

## CASENOTES

### **“BEFORE YOU ACCEPT A CHECK ON YOUR ADVERTISING, CHECK WITH THE FIFTH CIRCUIT!” FIRST AMENDMENT LIMITS ON ATTORNEY ADVERTISING RESTRICTIONS AFTER *PUBLIC CITIZEN, INC. V.* *LOUISIANA ATTORNEY DISCIPLINARY BOARD***

#### I. INTRODUCTION

As lawyer advertising becomes more prevalent, more creative, and expands into new, electronic media, state bar associations struggle to strike the proper balance between protecting the public, maintaining professional integrity, and ensuring that those who commit to upholding the Constitution also enjoy its protections. While the Supreme Court has provided some guidance as to how this balance might be maintained, namely the extent to which lawyer advertising can be regulated, it has not heard a case on the matter in almost two decades, and some lingering questions remain.<sup>1</sup>

This Note explores *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*,<sup>2</sup> the Fifth Circuit’s recent decision that answered some of these lingering questions and, in the process, established some of the outermost limits of a state’s ability to impinge upon a lawyer’s right to advertise. Section II of this Note traces the development of the advertising regulations challenged in *Public Citizen*. Section III examines the historical, jurisprudential lens through which the Fifth Circuit reviewed the plaintiffs’ First Amendment challenges to the regulations, and Section IV details the court’s decision and reasoning. Finally, Section V offers an analysis of how the Fifth Circuit’s decision fits

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1. See *infra* Section III.

2. *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011).

within the jurisprudence on the regulation of attorney advertising and concludes with some concerns about the entire framework used to assess a lawyer's First Amendment right to advertise.

## II. FACTS AND HOLDING

In 2006 the Louisiana legislature, motivated by its opinion that “the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived,” adopted a resolution calling on the Louisiana Supreme Court to study lawyer advertising and to revise the sections of the Louisiana Rules of Professional Conduct (LRPC) governing lawyer advertising.<sup>3</sup> The court thereafter directed the Louisiana State Bar Association (LSBA) to submit a proposal for rule changes, which were incorporated into Rule 7 of the LRPC on July 3, 2008.<sup>4</sup>

That fall, before the new rules went into effect, Public Citizen, Inc., Morris Bart, Morris Bart LLC, William N. Gee, III, and William N. Gee, III, Ltd. (collectively, the plaintiffs)<sup>5</sup> filed suit in the United States District Court for the Eastern District of Louisiana against the Louisiana Attorney Disciplinary Board (LADB) and two of its officers in their official capacity, claiming that several subsections of the LRPC's revised Rule 7 violated their First Amendment right to free speech.<sup>6</sup> To give the LSBA

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3. See *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 544 (E.D. La. 2009) (internal quotation marks omitted). See also LA. CODE OF PROF'L CONDUCT R. 7.1–7.10 (2012) (rules governing lawyer advertising).

4. *Pub. Citizen*, 642 F. Supp. 2d at 544. While an intermediary committee made two minor changes to the LSBA's proposals, neither is relevant to the litigation, and the court incorporated the rest of the LSBA's proposed changes in their entirety. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 216 (5th Cir. 2011).

5. *Pub. Citizen*, 642 F. Supp. 2d at 551. Public Citizen, Inc. is a non-profit, public-interest organization with 270 Louisiana members whose mission is to protect the First Amendment rights of consumers to receive information. *Id.* Morris Bart, Morris Bart LLC, William N. Gee, III, and William N. Gee, III, Ltd. are Louisiana law firms and lawyers who were “running advertisements containing specific elements that violate[d] the amended Rules.” *Id.* at 549-50.

Another group of plaintiffs—Scott G. Wolfe, Jr. and Wolfe Law Group, LLC—brought a related suit that challenged the regulation of Internet advertising, and the two actions were consolidated. *Id.* at 545-46. Their motions for summary judgment were granted in part and denied in part, but because there was no appeal, they are not addressed in this Note. See *Id.* at 560; *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 216 (5th Cir. 2011).

6. *Pub. Citizen*, 642 F. Supp. 2d at 545; see also U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

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an opportunity to address these constitutional challenges, the supreme court suspended the enactment of the new rules, and the district court granted a continuance of the proceedings.<sup>7</sup> Meanwhile, the LSBA commissioned a survey on the perceptions of lawyer advertising within the state.<sup>8</sup> On April 15, 2009, the LSBA proposed several modifications to the new rules, which were accepted by the supreme court and ordered to go into effect on October 1, 2009.<sup>9</sup>

The district court then resumed the case and heard the plaintiffs' challenges to the latest revision of the LRPC.<sup>10</sup> They mounted First Amendment challenges against seven provisions of the revised LRPC,<sup>11</sup> the provisions that prohibited lawyer advertisements from doing the following: (1) promising results;<sup>12</sup> (2) using a trade name or motto that states or implies an ability to obtain results;<sup>13</sup> (3) incorporating testimonials or references to past results;<sup>14</sup> (4) depicting a judge or jury;<sup>15</sup> (5) portraying a client by a non-client or depicting an inauthentic scene or picture without a disclaimer;<sup>16</sup> or (6) casting a non-lawyer spokesperson

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7. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 216 (5th Cir. 2011).

8. *Pub. Citizen*, 632 F.3d at 216. Survey Communications Inc. (SCI Research), a Baton Rouge based market-research firm, conducted the survey, which compiled opinions regarding attorney advertising from 600 phone-call responses by randomly selected Louisianians, nearly 4000 e-mail responses from members of the LSBA, and twenty-five focus group respondents. *See Pub. Citizen*, 632 F.3d at 216; *See also* SCI Research, *Opinions & Perceptions Study Regarding Attorney Advertising*, LSBA (last visited Feb. 9, 2012), <http://docs.justia.com/cases/federal/district-courts/louisiana/laedce/2:2008cv04451/128148/89/8.pdf>.

9. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 545 (E.D. La. 2009).

10. *Pub. Citizen*, 632 F.3d at 216.

11. *See generally, Pub. Citizen*, 642 F. Supp. 2d at 545.

12. *See* LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(E) (2011).

13. *See* LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(L) (2011).

14. *See* LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(D) (2011) (suspended by Order Suspending Enforcement of Certain of the Article XVI, Rule 7 Series of the Articles of Incorporation of the Louisiana State Bar Association and Which Amends the Article XVI, Rule 7 series of the Articles of Incorporation of the Louisiana State Bar Association (signed April 27, 2011),

[http://www.lasc.org/rules/orders/2011/Rule\\_7.2\(c\)\(1\)\(D\)\\_and\\_7.2\(c\)\(1\)\(J\).pdf](http://www.lasc.org/rules/orders/2011/Rule_7.2(c)(1)(D)_and_7.2(c)(1)(J).pdf) [hereinafter *Louisiana Supreme Court Order*]).

