07-3677-cv
07-3900-cv

United States Court of Appeals
for the
Second Circuit

JAMES L. ALEXANDER, ALEXANDER & CATALANO LLC
and PUBLIC CITIZEN, INC.,

Plaintiffs-Appellees-Cross-Appellants,

– v –

THOMAS J. CAHILL, et al.,

Defendants-Appellants-Cross-Appellees.

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

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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PRELIMINARY STATEMENT

All lawyers in private practice, no matter what their practice areas and no matter how large their firms, engage in communications for the purpose of obtaining work. Therefore, all lawyers in private practice have an interest in this case, in which the district court's decision both invalidates and upholds certain of the amendments to the Disciplinary Rules in the New York Code of Professional Responsibility (the "NY Code") that regulate such communications. The public also has an interest in lawyer advertising. As stated in Ethical Consideration 2-2 (as amended by the N.Y. State Bar Association on Nov. 3, 2007):

> The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

Finally, because lawyer advertising, as commercial speech, enjoys the protection of the First Amendment, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995), a decision in this case has implications beyond the challenged rules**.**

In light of these interests, the Association of the Bar of the City of New York (the "New York City Bar"), whose members include lawyers in all areas of practice affected by the challenged amendments, respectfully submits this memorandum as *amicus curiae*. It is the position of the New York City Bar that the order enjoining enforcement of N.Y. Comp. Codes R. & Regs. tit. 22

§§ 1200.6(c)(1), (3), (5), (7), and (g)(1) should be upheld. However, the New York City Bar urges this Court to reverse the district court's ruling upholding the 30-day moratorium on general advertising and website solicitations.

Public debate about increasing the regulation of lawyer advertising began in earnest in June 2005 when the newly elected President of the New York State Bar Association ("NYSBA") appointed a Task Force on Attorney Advertising. The Task Force collected and reviewed a sample of attorney advertising in New York and issued its preliminary report on November 5, 2005 (the "Preliminary Report") that proposed amendments to the lawyer advertising rules. Aside from the sampling of attorney advertising, the Preliminary Report did not site any empirical research. The New York City Bar recommended changes and additions to the proposals. Certain changes recommended by the New York City Bar were made, and the New York City Bar supported, with some exceptions, the proposals that were ultimately approved by the NYSBA's House of Delegates on January 27, 2006. Neither the NYSBA nor the New York City Bar recommended regulating the content of lawyer advertising.

After receiving the NYSBA's proposals, the Presiding Justices of New York's Appellate Division issued proposed rules for public comment on June 14, 2006. Unlike the NYSBA recommendations, the proposed rules included substantial restrictions on the content of lawyer advertising. The ninety-day

comment period on the proposed rules was extended to November 15, 2006, due in part to the volume of comments submitted (more than one hundred). The New York City Bar and others criticized the proposed restrictions on the content of advertisements.

The New York City Bar, in its comment, expressed concerns about the First Amendment issue raised by the proposal. The Federal Trade Commission ("FTC") also wrote a letter stating:

> Some of the Proposed Amendments are related to the style and content of media advertising but do not necessarily target deception . . . . The Proposed Amendments therefore may have the effect of prohibiting or deterring some truthful, non-misleading advertising techniques or claims that consumers find beneficial in making decisions.

Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission, *et al.*, to Michael Colodner, Counsel, Office of Court Administration, (September 14, 2006) (hereinafter "FTC Letter"). The state has not refuted the FTC's position because the state has not disclosed any efforts systematically to study the lawyer advertising practices that the new rules prohibit.

Following receipt of the comments, the presiding justices of the Appellate Division of the New York State Supreme Court modified the proposed rules and, on January 4, 2007, announced that the revised rules to the NY Code would take effect on February 1, 2007. On the day the amendments took effect, the Complaint in this case was filed. In its decision on summary judgment, issued July 20, 2007,

The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York found that certain of the amendments that restricted the content of attorney advertisements violated the First Amendment and enjoined enforcement of these provisions.

