled if they do not inform themselves of the precise standards under which claims of certification are allowed.").

80. *Mason*, 208 F.3d at 958.

81. *Id.*

82. *Id.*

83. *See supra* text accompanying notes 51-61.

regulation,⁸⁴ has placed a significant burden on the State.⁸⁵ The court's principal conclusion was that the State failed to show an identifiable harm because no proof beyond "common sense" was presented to indicate a true potential for misleading the public.⁸⁶ A key assertion in the instant opinion was that although "empirical data . . . is not a *sine qua non* for a finding of constitutionality, the Supreme Court has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm."⁸⁷ Despite this language and considering the focus placed by the Eleventh Circuit on a need for "concrete evidence,"⁸⁸ 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. What this case means for the state bars of Florida, Georgia, and Alabama,⁸⁹ at the very least, is that to engage in any prophylactic regulation of attorney advertising may require a great deal of homework first.

On the other hand, it appears that the Eleventh Circuit might have upheld the proposed regulation if the state bar had only produced some sort of minimal evidence of identifiable harm. Such evidence may not need to be extensive or greatly scientific considering the *Went for It* dissent's interpretation of that record.⁹⁰ If the court had found that the State's burden in showing identifiable harm was met, the fact that the regulation at issue took the form of a disclaimer likely would have helped on the remaining issues, given the language in *Bates* and *Peel*.⁹¹ A disclaimer would alleviate the potential harm by providing the public with information deemed necessary by the State to ensure that the statement would not be overvalued.⁹² The public would understand that the AV rating was based on subjective opinions of confidential sources rather than objective criteria,

84. Fla. Bar v. *Went for It, Inc.*, 515 U.S. 618, 635 (1995).

85. *See id.* at 626.

86. *See Mason*, 208 F.3d. at 956-57.

87. *Id.* at 957.

88. *Id.* at 958.

89. The Eleventh Circuit, in which this case was decided, is made up of the states of Florida, Georgia, and Alabama.

90. *See Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 640-41 (1995) (Kennedy, J., dissenting) and *supra* text accompanying notes 59-61.

91. *See supra* notes 26 and 44 and accompanying text.

92. For example, one concern of The Florida Bar was that the public be informed that not all Florida attorneys are rated by the Martindale-Hubbell National Law Directory. *Mason*, 208 F.3d. at 954. Presumably, with this information the public would be deterred from concluding that another attorney not rated by Martindale-Hubbell necessarily provides lesser quality representation.

such as years of experience or scores on an examination.⁹³ Additionally, as numerous cases have asserted, a disclaimer is a form of acceptable supplementation providing a "more limited restriction."⁹⁴ Of course, as noted in *Peel*, the state bar would still have had the final and significant burden of showing that the information to be included in the mandatory disclaimer would not be so burdensome as to become prohibitive in itself.⁹⁵ The state bar's insistence on "a full explanation as to the meaning . . . and how the publication chooses the participating attorneys"⁹⁶ appears rather burdensome indeed. Thus, it is uncertain if the fourth part of the *Central Hudson* test would be met if a State provides documented evidence of harm in future cases involving similar disclaimers.

Finally, it is important to note that the computer age is well underway in the United States. As information becomes easier to obtain via the Internet, a State's concern for an uninformed public may be increasingly unnecessary. Whereas once a consumer might have had to visit the local library to verify information about a directory such as Martindale-Hubbell, now he or she can log on at home or at work and find the same information within minutes.⁹⁷ In light of our information-rich society that has evolved with today's technologies, it appears the Eleventh Circuit properly followed precedent in effectively requiring state bars to obtain evidence of actual harm before regulating factually-truthful commercial speech on the assumption that an uninformed public will be misled.

93. *Cf. Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 95 (1990). NBTA certification standards include objective criteria such as experience as lead counsel and successful completion of an examination. The *Peel* majority relied heavily on these objective criteria when it found that the statement was not potentially misleading. *Id.* at 101-02.

94. *E.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

95. *Peel*, 496 U.S. at 117 n.2.

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

97. *See Mason v. Fla. Bar*, 29 F. Supp. 2d 1329, 1330 (Fla. 1998) (noting that information explaining the ratings is available in libraries and on the Internet).