15. *See* LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(J) (relevant portion suspended by *Louisiana Supreme Court Order*, *supra* note 14, although other prohibitions in Rule 7.2(c)(1)(J) were not challenged). *Pub. Citizen*, 642 F. Supp. 2d at 545 n.1.

16. *See* LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(I).

without a disclosure that the spokesperson is a paid non-lawyer.<sup>17</sup> In addition, the plaintiffs attacked the specific provisions of the disclosure rule that (1) dictated the font size of written disclaimers and the speed of spoken disclaimers and (2) required that disclaimers in television and electronic advertisements be both spoken *and* written.<sup>18</sup>

Applying the test that the United States Supreme Court established in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*<sup>19</sup> (*Central Hudson*) to determine the constitutionality of restrictions on commercial speech, the district court granted partial summary judgment for the plaintiffs, finding that the disclosure requirement for lawyer advertisements containing non-lawyer spokespeople (Rule 7.5(b)(2)(C)) was unconstitutional.<sup>20</sup> However, using the same constitutional analysis, the district court granted partial summary judgment for the defendants on all other claims, holding that the other six provisions challenged by the plaintiffs did not violate the First Amendment.<sup>21</sup>

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17. See LA. CODE OF PROF'L CONDUCT R. 7.5(b)(2)(C) (suspended by *Louisiana Supreme Court Order*, *supra* note 14).

18. Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 217 n.2 (5th Cir. 2011); see also Rule 7.2(c)(10), requiring that:

Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be spoken aloud *and* written legibly.

LA. CODE OF PROF'L CONDUCT R. 7.2(c)(10) (emphasis added) (replaced by new rule by *Louisiana Supreme Court Order*, *supra* note 14); see *infra* note 26.

19. 477 U.S. 557, 566 (1980). For a discussion of this test, see *infra* Section III.

20. Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 642 F. Supp. 2d 539, 557, 559-60 (E.D. La. 2009). Especially important to the district court's decision was the lack of evidence for the LADB's claim that the regulation was needed to preserve the ethical standards of the legal profession. *Id.* at 557.

21. *Id.* at 559. The district court held that, according to the survey results, attorney advertisements that promised results (prohibited by Rule 7.2(c)(1)(E)), contained references or testimonials to past results (prohibited by Rule (7.2(c)(1)(D)), or used the portrayal of a judge or jury (prohibited by Rule 7.2(c)(1)(J)) were inherently misleading and therefore could be prohibited. See *id.* at 553-54; see also *infra* Section III.B.

In upholding the other three rules, Rule 7.2(c)(1)(D) (prohibiting testimonials and references to past results), Rule 7.2(c)(1)(I) (requiring

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The plaintiffs appealed the district court's six adverse findings.<sup>22</sup> On review, the Fifth Circuit also applied the *Central Hudson* analysis, and affirmed in part and reversed in part.<sup>23</sup> Specifically, the Fifth Circuit held that the prohibitions on portraying judges or juries (Rule 7.2(c)(1)(J)) or using testimonials or references to past results (Rule 7.2(c)(1)(D)) in attorney advertisements violated a lawyer's First Amendment rights.<sup>24</sup> The court further held that the specific provisions of the disclaimer rule (Rule 7.2(c)(10)) that mandated font size and speed of speech in disclaimers and required both spoken and written disclaimers in a television or electronic advertisement were unduly burdensome and violated the First Amendment.<sup>25</sup> However, the court held that the LRPC's prohibitions against communications that promise results (Rule 7.2(c)(1)(E)), contain nicknames or mottos that state or imply an ability to obtain results (Rule 7.2(c)(1)(L)), or use actors, reenactments, or reproductions without a disclaimer (Rule 7.2(c)(1)(I)) are constitutionally permissible restrictions on a lawyer's commercial speech.<sup>26</sup>

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disclaimers when displaying non-authentic scenes or reenactments), and Rule 7.2(c)(10) (mandating the formatting disclaimers must take), the court applied the *Central Hudson* test and found the survey evidence sufficient to justify each regulation. *Pub. Citizen*, 642 F. Supp. 2d. at 554-58. Interestingly, the court also applied the *Central Hudson* test to Rule 7.2(c)(1)(J) (prohibiting the portrayal of portrayal of a judge or jury), even though it had already found the rule to be constitutionally permissible because it targeted inherently misleading content. *See See id.* at 554, 557.

22. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 216-17 (5th Cir. 2011).

23. *Id.* at 229.

24. *Id.* at 222-24. Significantly, the court held that, based on the record, the State could not restrict either objective, verifiable testimonials or subjective, unverifiable testimonials under the First Amendment. *Id.*; *see infra* Section IV.B.2.

25. *Pub. Citizen*, 632 F.3d at 229.

26. *Pub. Citizen*, 632 F.3d at 216, 218-19, 224, 228. *See Louisiana Supreme Court Order*, *supra* note 14 (suspending Rule 7.2(c)(1)(D) (prohibiting references or testimonials to past results), Rule 7.2(c)(1)(J) (the specific portion prohibiting the depiction of a judge or jury), and Rule 7.2(c)(10) (dictating the format for disclosures) on April 27, 2011). Rule 7.2(c)(10) now reads:

All disclosures and disclaimers required by these Rules shall be clear, conspicuous, and clearly associated with the item requiring disclosure or disclaimer. Written disclosures and disclaimers shall be clearly legible, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and clearly intelligible.

LA. CODE OF PROF'L CONDUCT R. 7.2(c)(10) (2011).

### III. BACKGROUND

#### A. THE RISE OF FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH

Though at least one scholar has asserted that the framers valued commercial speech and intended to grant it constitutional protection,<sup>27</sup> the Supreme Court has not always extended First Amendment protection to commercial speech.<sup>28</sup> In 1942, the Supreme Court explicitly held in *Valentine v. Chrestensen*<sup>29</sup> that “purely commercial” speech, such as advertisements that propose the sale of an item or service, fell outside the scope of the First Amendment.<sup>30</sup> This opinion persisted until 1976, when, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>31</sup> the Court changed its position and began to expand the First Amendment’s application to commercial speech and advertisements.<sup>32</sup>

Beginning with *Virginia Pharmacy*, the Supreme Court has adopted a notably “anti-paternalistic” position regarding government restrictions on advertising, maintaining that the consumer and, by extension, society benefit from maximum exposure to truthful, non-deceptive, commercial information.<sup>33</sup> While the Court has never found the First Amendment’s protection of commercial speech absolute, it has held that the

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27. See Daniel E. Troyd, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 101 (1999).

28. *Id.* at 120-22. See also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 758-61 (1976).

29. 316 U.S. 52 (1942).

30. *Id.* at 54-55

31. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

32. *Id.* at 770.

33. *Va. Pharmacy*, 425 U.S. at 765, 770; see, e.g., *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 105, 111 (1990) (rejecting advertising restrictions that arose from the government’s “paternalistic assumption that . . . [consumers] are no more discriminating than the audience for children’s television,” and noting a “constitutional presumption favoring disclosure over concealment”); and *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561-62 (1980) (“Commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”). For a further discussion, see Nat Stern, *Commercial Speech, “Irrational” Clients, and the Persistence of Bans on Subjective Lawyer Advertising*, 2009 B.Y.U. L. REV. 1221, 1251-53 (2009) (celebrating anti-paternalism in Supreme Court jurisprudence on lawyer advertising).