The district court applied the United States Supreme Court's test established in *Central Hudson Gas & Electric Corp. v. Public Services Commission of N.Y.*, 447 U.S. 557 (1980),[1] for determining the constitutionality of government restrictions on commercial speech. The district court granted the Plaintiff-Appellees' motion for summary judgment and enjoined enforcement of the following rules (all of which restrict the content of advertisements) on the grounds that they do not materially advance the state's interests and therefore violate the third prong of the *Central Hudson* test:

- § 1200.6(c)(1) prohibiting endorsements and testimonials from a client about a pending matter;
- the portions of § 1200.6(c)(3) prohibiting the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated in a firm, or otherwise implying that lawyers are associated in a firm if that is not the case;

[1] *Alexander v. Cahill*, No. 5:07-CV-117, 2007 U.S. Dist. LEXIS 53602, at *12 (N.D.N.Y., July 23, 2007), *citing Central Hudson*, 447 U.S. at 564–66. Section I, *infra*, contains a full discussion of the test.

- § 1200.6(c)(5) prohibiting the use of techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; and
- the portions of § 1200.6(c)(7) prohibiting the use of a nickname, moniker, or motto that implies an ability to obtain results.

Alexander v. Cahill, No. 5:07-CV-117, 2007 U.S. Dist. LEXIS 53602, at *21-22 (N.D.N.Y., July 23, 2007). The court further concluded that the proposed prohibitions against the portrayal of judges in § 1200.6(c)(3) and the use of trade names that imply an ability to obtain results in § 1200.6(c)(7) were not narrowly tailored, and therefore violated the third *Central Hudson* prong. *Id.* at *24–25. The court also enjoined enforcement of the ban on pop-up and pop-under web site advertisements contained in § 1200.6(g)(1). *Id.* at *26–27.[2]

The court upheld the ban in §§ 1200.8(g) and 1200.41 (the "Moratorium Rules") on issuing direct mail, general advertising (*i.e.*, television, radio, and newspaper) and website solicitations related to a specific personal injury or wrongful death event, within thirty days of the event. *Id.* at *38.

[2] This ruling has not been challenged by the state.

ARGUMENT

I. THE *CENTRAL HUDSON* TEST FOR COMMERCIAL SPEECH APPLIES IN THIS CASE

In *Central Hudson*, the Supreme Court articulated a four-part framework to evaluate the constitutionality of government restrictions on commercial speech. *Central Hudson*, 447 U.S. at 563–64; *see also Anderson v. Treadwell*, 294 F.3d 453, 460–61 (2d Cir. 2002). This test is the basis on which challenges to restrictions on attorney advertising are to be judged. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995). The state bears the burden of justifying its restrictions, and "this burden is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain such 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." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); *see also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996).

The first step in the *Central Hudson* test is determining whether the prohibited communication is misleading or relates to unlawful activity. *Central Hudson*, 447 U.S. at 564. Commercial speech restrictions are subject to the remaining *Central Hudson* requirements unless the state shows that the speech at issue is more likely than not to mislead or has in fact misled people. *See id*. at 563 ("[t]he government may ban forms of communication more likely to deceive the

public than to inform it."); *see also In re R.M.J.*, 455 U.S. 191, 202 (1982) (noting that regulations on commercial speech "are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive."). The Supreme Court has stated that that the state "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." *Id.* at 203. It is not sufficient for the state to claim that certain speech is potentially misleading. *Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 146 (1994) (striking down Florida's ban on a lawyer-accountant truthfully advertising that she was a "Certified Financial Planner"); *see also Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 106-07 (1990) (striking down an Illinois Disciplinary Rule prohibiting a lawyer from truthfully advertising that he was a "Certified Civil Trial Specialist").

If the communication is not misleading and does not relate to unlawful activity (for example, the use of mottos and monikers, or the portrayal of judges), then the state may only regulate the communication if the state meets the remaining three elements of the *Central Hudson* test.

The second step is to determine whether the state asserts a substantial interest to be achieved by the regulation. *Central Hudson*, 447 U.S. at 564. In its brief, the state asserts an interest "in prohibiting attorney advertisements from

containing deceptive or misleading content." Br. for Def.-Appellant at 32. The New York City Bar agrees that the state has a legitimate interest in preventing misleading or untruthful attorney advertising. Indeed, the Code has long contained — and still contains — a general prohibition against misleading or untruthful lawyer advertising. *See* DR 2-101(A), 22 N.Y.C.R.R. § 1200.6(a).