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government may not ban an advertisement simply because the legislature disapproves of its content or believes that some members of the public might find it offensive.<sup>34</sup> Similarly, the Court has held that the government cannot ban a truthful advertisement simply because the legislature thinks it may have negative effects on the public.<sup>35</sup> As long as the commercial speech is not false or deceptive and does not propose an illegal transaction, it is entitled to at least some degree of First Amendment protection.<sup>36</sup>

**B. THE *CENTRAL HUDSON* TEST AND “INTERMEDIATE SCRUTINY” FOR RESTRICTIONS ON COMMERCIAL SPEECH**

Although the Supreme Court has concluded that truthful, non-deceptive commercial speech is entitled to some First Amendment protection, it has stopped short of finding that commercial speech is entitled to the same robust protection afforded other types of speech.<sup>37</sup> The Supreme Court has maintained that there is a “common sense distinction” between commercial speech and other types of speech, such as political speech, and that commercial speech is less important and, consequently, subject to greater government regulation.<sup>38</sup>

In *Central Hudson*, the Supreme Court reasoned that First Amendment protection is extended to commercial advertisements only because they serve to inform the public, so advertisements that are false, deceptive, inherently misleading, or otherwise fail

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34. See *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 648 (1985).

35. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); see also *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”).

36. *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). Note that the converse is also true: commercial speech that is inaccurate, deceptive, or concerns unlawful activities receives no First Amendment protection. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

37. See *Cent. Hudson*, 447 U.S. at 562-63; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978).

38. See *Ohralik*, 436 U.S. at 456 (“[W]e have . . . afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”). Note that while this has been the Court’s majority opinion, some scholars believe that commercial speech should receive the same protection as other speech. See, e.g., Stern, *supra* note 33, at 1250-51.

to convey accurate information to consumers about lawful transactions are not entitled to *any* constitutional protection and can be freely regulated.<sup>39</sup> However, the *Central Hudson* Court also held that, under certain circumstances, even truthful, non-deceptive advertisements can be restricted by a government regulation that satisfies a three-prong test (the *Central Hudson* test).<sup>40</sup> This test continues to provide the intermediate-scrutiny standard under which a restriction of commercial speech is analyzed for constitutional validity.<sup>41</sup>

### 1. FIRST PRONG: THE REGULATION MUST FURTHER A SUBSTANTIAL GOVERNMENT INTEREST

Under the first prong of the *Central Hudson* test, the government must put forward the “substantial interests” it seeks to further by its proposed restriction on commercial speech.<sup>42</sup> Typically, the first prong of the *Central Hudson* test is the easiest of the three to satisfy,<sup>43</sup> and courts generally uphold a state’s assertion that a given interest is “substantial,”<sup>44</sup> especially if it concerns “ensuring the accuracy of commercial information in the marketplace.”<sup>45</sup>

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39. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

40. *See Cent. Hudson*, 447 U.S. at 564. Note that while “[t]he Supreme Court has variously described the *Central Hudson* Test as having three or four prongs, depending on whether the preliminary inquiry into whether the content to be regulated is protected [i.e., whether it is false or deceptive or proposes an unlawful transaction] is counted as a prong,” both the three-prong and four-prong approaches are exactly the same. *Alexander v. Cahill*, 598 F.3d 79, 88 n.5 (2d Cir. 2010). In *Public Citizen*, both the district court and the Fifth Circuit used the “three-prong-plus-threshold-question approach.” *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 552, 554 (E.D. La. 2011); *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 218-19 (5th Cir. 2011).

41. *See, e.g., Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995).

42. *Cent. Hudson*, 447 U.S. at 564. *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“Unlike rational basis review, the *Central Hudson* standard does not permit [the court] to supplant the precise interests put forward by the State with other suppositions.”).

43. *See* Ralph H. Brock, “*This Court Took a Wrong Turn with Bates:*” *Why the Supreme Court Should Revisit Lawyer Advertising*, 7 FIRST AMEND. L. REV., 145, 156 (2009) (indicating that this is especially true in cases involving attorney advertising).

44. *See* Troyd, *supra* note 27, at 131. *But see, e.g., infra* note 45.

45. *Edenfield*, 507 U.S. at 769. In cases involving attorney advertising, the Supreme Court has recognized several “substantial” interests in addition to “protecting consumers,” such as “maintaining standards of ethical conduct in the licensed professions” and protecting the privacy of potential clients; *id.* at 770; *Went for It*, 515 U.S. at 625. Notably, however, the Court has been unwilling to recognize

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### 2. SECOND PRONG: RESTRICTION MUST DIRECTLY ADVANCE THE SUBSTANTIAL GOVERNMENT INTEREST

Under the second prong of the *Central Hudson* test, the state must prove that the restriction “directly and materially” advances the substantial government interests asserted under the first prong.<sup>46</sup> The Supreme Court has held that the state’s burden of proof in establishing the relationship between the regulation and the state interest is quite high,<sup>47</sup> and federal courts have generally required the state to produce affirmative evidence, such as survey data or anecdotal reports, to support its contention that a restriction furthers its asserted substantial interest.<sup>48</sup>

### 3. THIRD PRONG: RESTRICTION MUST BE “NARROWLY DRAWN”

Under the third and final prong of the *Central Hudson* test, the state must demonstrate that the proposed restriction on commercial speech is “narrowly drawn.”<sup>49</sup> While the Court’s language in *Central Hudson* seems to indicate that “narrowly drawn” means “least restrictive” possible,<sup>50</sup> the Court has clarified that the third prong requires only a reasonable, but not necessarily perfect, “fit” between the government interest and the regulation furthering it.<sup>51</sup> Nevertheless, this does not mean that

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“preserving the dignity of the legal profession” as a “substantial” state interest that satisfies the first prong of *Central Hudson*. See *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 647-48 (1985).

46. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624 (1995).

47. See *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); see also *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (“This burden is not satisfied by mere speculation or conjecture.”).

48. See, e.g., *Went for It*, 515 U.S. at 626-28. Note that while the majority opinion is that survey evidence can satisfy the second prong of the *Central Hudson* test, some justices and courts have been less enthusiastic about survey data. See, e.g., *Went for It*, 515 U.S. at 640 (Kennedy, J., dissenting) (criticizing the government’s survey evidence as “selective synopses of unvalidated studies”); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) (noting, in dicta, the court’s hesitancy to base a decision on “the shifting sands of polling data, which change according to techniques, sample populations, and even the phrasing of questions”). See also *infra* Section V.C.1.

49. *Went for It*, 515 U.S. at 624.

50. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980) (“[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the extensive restrictions cannot survive.”).

51. *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479 (1989) (“We have not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government’s legitimate interests.”).

the third prong somehow lacks the rigor of intermediate scrutiny or is easy to satisfy.<sup>52</sup> Courts have held that the third prong of the *Central Hudson* test demands an exploration of whether the state could protect its interests using more tailored methods of regulation,<sup>53</sup> and they have regularly invalidated commercial speech restrictions when less restrictive means, such as disclaimers, could have accomplished the state's goals.<sup>54</sup>

### C. ATTORNEY ADVERTISING AS PROTECTED SPEECH

#### 1. *BATES* AND *CENTRAL HUDSON* APPLIED TO ATTORNEY ADVERTISEMENTS

While it is still passionately debated within the profession whether lawyer advertisements are inherently different from other forms of commercial speech and should be treated as such,<sup>55</sup> in *Bates v. State Bar of Arizona*<sup>56</sup> the Supreme Court established that "advertising by attorneys may not be subjected to blanket suppression."<sup>57</sup> Since *Bates*, the Court has taken essentially the same anti-paternalistic approach regarding attorney advertising as it has with other forms of commercial speech.<sup>58</sup> While the Court has found some restrictions constitutionally permissible, those restrictions have involved direct mailings<sup>59</sup> or in-person

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52. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995).

53. *Pruett v. Harris Cnty. Bail Bond Bd.*, 499 F.3d 403, 412 (5th Cir. 2007).

54. This is especially true when the regulations involve attorney advertisements. See *In re R.M.J.*, 455 U.S. 191, 206 (1982); *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985); *Alexander v. Cahill*, 598 F.3d 79, 96 (2d Cir. 2010); see also *infra* Section III.C.2.

55. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 ("[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."); but see *Stern*, *supra* note 33, at 1260-61 (noting "the Court's refusal to treat attorney advertising as an altogether different species from advertising of other goods or services").

56. 433 U.S. 350 (1977).

57. *Id.* at 383.

58. See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 105, 109 (1990) (rejecting "the paternalistic assumption that the recipients of the petitioner's [attorney] letterhead are no more discriminating than the audience for children's television" and reaffirming the Court's "presumption favoring disclosure over concealment" in the realm of attorney advertising).

59. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding a thirty-day restriction on sending direct-mail solicitations to personal injury and wrongful death clients); but see *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (invalidating a blanket ban on direct-mail solicitation by lawyers).

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solicitation,<sup>60</sup> and the Court has treated public, non-targeted lawyer advertisements just like all other forms of commercial speech.<sup>61</sup> For example, like it has in other advertising contexts, the Supreme Court has held that regulations that ban truthful, verifiable content in lawyer advertisements violate the First Amendment,<sup>62</sup> that regulations that ban *inherently* misleading content (or content that has been proven to be misleading in the past) do not violate the First Amendment,<sup>63</sup> and that regulations that ban *potentially* misleading content must be analyzed under the three-prong *Central Hudson* test.<sup>64</sup>

In *Bates*, the Supreme Court left some open questions regarding the constitutional limits of restrictions on attorney advertisements, such as whether, and to what extent, state bar associations may restrict unverifiable, self-laudatory statements, and whether electronic or broadcasted advertisements are so different from print advertisements that they may be more freely regulated.<sup>65</sup> Several state supreme courts have used the dicta from *Bates* to uphold greater restrictions on attorney advertisements that contain unverifiable, self-laudatory statements or are broadcast via electronic media.<sup>66</sup> However,

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60. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (upholding a restriction on personal solicitation of accident victims, but noting the difference between in-person solicitation and public advertisements).

61. *See Stern*, *supra* note 33, at 1260-61; *see also infra* note 64.

62. *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 646-47 (1985).

63. *In re R.M.J.*, 455 U.S. 191, 202-03 (1982).

64. *See, e.g., Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 U.S. 146 (1994) (applying the *Central Hudson* Test and maintaining "we 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.") (internal quotations omitted). Some state courts have seemingly ignored the Supreme Court's instructions regarding potentially misleading advertising content, contributing to a growing split between the federal and some state courts. *Compare Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (subjecting restrictions of potentially misleading lawyer advertisements to *Central Hudson* analysis), *with Fla. Bar v. Pape*, 918 So.2d 240, 247 (Fla. 2005) (upholding restrictions of potentially misleading lawyer advertisements without discussing the *Central Hudson* test).

65. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (in dicta) ("[Lawyer] advertising claims as to the quality of services . . . may be so likely to be misleading as to warrant restriction. . . . And the special problems of advertising on the electronic broadcast media will warrant special consideration.").

66. *See Pape*, 918 So. 2d at 247-49 (holding that unverifiable content in attorney advertisements is not protected by the First Amendment); *see also Comm. of Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey*, 377 N.W. 2d 643, 645-46

federal courts have not followed suit, and have instead applied the *Central Hudson* test to regulations of attorney advertisements that contain self-laudatory content or are transmitted via television, radio, or the Internet.<sup>67</sup>

## 2. A PREFERENCE FOR LESS-RESTRICTIVE RESTRICTIONS: THE *ZAUDERER* DISCLAIMER STANDARD

In line with its belief that consumers benefit from more, rather than less, information, the Supreme Court is generally opposed to complete bans of content in attorney advertisements, preferring instead the use of disclaimers to protect the public from “potentially misleading” communications.<sup>68</sup> In *Zauderer*, the Court noted that attorneys have only a minimal constitutional interest in *not* disclosing particular information in advertisements, and therefore established a less rigorous standard of scrutiny for determining whether a disclaimer requirement violates the First Amendment.<sup>69</sup> Specifically, the Court held that a disclaimer requirement needs only to be “*reasonably related* to the state’s interest in preventing the deception of consumers.”<sup>70</sup> While a disclaimer requirement still violates the First Amendment if it is unduly burdensome, unjustified, or unsupported by any evidence of the potential harm it seeks to remedy,<sup>71</sup> the Supreme Court has held that a

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(Iowa 1985), *appeal dismissed for want of substantial federal question*, 475 U.S. 1114 (1986) (upholding a regulation prohibiting certain content from attorney advertisements on television and maintaining that *Zauderer*, 471 U.S. 626, does not apply to electronic advertisements that are “ripe for abuse”).

67. *See* *Mason v. Fla. Bar*, 208 F.3d 952 (11th Cir. 2000) (applying the *Central Hudson* test to a regulation pertaining to subjective, self-laudatory content in lawyer advertisements); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (applying *Central Hudson* to both television advertisements and advertisements that contained unverifiable, self-laudatory statements).

68. For example, the Court stated:

In virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.

*Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (quotation marks omitted). *See also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

69. *Zauderer*, 471 U.S. at 651.

70. *Id.* (emphasis added); *see also* *Milavetz v. U.S.*, 130 S. Ct. 1324, 1339-40 (2010) (reaffirming the “reasonably related” standard for disclaimers and describing the standard as “less exacting” than the *Central Hudson* test).