The third *Central Hudson* step is to determine whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566. Again, the state bears the burden of demonstrating such direct advancement. That burden "is not satisfied by mere speculation or conjecture," but rather the state "must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770–71. In *Edenfield*, the Supreme Court struck down a ban on in-person solicitation by certified public accountants ("CPAs") in part because the state had presented "no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the [state] claims to fear." *Edenfield*, 507 U.S. at 771. The *Edenfield* Court also noted the lack of any anecdotal evidence in the record to support the state's claims. *Id.* Addressing the state's regulation of attorney-accountants that advertised their status as certified financial planners in *Ibanez*, the Supreme Court rejected the state's claim because the state failed to point to "any harm that is potentially real,

not purely hypothetical." *Ibanez*, 512 U.S. at 147; *see also id*. at 138 ("[The state] has not demonstrated with sufficient specificity that any member of the public could have been misled by *Ibanez's* constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes.").

In contrast, in upholding Florida's restriction on targeted direct-mail solicitation in *Florida Bar v. Went For It*, the Supreme Court relied on the state's extensive report of statistical and anecdotal data, "noteworthy for its breadth and detail," that supported the state's claim that such solicitation invaded victims' privacy. *Went For It*, 515 U.S. at 626–27.[3]

In the fourth and final step set forth in *Central Hudson*, the state must show that the restriction "is not more extensive than is necessary to serve [the state's] interest." *Central Hudson*, 447 U.S. at 566. In *Board of Trustees of the State Univ. v. Fox*, 492 U.S. 469 (1989), the Supreme Court clarified that the state must use "a means narrowly tailored to achieve the desired objective." The existence of other obvious, less-burdensome restrictions is a relevant factor to consider in deciding

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[3] The state argues that the district court should have upheld the prohibitions on the basis of *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 472 U.S. 1004 (1985), *after remand*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed for want of a substantial federal question*, 475 U.S. 1114 (1986). Br. for Def.-Appellant at 22. As the state recognizes, *Humphrey* did not "squarely address" the issues in this case. *Id*. However else *Humphrey* may be interpreted in light of other Supreme Court decisions, by its own express terms the decision concerned, and was confined to, electronic media. *Humphrey*, 377 N.W.2d at 645-46. In its brief, the state does not point to evidence justifying its restrictions on the basis of a special concern for electronic media, and indeed the prohibitions at issue here apply broadly to all media, whether electronic, print, or otherwise.

whether the state's chosen means is narrowly-tailored. *Went for It*, 515 U.S. at 632. In *Zauderer*, the Court rejected the state's argument that broad, prophylactic restrictions on attorney advertising, including a ban on illustrations, were necessary to prevent deception. The Court noted that a state may not enact broad restrictions "to spare itself the trouble of distinguishing [truthful, non-deceptive] advertising from false or deceptive advertising," *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 643–47 (1985), and that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," *id*. at 651. The Supreme Court has repeatedly struck down prohibitions on lawyer advertising techniques as unjustified. *See Peel*, 496 U.S. at 106–10; *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988); *Zauderer*, 471 U.S. at 655; *In re R.M.J.*, 455 U.S. at 206.

The state has failed to meet the burdens placed on it by the Supreme Court in *Central Hudson* with respect to both the content restrictions found unconstitutional by the district court and the 30-day moratorium on all forms of advertising.

II. THE EXTENSION OF THE 30-DAY MORATORIUM TO ALL FORMS OF ADVERTISING IS OVERBROAD

Section 1200.41-a states:

> (a) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a

> lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.
>
> (b) This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.
>
> Section 1200.8(g) states:
>
> No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

These rules bar "unsolicited communication" or "solicitation," including general advertising (*i.e.*, newspaper, television, and radio advertising) and listing information about an incident on a website. Such a restriction does not pass muster under the *Central Hudson* test.