71. *Zauderer*, 471 U.S. at 651, 669 n.14; *see also* *Mason*, 208 F.3d at 958 (holding

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disclosure requirement may be constitutionally permissible even if there are less restrictive means by which the state could achieve its goals.<sup>72</sup>

**IV. THE FIFTH CIRCUIT'S DECISION**

The Fifth Circuit engaged in a three-step analysis to determine whether the six challenged provisions of the LRPC<sup>73</sup> violated the First Amendment.<sup>74</sup> First, the court determined whether each of the rules restricted speech that was inherently misleading or only potentially misleading.<sup>75</sup> Next, for those rules that completely prohibited speech that was only potentially misleading, the court applied *Central Hudson's* three-prong test.<sup>76</sup> Finally, the court employed *Zauderer's* "reasonably related" test to analyze those provisions of the LRPC that required disclaimers and regulated their form.<sup>77</sup>

**A. THRESHOLD INQUIRY: INHERENTLY MISLEADING CONTENT OR POTENTIALLY MISLEADING CONTENT?**

While commercial speech that is inherently misleading receives no First Amendment protection, commercial speech that is merely potentially misleading can only be completely banned or burdened by a disclaimer requirement if the *Central Hudson* or *Zauderer* standards are satisfied.<sup>78</sup> Therefore, the Fifth Circuit determined as a threshold matter whether each of the LRPC

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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 . . . [the attorney's] speech"; *but see Milavetz*, 130 S.Ct. at 1340 (holding that survey evidence is not needed to support a disclaimer requirement when it is "self-evident" that the advertisement in question is likely to deceive).

72. *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 669 n.14 (1985).

73. (1) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(E) (prohibiting communications that promise results); (2) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(J) (prohibiting the depiction of a judge or jury); (3) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(D) (prohibiting references or testimonials to past results); (4) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(L) (prohibiting trade names or mottos that state or imply the ability to obtain results); (5) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(1)(I) (prohibiting reenactments without a disclaimer); and (6) LA. CODE OF PROF'L CONDUCT R. 7.2(c)(10) (describing the formatting requirements for disclaimers).

74. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 218 (2011).

75. *Id.* at 218-19.

76. *Id.* at 219-20.

77. *Id.* at 218, 227.

78. *Id.* at 218 (quoting *In re R.M.J.*, 455 U.S. 191, 202 (1982)) (internal quotations omitted).

provisions targeted speech that was inherently misleading or merely potentially misleading.<sup>79</sup>

Of the six LRPC regulations at issue, the Fifth Circuit found that only one, the rule prohibiting lawyers from promising results in advertisements (Rule 7.2(c)(1)(E)) targeted inherently misleading speech.<sup>80</sup> Noting that “[n]o attorney can guarantee future results,” the court held that because communications that promise results are necessarily misleading and untruthful, the State could regulate them freely without offending the First Amendment.<sup>81</sup>

The Fifth Circuit found that the remaining LRPC regulations restricted speech that was merely potentially misleading and therefore required further First Amendment analysis under *Central Hudson* or *Zauderer*.<sup>82</sup> Unlike the district court, which found that the rule prohibiting the portrayal of a judge or a jury (Rule 7.2(c)(1)(J)) and the rule prohibiting testimonials or references to past results (Rule 7.2(c)(1)(D)) concerned speech that was inherently misleading,<sup>83</sup> the Fifth Circuit concluded that the communications targeted by these rules “may be presented in a non-deceptive manner,” and therefore were only potentially misleading.<sup>84</sup> The court employed similar logic to the rule prohibiting mottos that state or imply an ability to obtain results (Rule 7.2(c)(1)(L)), asserting that it is “obvious that a nickname or motto that might *imply* an ability to obtain results can be employed in a non-deceptive fashion.”<sup>85</sup> Finally, with regards to the rule prohibiting the use of actors or

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79. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 218 (2011). See *supra* note 40 (noting that when a court analyzes commercial speech under a four-prong *Central Hudson* test, this “threshold test” to determine whether the speech is entitled to any First Amendment protection is often invoked as the first of the four prongs).

80. *Pub. Citizen*, 632 F.3d at 218.

81. *Id.* at 218-19.

82. *Id.* at 219.

83. See *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 642 F. Supp. 2d 539, 553 (E.D. La. 2009). Note that despite characterizing references to past results as inherently misleading, in stating that “[r]eference[s] to past results, even if truthful . . . could also be inherently misleading,” the district court may be interpreted as stating that testimonials are only potentially misleading. *Id.* (emphasis added). The Fifth Circuit seems to share this interpretation: “[A]s the district court determined, it is possible to present results in a matter that is not misleading.” *Pub. Citizen*, 632 F.3d at 219 (emphasis added).

84. *Pub. Citizen*, 632 F.3d at 219.

85. *Id.*

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reenactments in an advertisement without a disclaimer (Rule 7.2(c)(1)(J)), the court maintained that the “depiction of a scene . . . can be presented in a non-deceptive way,”<sup>86</sup> and therefore such speech could only be burdened by a disclaimer requirement if the *Zauderer* standards are met.<sup>87</sup>

**B. CENTRAL HUDSON ANALYSIS OF RESTRICTIONS ON  
POTENTIALLY MISLEADING ADVERTISING CONTENT: AN  
EMPHASIS ON EVIDENCE**

After determining that the rules restricting (1) the portrayal of a judge or jury, (2) the communication of a testimonial or reference to past results, and (3) the use of a trade name or motto that states or implies an ability to obtain results completely prohibited speech that is only potentially misleading,<sup>88</sup> the Fifth Circuit analyzed the constitutional validity of the rules under the three-prong *Central Hudson* test.<sup>89</sup> The court looked at each regulation and assessed whether the LADB (1) articulated a substantial governmental interest necessitating the regulation, (2) proved that the regulation directly advanced their stated governmental interest, and (3) proved that the regulation was not more extensive than necessary.<sup>90</sup>

**1. DID A SUBSTANTIAL GOVERNMENT INTEREST NECESSITATE  
THE SPEECH RESTRICTIONS?**

Relying on Supreme Court jurisprudence,<sup>91</sup> the Fifth Circuit found that the LADB easily satisfied the first prong of the *Central Hudson* test with two of the government interests it offered: (1) the protection of the public from attorney advertising that is unethical and potentially misleading; and (2) the preservation of the legal profession’s ethical integrity.<sup>92</sup>

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86. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 219 (2011).

87. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 219 (2011).

88. These complete prohibitions are to be distinguished from the rule that merely required disclaimers when actors, reenactments, or reproductions were used. LA. CODE OF PROF’L CONDUCT R. 7.2(c)(1)(I). For a discussion of the constitutional validity of this disclaimer requirement, see *infra* Section IV.C.

89. *Pub. Citizen*, 632 F.3d at 219.

90. *Id.*

91. Specifically, *Edenfield v. Fane*, 507 U.S. 761, 769-70 (1993) and *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). See also *supra* note 45 & Section III.

92. *Pub. Citizen*, 632 F.3d at 220. Note that, also relying on Supreme Court jurisprudence, the court rejected a third government interest asserted by the LADB, “preserving attorneys’ dignity in their communications with the public,” as not

## 2. WERE THE REGULATIONS NARROWLY DRAWN TO MATERIALLY ADVANCE THE STATE'S ASSERTED INTEREST?

After finding that the LADB had offered substantial government interests that satisfied the first prong of the *Central Hudson* test, the court determined whether each of the three rules satisfied the second and third prongs, making sure that the LADB met its burden of proof for each prong with actual evidence and not “mere speculation or conjecture.”<sup>93</sup>

### a. The prohibition of the portrayal of a judge or jury (Rule 7.2(c)(1)(J))

The Fifth Circuit concluded that rule prohibiting the portrayal of a judge or jury failed both the second and third prongs of the *Central Hudson* test and, therefore, violated the First Amendment rights of Louisiana attorneys.<sup>94</sup> The court found that the regulation failed the second prong because the LADB did not supply evidence demonstrating how the restriction directly advanced either of its asserted substantial interests,<sup>95</sup> and the court found that the regulation failed the third prong because the LADB did not provide any explanation, beyond mere conclusory statements, as to why a less extensive restriction, such as a disclaimer, could not protect the public from the potentially misleading speech.<sup>96</sup>

### b. The prohibition of the use of testimonials or references to past results (Rule 7.2(c)(1)(D))

The Fifth Circuit also concluded that the restriction prohibiting testimonials or references to past results violated the First Amendment rights of Louisiana attorneys.<sup>97</sup> Distinguishing between objective, verifiable references and subjective,

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substantial enough to justify the prohibition. *See id.* (relying on *Zauderer*, 471 U.S. at 647-48); *see also supra* note 45.

93. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 218 (2011) (quoting from *Edenfield*, 507 U.S. at 770-71).

94. *Id.* at 224, 229.

95. *Id.* at 223-24 (noting that the defendants did not provide evidence that the depiction of a judge or jury implies that a lawyer has undue influence on a court and rejecting the LADB's paternalistic “assumption that Louisianians are insufficiently sophisticated to avoid being misled by a courtroom not devoid of its normal occupants”).

96. *Id.*

97. *Pub. Citizen*, 632 F.3d at 223.

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unverifiable references,<sup>98</sup> the court held, without even applying the second and third prongs of the *Central Hudson* test, that the regulation was unconstitutional insofar as it applied to objective, verifiable testimonials.<sup>99</sup> Noting the Supreme Court's assertion that "the First Amendment does not tolerate speech restrictions that are based only on a fear that people would make bad decisions if given truthful information,"<sup>100</sup> the Fifth Circuit maintained that truthful, non-deceptive testimonials are absolutely protected by the First Amendment.<sup>101</sup> Therefore, they could not be prohibited even if, as the defendants argued, such testimonials could potentially give rise to unrealistic consumer expectations.<sup>102</sup>

To the extent that the regulation also restricted subjective, unverifiable references, the court did analyze the rule under the second and third prongs of the *Central Hudson* test, but nonetheless found the evidence offered by the LADB insufficient to justify the prohibition of speech.<sup>103</sup> The court maintained that the regulation failed the second prong because the LADB's survey evidence did not prove how prohibiting unverifiable testimonials would "materially advance the State's asserted interests in preventing consumer deception or setting standards for ethical conduct."<sup>104</sup> Similarly, the court held that the regulation failed the third prong because the LADB did not adequately explain why it would be unable to further its interests with less extensive restrictions, like disclaimers.<sup>105</sup>

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98. The court provides examples of the two kinds of references:

A statement that a lawyer has tried 50 cases to a verdict, obtained a \$1 million settlement, or procured a settlement for 90% of his clients . . . are objective, verifiable facts regarding the attorney's past professional work. Conversely, statements such as "he helped me," "I received a large settlement," or "I'm glad I hired her," constitute subjective and unverifiable references.

Pub. Citizen, Inc. v. La. Disciplinary Bd., 632 F.3d 212, 221 (2011).

99. *Id.* at 222.

100. *Id.* (partially quoting *Thompson v. W. States Med Ctr.*, 535 U.S. 357, 359 (2002)) (internal quotations omitted). *See also supra* Section III.

101. *Id.* at 221-22.

102. *Id.*

103. *Pub. Citizen*, 632 F.3d at 222-23.

104. *Id.* at 222. While the LADB insisted that the survey evidence established how the ban of testimonials and references directly advanced its asserted interests, the court did not find the survey responses directly enough on point: "These responses are either too general to provide sufficient support for the rule's prohibition or too specific to do so." *Id.*

105. *Id.* at 223 (identifying an apparent inconsistency in the LRPC in that it completely prohibited some kinds of potentially misleading content (e.g.,

**c. The prohibition of nicknames or mottos that state or imply an ability to obtain results (Rule 7.2(c)(1)(L))**

The Fifth Circuit reached a different conclusion regarding the rule prohibiting the use of nicknames or mottos that state or imply an ability to obtain results.<sup>106</sup> The court concluded that this restriction did satisfy the second and third prongs of the *Central Hudson* test and, therefore, did not violate the First Amendment.<sup>107</sup>

In addressing the second prong, the Fifth Circuit found that the survey evidence presented by the LADB supported its assertion that the restriction of nicknames or mottos that state or imply to ability to obtain results directly advanced “the State’s interest in preventing deception of the public.”<sup>108</sup> The court found the survey evidence convincing because the responses represented “the perceptions of a significant number of people” and “consistently reveal[ed] that the advertisements containing . . . mottos [like those prohibited by the rule] misled the public.”<sup>109</sup> Moreover, because the survey questions were specifically tailored to the type of communications prohibited by the rule, including some well-known mottos of Louisiana attorneys (like “One call, that’s all”; “I’ll make them pay”; and “Before you accept a quick check, check [with] me”),<sup>110</sup> the court found that the responses provided compelling evidence that the restrictions actually furthered the state’s interest in “preventing consumer confusion” and satisfied the second prong of the *Central*

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testimonials), but merely required disclaimers for other kinds of potentially misleading content (e.g., reenactments) and noting its preference for disclaimers rather than total bans: “A disclaimer may be an acceptable way to alleviate the consumer deception that could result from this type of advertising.”)

106. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 224 (2011)

107. *Id.*

108. *Id.* (quoting *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 642 F. Supp. 2d 539, 557-58).

109. *Id.* at 225 (relying on survey data showing that “59% of the public agreed that the advertisements [containing mottos like those prohibited by the rule] implied that the featured attorneys can manipulate Louisiana courts. . . . 61% of the public agreed that these advertisements promised that the lawyer would achieve a positive result, and 78% of the Bar Members [interviewed] agreed that [the advertisements] implied that the lawyers could obtain favorable results regardless of facts or law. Of the Bar Members surveyed, 66% agreed that these advertisements were implicitly misleading and 76% disagreed that the public was not misled by the advertisements.”).