The moratorium rules place plaintiffs in personal injury or wrongful death lawsuits at a significant disadvantage. When an individual who is not knowledgeable about the law is injured, she may not know that legal rights have been affected, or how they have been affected; and even if she does, she may not know how to go about obtaining legal counsel. Ethical Consideration 2-7 states in

part: “The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed.” Ethical Consideration 2-2 states: “The public’s need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel.”

If thirty days lapse before an individual learns that there are legal options to pursue, that individual’s claims may be prejudiced. An individual involved in an automobile accident who does not know about the no-fault requirement may run the risk of foregoing important no-fault benefits by missing the thirty day filing deadline. Even with a 15-day moratorium where the 30-day filing period is required, this leaves the attorney only 15 days to persuade a client to retain the lawyer and to complete the significant work necessary to make the filing deadline. For example, it is crucial in an automobile accident case for the injured passenger or pedestrian to obtain a copy of the police report of the incident with the insurance code for the subject vehicle. Even if the police report is promptly obtained, the insurance code might be incorrectly entered or not entered at all, requiring investigation to correct the error. The process of obtaining the necessary data to make the filing may be very difficult in 15 days, which is why the no-fault regulations provide 30 days. Furthermore, retaining an attorney does not happen

instantaneously. A potential client may wish to meet with several attorneys, and will need time to discuss and review a retention agreement.

Also, during the moratorium, evidence will age, witnesses' memories will fade, and key elements of the accident scene might change. It is very important that an attorney or his agents be able to gather evidence as soon as possible to make their case properly. In this way, the 30-day delay can have an immensely detrimental impact on potential claims.

In contrast, in the case of an insurance company or other corporate defendant, which likely has in-house counsel or counsel on retainer, the moratorium essentially gives the defendant a 30-day head start. The defendants may use this time to gather physical evidence, interview witnesses, and accomplish all the other time-sensitive matters that the plaintiff may not even know he or she should be doing (and cannot be expected to do without a lawyer).

An earlier draft of the proposed amendments did not contain § 1200.41(b), meaning that potential plaintiffs could be contacted by defense counsel even before they had a chance to be contacted by plaintiff's counsel. Although this prohibition was added, the rule still gives defendants a significant advantage. While defense counsel may no longer contact victims, there is nothing to stop the *defendants themselves*, or their agents, from reaching out to potential plaintiffs. Therefore, an insurance company or large corporation, with a sophisticated legal department that

has already created form waivers, may directly contact victims of accidents, both interviewing them and potentially convincing them to sign away rights before plaintiff's counsel even has a chance to inform the victims of their legal rights.

Even if an accident victim *does* know that he or she has a legal claim, and wants to hire a lawyer, without legal advertising, a potential plaintiff may not have any idea which lawyers focus on the specific type of incident at issue nor which lawyers other potential claimants are retaining. Though a general practitioner may be able to perform adequately, it would be in the victim's interest to know who has experience handling those types of cases and who has been retained to represent other victims of the accident. For example, an attorney may have extensive experience in mass transit disasters, particularly in the railroad industry. If a train crashes, killing or injuring hundreds, it may be in the interest of the victims and their families to be represented jointly by an attorney. Without the type of advertising banned by the moratorium rule, the plaintiffs may instead retain dozens of separate, less qualified counsel, resulting in less effective representation.

In *Went For It*, the Supreme Court upheld the ban on direct mail because injured citizens had other ways to learn about the availability of legal counsel through "ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents," including prime-time television, radio, newspapers, other media, billboards, and

"recorded messages the public may access by dialing a telephone number" (a mid-1990's analog for looking up information on a website). *Went for It*, 515 U.S. at 634. New York's moratorium rule eliminates one of the foundations on which the Supreme Court found the rule constitutional.

The purpose behind the moratorium rules is the understandable desire of the state to protect victims from undue influence, and to protect "the privacy of its citizens and guarding against the indignity and offense of being solicited for legal services immediately following a personal injury or wrongful death event." *Alexander*, 2007 U.S. Dist. LEXIS 53602, at *23. While this goal may be achieved by the 30-day moratorium on direct mail solicitations, the extension of that ban to general advertising and website postings is unnecessary, does not fulfill this goal, and infringes on attorneys' First Amendment rights. It is in fact nothing more than another manifestation of the type of paternalism decried by the Supreme Court. *Went for It*, 515 U.S. at 630. As such the extension of the moratorium violates the fourth prong of the *Central Hudson* test.