110. *See* SCI Research, *supra* note 8, at 14.

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*Hudson* test.<sup>111</sup>

In addressing the third prong, the court focused on the fact that the challenged restriction did not prohibit the use of *all* nicknames and mottos, but only those that state or imply the ability to obtain results.<sup>112</sup> Noting that this meant that the rule was “*narrowly drawn* to materially advance the substantial government interest in protecting the public from misleading lawyer advertising,” the court held that the restriction satisfied the third prong of the *Central Hudson* test.<sup>113</sup> Therefore, because the restriction also satisfied the first and second prongs, the Fifth Circuit held that the prohibition against nicknames or mottos that state or imply an ability to achieve results did not violate the First Amendment.<sup>114</sup>

Although the Fifth Circuit acknowledged that the Second Circuit reached the opposite conclusion in *Alexander v. Cahill* with regards to a similar New York regulation that prohibited advertisements “utilizing a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter,”<sup>115</sup> it attributed this difference in outcome to a difference in evidence and not a difference in reasoning.<sup>116</sup> In *Cahill*, the State failed to support its regulation with any evidence and relied entirely on commonsense arguments.<sup>117</sup> By contrast, in *Public Citizen*, the LADB offered extensive survey evidence that the Fifth Circuit found sufficient to satisfy the *Central Hudson* standard.<sup>118</sup> Observing that in *Cahill* “the [Second Circuit] specifically noted that a regulation that failed *Central Hudson* for want of evidence might lawfully be enacted on a different record,” the Fifth Circuit held that the evidence offered by the LADB justified a different

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111. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 225 (2011).

112. *Pub. Citizen*, 632 F.3d at 225. The Fifth Circuit also rejected the plaintiffs’ argument that the ban on mottos that imply the ability to obtain results is unconstitutionally vague, noting that “the LSBA Handbook provides Louisiana lawyers with significant guidance regarding how the LSBA Committee interprets [the] Rule.” *Id.* at 226.

113. *Id.* at 225-26 (emphasis added). Notably absent from the court’s analysis is an explanation as to why, for this rule, a complete prohibition is permissible despite no mention of evidence that a disclaimer could not prevent the consumer confusion. See *infra* Section V.B.

114. *Id.*

115. See *Alexander v. Cahill*, 598 F.3d 79, 94 (2d Cir. 2010).

116. *Pub. Citizen*, 632 F.3d at 226.

117. *Cahill*, 598 F.3d at 94.

118. *Pub. Citizen*, 632 F.3d at 225-26.

holding than that of the Second Circuit.<sup>119</sup>

### C. DISCLAIMERS: APPROPRIATE TO REQUIRE BUT OVERLY BURDENSOME IN FORM

The Fifth Circuit analyzed the constitutional validity of the rules that (1) prohibited the portrayal of a client by a non-client or the use of fictional scenes or reenactments without a disclaimer (Rule 7.2(c)(1)(I)) and (2) mandated the form those disclaimers must take (Rule 7.2(c)(10)) using the lower rational-basis standard established in *Zauderer* rather than the intermediate-scrutiny standard established in *Central Hudson*.<sup>120</sup> Echoing the *Zauderer* Court, the Fifth Circuit maintained that a disclosure requirement is constitutional as long as it is “reasonably related to the State’s interest in preventing deception of consumers,”<sup>121</sup> and that the lower standard of scrutiny is justified by the *de minimis* nature of a lawyer’s constitutional interest in *not* providing any particular factual information.<sup>122</sup> However, the court emphasized that the permissive standard for disclaimer requirements does not grant the State unlimited authority to impose them at will, maintaining that “unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech.”<sup>123</sup>

Using this standard, the Fifth Circuit found that the requirement on Louisiana attorneys to include a disclaimer when using actors or reenactments in an advertisement (Rule 7.2(c)(1)(I)) did not, itself, offend the First Amendment.<sup>124</sup> Relying on survey data put forward by the LADB, as well as “simple common sense,”<sup>125</sup> the court held that the government regulation was reasonably related to the state’s interests in

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119. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 226 (2011) (quoting *Cahill*, 598 F.3d at 91-92). For concerns about the practical implications of this reasoning, see *infra* Part V.C.1.

120. See *Pub. Citizen*, 632 F.3d at 227.

121. *Id.* (quoting *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)) (emphasis added).

122. *Pub. Citizen*, 632 F.3d at 617.

123. *Pub. Citizen*, 632 F.3d at 228 (quoting *Milavetz v. U.S.*, 130 S. Ct. 1324, 1339-40 (2010)). For more on disclosure requirements, see *supra* Section III.C.2.

124. See *Pub. Citizen*, 632 F.3d at 228.

125. *Id.* Note that common sense arguments did not play a role in the court’s analysis regarding complete prohibitions of advertising content, perhaps illustrating a practical difference between the “rational basis” and “intermediate” standards of review.

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protecting consumers from deception and maintaining the ethical standards of the legal profession<sup>126</sup> and, thus, satisfied the permissive rational-basis standard.<sup>127</sup>

However, the court held that the specifics of Rule 7.2(c)(10), the formatting rule mandating that written disclaimers “use a print size *at least as large* as the largest print used in the advertisement,” that spoken disclaimers be “spoken at the *same or slower rate of speed* as the other spoken content of the advertisement,” and that televised and electronic ads include both written *and* spoken disclaimers,<sup>128</sup> were so excessive that they violated the First Amendment.<sup>129</sup> The court noted that while the LADB provided evidence in support of its position that previous versions of the disclaimer formatting rule were ineffective at preventing consumer deception, it failed to provide any evidence that the revisions to the formatting rule would be any more effective.<sup>130</sup> Furthermore, the court found that the new formatting regulations would require so much time and space to be devoted to disclosures that they would “effectively rule out an attorney’s ability to include one or more of the disclaimer-requiring elements” in a short advertisement and, thus, were overburdensome and unconstitutional.<sup>131</sup>

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126. See *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 228 (2011). To support its argument that the regulation was reasonably related to the state’s interest in protecting consumers from deception, the LADB highlighted the survey result indicating that “59% of the public and 63% of the Bar Members could not always tell when a testimonial in a lawyer advertisement was provided by an actor rather than a real client,” and to support its argument that the regulation was reasonably related to maintaining the ethical standards of the profession, the LADB highlighted survey results showing that “54% of Bar Members believe that these advertisements [containing reenactments] imply that the attorney can obtain a positive result without regard to facts or law” and that “59% of the public said that these advertisements [containing reenactments] decrease their confidence in the integrity of Louisiana lawyers.” *Pub. Citizen*, 632 F.3d at 227-28.

127. See *Pub. Citizen*, 632 F.3d at 228.

128. LA. CODE OF PROF’L CONDUCT R. 7.2(c)(10) (emphasis added), *replaced by new rule by Louisiana Supreme Court Order*, *supra* note 14; see also *Pub. Citizen*, 632 F.3d at 228. The new formatting rule is far less specific and restrictive.