The district court's conclusion that "a solicitation concerning a specific personal injury or wrongful death event is no less disturbing when it enters a victim or family member's home through the newspaper, the internet, or the airwaves rather than through the mail," *Alexander*, 2007 U.S. Dist. LEXIS 53602, at *25, is incorrect. General advertisements and internet postings are different in

kind from a direct mail solicitation. A direct letter may be considered particularly offensive to a victim because it is directly addressed to the particular victim and because it is specifically directed to their home or place of business and indicates that an attorney knows the victim's name and address. If an event is significant enough that attorneys will see value in placing an advertisement mentioning the incident, there is a high likelihood that the event will be reported in the press. Potential plaintiffs therefore likely will be reminded of the incident by newspapers, radio and television. Advertisements in the same media are unlikely to contribute to the victims' distress.

The justification for the internet ban is particularly attenuated. To find a website offering services to potential plaintiffs of a particular incident, a victim would have to search actively for the website. There is a negligible chance that a potential plaintiff will accidentally happen across such a web site. More likely, if the victim is looking at the website containing information banned by the moratorium, the victim was looking for and required exactly that information. The moratorium on web sites mentioning the ban therefore does not even fall within the general justification for the rule.

It is not the state's role to paternalistically shield its citizens from all mentions of tragic occurrences. The 30-day moratorium on general advertising and web site notices does nothing but close off avenues through which victims may

be able to obtain legal representation. A ban on general advertisements referencing a specific event, like news accounts, is overbroad and violates the third and fourth prongs of the *Central Hudson* test.

III. EXCEPT FOR THE 30-DAY MORATORIUM, THE DISTRICT COURT PROPERLY BALANCED THE GOVERNMENTAL INTEREST IN AVOIDING DECEPTIVE ADVERTISING AND THE ATTORNEYS' RIGHTS TO FREE SPEECH

A. The practices subject to the proposed prohibitions are not inherently misleading, and have not been proven misleading (or so likely to be misleading), so as to permit their regulation under the first step of the *Central Hudson* test.

The state has not met its burden of demonstrating that the prohibitions against techniques commonly used in advertising are inherently misleading, have been proven misleading, or are so likely to be misleading thus permitting their regulation under the first step of the *Central Hudson* test. The state has banned endorsements and testimonials from a client about a pending matter, the portrayal of a fictitious law firm or judges, the use of techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence, and the use of a nickname, moniker, trade name, or motto that implies an ability to obtain results.

The New York City Bar recognizes that, in certain instances, these advertising devices could be misleading, but the state has not demonstrated that

these techniques are misleading per se. For example, the state has asserted that without its ban on endorsements by current clients regarding pending matters "a client will feel pressured by his attorney to endorse the attorney's work in a pending matter out of fear that anything less would lessen the attorney's zeal in pursuing the case." Br. for Def.-Appellant at 40. Although in some instances this could be true, it does not explain why endorsements or testimonials by a client are *per se* so likely to be misleading as to allow their regulation under the first *Central Hudson* test. Indeed, such endorsements are no less likely to be misleading than those by current clients with regard to past matters. Such endorsements could equally be the result of pressure based upon a client's fear that the lawyer will be less vigorous in handling the current matter if the endorsement is not given. Moreover, given the choices of potential counsel, it is hard to imagine that many clients, such as a large corporation or other sophisticated regular users of legal services, would ever feel pressured to provide such an endorsement.

Similarly, the state has not met its burden with respect to techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence. Whether a particular tactic is "relevant" is a separate question from whether that technique is "misleading." The prohibition does not identify particular techniques or portrayals of characteristics that are so

likely to be misleading as to permit their regulation under the first step of *Central Hudson*. Nor has the state offered any evidence that irrelevant techniques, such as the use of humor, flashy graphics, music or personal characteristics, such as a friendly smile or flashy clothes, are per se likely to be misleading such that they may be regulated under the first step of *Central Hudson*.

The fact that some lawyers occasionally use a particular advertising device for unethical purposes does not establish that the technique itself is likely to be misleading. The categorical bans that the state has adopted would cover truthful, non-misleading communications, and must therefore be analyzed under the remaining elements of *Central Hudson*.

B. The proposed prohibitions do not materially advance the state's interest under the third step of the *Central Hudson* test.

The state has not met its burden of demonstrating that its prohibitions materially advance its interest in accurate communications. The state has not offered any studies, surveys, or empirical or anecdotal evidence to support its assertion of a harm "that is potentially real, not purely hypothetical." The state's prohibitions sweep too broadly, targeting practices not shown to be misleading and only tangentially implicating a concern with truthful and non-misleading communication.

In sharp contrast, in *Florida Bar v. Went For It*, the state offered an extensive report demonstrating that, in certain circumstances, attorney advertising

was too intrusive of victims' privacy. *Went For It*, 515 U.S. at 626–32. The report included a survey commissioned by the bar and anecdotal evidence in the form of newspaper editorials and letters submitted to the bar written by the public objecting to the very practice the state sought to prohibit. *Id*. at 626–28. Here, the state has done nothing to demonstrate that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771.

The report contains a collection of lawyer advertisements and an expression of concern by the state bar about certain advertising devices. The state has offered no evidence to support its position other than the Task Force report. Historic evidence cited in the state's brief, Br. for Def.-Appellant at 34–35, confirming that the state has an interest in stopping misleading advertising, is not evidence that the particular prohibited practices are misleading. The state cites proposed rules in the report of the New York State Bar Association Task Force on Attorney Advertising. Br. for Def.-Appellant at 35–36. The state bar's expression of concern about non-misleading advertising techniques also is not evidence of harm caused by those particular techniques. Nor is that concern evidence that prohibitions on those particular techniques will advance the state's interest in non-misleading advertising. Thus, the state has failed to offer sufficient evidence showing that the particular prohibitions advance its interest.

The state has not met its burden of demonstrating that techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence, materially advance its interest in accurate communication. The FTC, whose charge includes protecting the public against misleading advertising, expressed its concern that the prohibitions relate to "the style and content of media advertising but do not necessarily target deception." FTC Letter. As the FTC points out, some of the prohibited techniques could be useful to consumers: "For example, dramatizations may be an effective way of reaching consumers who do not know how legal terminology corresponds to their experiences and problems." *Id*. Many techniques irrelevant to legal competence are "common methods that advertising firms have used to make their messages memorable" and are "unlikely to hoodwink unsuspecting consumers." *Id*.

Portraying the legal process, including the role of judges, in dramatizations may be useful. The state has not offered evidence that the portrayal of a judge implies that an attorney has the ability to influence a judge improperly. Though the Task Force report observed that a communication implying the ability to improperly influence a judge was misleading, but it does not follow that a ban on all portrayals of judges materially advances that interest. The state also cites a New York State Bar Association Ethics Opinion stating that law firms' letterhead

should not include the title "Hon." to designate a retired judge. Br. for Def.-Appellant at 39 (citing N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. No. 284). Falsely implying that a sitting judge works for a law firm could mislead the public into thinking that a firm may influence a court improperly, but it is easy to imagine many instances in which portraying a judge in an advertisement would not mislead the public. For example, showing a pro se plaintiff fumbling in front of a judge in a courtroom would not be misleading in most instances, but rather would convey the dangers of litigating without a lawyer.

The state similarly relies on a provision of the New York Code of Professional Responsibility, DR 2-102(B), which is narrowly tailored to address misrepresentation in order to support a different and broader prohibition on the use of a nickname, moniker, motto or trade name that implies an ability to obtain results. The prohibition in DR 2-102(B) on practicing under a trade name is concerned with practices that mislead the public as to the *identity* of the lawyers. Br. for Def.-Appellant at 36. Similarly, the case on which the state relies, *Friedman v. Rogers*, 440 U.S. 1 (1979), addressed a prohibition on optometrists' use of trade names to obscure the *identity* of the members of a practice. *Id*. at 13. The prohibition at issue here, however, is not rooted in a concern that nicknames, monikers, mottos or trade names conceal lawyers' identities, but rather that such devices mislead the public if they imply an ability to obtain results. The state has

not offered evidence that the practices have misled the public or that the prohibitions materially advance its interest in preventing the public from being misled about a firm's ability to achieve particular results. Indeed, even major law firms that generally represent large corporations have used mottos.

Finally, the state offers another justification for its ban on endorsements and testimonials from a client about a pending matter: the need to preserve the integrity of the attorney-client relationship. Br. for Def.-Appellant at 40. The state cites ethical rules about the attorney-client relationship in general, *id.*, but it has offered no evidence to show that the harm from client endorsements is more real than hypothetical. The New York City Bar shares the state's concern about the integrity of the attorney-client relationship. The prohibition, however, denies consumers valuable information about client satisfaction without advancing the state's interest. Indeed, many law firms frequently list corporations they have represented and do represent. Repeatedly retaining a lawyer effectively is an endorsement of the law firm. Such listings, however, are not prohibited.

C. The prohibitions are not narrowly tailored under the fourth step of the *Central Hudson* test.

The state has also failed to satisfy the fourth and final step in the *Central Hudson* analysis: demonstrating that the prohibitions are "not more extensive than is necessary to serve [the state's] interest." *Central Hudson*, 447 U.S. at 566. The

state's bans are overly broad and would include practices and techniques that are used successfully and without deception by many firms in New York.

For instance, even assuming that the harm from endorsements and testimonials from a client about a pending matter were real and that the state provided some evidence that the public was deceived, the state has not met its burden of demonstrating that its total prohibition on such endorsements and testimonials by clients regarding current matters is narrowly tailored to meet the state's concern that the endorsement may be the result of pressure by the lawyer. Indeed, the Task Force Report itself did not recommend a ban on such endorsements and testimonials, as the state notes. Br. for Def.-Appellant at 40. Moreover, in its letter addressing the state's proposed restrictions on advertising, the FTC expressed its view that the interest of ensuring accurate information is better addressed by requiring a disclosure than through an outright ban. FTC Letter. Client endorsements and testimonials may contain truthful, non-misleading information that would be helpful to potential clients, information which the prohibition would deny them. Although the state is not required to use the least restrictive means, the Supreme Court has rejected outright bans where less burdensome means, such as disclosure requirements, are available. *See Peel*, 496 U.S. at 106-110; *Shapero*, 486 U.S. at 476; *Zauderer*, 471 U.S. at 655; *In re R.M.J.*, 455 U.S. at 206.

The ban on tactics to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel is also troubling, because it bans techniques that are not misleading. Even the use of common advertising techniques, such as color, sounds, graphics and logos, are arguably irrelevant to the selection of counsel, or at least what the state appears to believe are appropriate factors to consider in selecting counsel. The Supreme Court has rejected outright bans of pictures or illustrations where the state rested on the theory that the visual content of advertising may be deceptive or manipulative. *Zauderer*, 471 U.S. at 649. The Court recognized that "the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." *Id*. at 647. Likewise, a prohibition on techniques that are not "relevant" to the selection of counsel deprives firms of valid and valuable advertising tactics without directly targeting misleading communications.

As the district court noted, the state has not shown that any of the available less-restrictive alternatives are insufficient. *Alexander*, 2007 U.S. Dist. LEXIS 53602, at *24–26. The Task Force report on which the state relies concluded that greater enforcement of the existing limitations on advertising would be adequate to combat misleading and deceptive advertising. *Id*. at *25. In addition, the state has not shown that disclaimers, which the FTC prefers, are insufficient. *Id*. at *24.

The state has even recognized the efficacy of disclaimers by mandating, in some settings, a disclaimer that "[p]rior results do not guarantee a similar outcome." That disclaimer would address the state's concerns expressed in support of the prohibitions and would be far less restrictive than the challenged prohibition.

CONCLUSION

For the reasons set forth above, the district court's order enjoining enforcement of N.Y. Comp. Codes R. & Regs. tit. 22 §§ 1200.6(c)(1), (3), (5), (7), and (g)(1) should be upheld, but its ruling on the 30-day moratorium on general advertising and website solicitations should be reversed and the moratorium, to the extent it applies to general advertising and websites should be found unconstitutional and enjoined.

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Respectfully submitted,

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