129. *Pub. Citizen*, 632 F.3d at 229.

130. See *id.* (“The record is devoid of evidence that Rule 7.2(c)(10)’s font size, speed of speech, and spoken/written provisions are ‘reasonably related’ to LADB’s substantial interests in preventing consumer deception and preserving the ethical standards of the legal profession.”).

131. *Pub. Citizen*, 632 F.3d at 229 (internal quotations omitted). Note that while the court used rational basis review when upholding the rules requiring disclaimers, it may have used more heightened scrutiny when analyzing, and ultimately invalidating, the rules imposing formatting requirements on the disclaimers. See *id.*

## V. ANALYSIS

A. *PUBLIC CITIZEN*: IN LINE WITH THE JURISPRUDENCE AND PART OF A DEVELOPING CIRCUIT CONSENSUS

The Fifth Circuit's decision in *Public Citizen* is squarely in line with the Supreme Court and circuit court jurisprudence. Appropriately applying the Supreme Court's decisions regarding commercial speech and attorney advertising,<sup>132</sup> the Fifth Circuit in *Public Citizen* held that truthful, verifiable content in lawyer advertisements is fully protected by the First Amendment,<sup>133</sup> that false and inherently misleading content is totally unprotected by the First Amendment, that outright bans of potentially misleading content receive intermediate scrutiny under the *Central Hudson* test,<sup>134</sup> and that burdens on potentially misleading advertising content in the form of disclaimer requirements receive rational-basis scrutiny under *Zauderer*.<sup>135</sup> In applying the *Central Hudson* test, the Fifth Circuit joined its sister circuits and followed the Supreme Court's assertions that a state seeking to implement a restriction on commercial speech must overcome a heavy burden of proof that can only be satisfied by specific, narrowly tailored evidence.<sup>136</sup>

Also, by applying the *Central Hudson* test to prohibitions that targeted attorney advertisements containing unverifiable, self-laudatory statements and appearing on electronic media, two categories of attorney advertisements that the *Bates* Court hinted might "warrant special consideration" and be susceptible to greater restriction,<sup>137</sup> the Fifth Circuit joined with the Second and

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at 227-29. In a way, the court seemed to treat disclaimer requirements that "effectively rule out" certain kinds of speech like complete prohibitions of speech. *See id.* By requiring that the government prove with specific evidence that the disclaimer-formatting rules would accomplish the state's goals and were not unduly burdensome, the court seemed to be employing an analysis similar to the second and third prongs of *Central Hudson's* intermediate-scrutiny test. *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 229 (2011).

132. *See supra* Section III.

133. *Pub. Citizen*, 632 F.3d at 221. *See also supra* Section IV.B.2.

134. *Pub. Citizen*, 632 F.3d at 218. *See also supra* Section IV.A.

135. *Pub. Citizen*, 632 F.3d at 227. *See also supra* Section IV.C.

136. *Compare Pub. Citizen*, 632 F.3d at 223 and *supra* Section IV.B with *Edenfield v. Fane*, 507 U.S. 761, 770-71; *Alexander v. Cahill*, 598 F.3d 79, 91 (2d Cir. 2010); & *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000).

137. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84. *See also supra* Section III.C.1 & note 74.

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Eleventh Circuits as part of a growing circuit consensus that the *Central Hudson* test applies to restrictions of *any* potentially misleading lawyer advertisement, no matter what it contains or where it appears.<sup>138</sup> This position stands in stark contrast to the position of some state supreme courts,<sup>139</sup> and at least one scholar has called upon the Supreme Court to settle the debate.<sup>140</sup>

Finally, in line with the Supreme Court's preference for disclaimers over outright bans of potentially misleading advertising content,<sup>141</sup> the Fifth Circuit in *Public Citizen* invalidated the rules that completely prohibited the use of testimonials or references to past results and portrayals of a judge or jury, noting repeatedly that the state should consider using disclaimers to accomplish its goal of protecting the public from being deceived by potentially misleading content in advertisements.<sup>142</sup>

**B. A NOTABLE OMISSION FROM THE THIRD-PRONG ANALYSIS OF THE PROHIBITION OF NICKNAMES OR MOTTOS THAT STATE OR IMPLY THE ABILITY TO OBTAIN RESULTS**

In light of the Fifth Circuit's expressed preference for using disclaimers to protect the public from potentially misleading speech rather than outright bans, it seems noteworthy that in analyzing the restriction of nicknames or mottos that state or imply the ability to obtain results, the Fifth Circuit upheld the regulation without ever considering whether a disclaimer requirement could protect the public from the potentially misleading nature of such content.<sup>143</sup> However, in finding that the rule satisfied the *Central Hudson* test, the court relied on

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138. See *Alexander v. Cahill*, 598 F.3d 79, 91 (2d Cir. 2010); *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000). See also *supra* Section IV.B.2.

139. See *Fla. Bar v. Pape*, 918 So. 2d 240 (Fla. 2005) & *Comm. of Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey*, 377 N.W. 2d 643 (Iowa 1985). See also *supra* Section III.C.1.

140. See *Brock*, *supra* note 43, at 209 (siding with the states and imploring the Supreme Court to "draw the line of permissible lawyer advertising . . . at measurable and objectively verifiable claims in the media"). But see *Stern*, *supra* note 33, at 1262-76 (noting that the federal perspective seems more in line with the Supreme Court jurisprudence).

141. See *supra* Section III.C.2.

142. See *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 223-24 (5th Cir. 2011). See also *supra* Section IV.C.1-2.

143. See *supra* Section IV.C.3; see also *Pub. Citizen*, 632 F.3d at 225-27 and *supra* note 113.

survey data that it held showed that attorney advertisements containing the prohibited content *actually* misled the public.<sup>144</sup> Therefore, based on the Supreme Court's assertion that an advertising restriction does not violate the First Amendment if the record demonstrates that the content it restricts has been deceptive in the past,<sup>145</sup> a detailed third-prong analysis, including an exploration into the possible efficacy of disclaimers, may have been unnecessary.

In a way, the survey data the Fifth Circuit relied on may have changed the status of mottos that imply the ability to obtain results from "potentially misleading" to "inherently misleading," or, perhaps more accurately, from "potentially misleading" to "*actually* misleading." If the mottos were inherently misleading or actually misleading, they were not entitled to any First Amendment protection in the first place. Therefore, because the court viewed the survey data as evidence that advertisements containing the prohibited mottos have actually misled the public, the court probably could have upheld the constitutionality of the restrictions without applying the three-prong *Central Hudson* test.<sup>146</sup>

### C. CRITICISMS OF THE *CENTRAL HUDSON* TEST

Even if the Fifth Circuit's analysis of the restriction on the use of nicknames or mottos that state or imply the ability to obtain results did not deviate significantly from the usual application of the *Central Hudson* test, the court's handling of the restriction highlights two open questions regarding the test in general: (1) whether survey data alone can provide substantial enough evidence to support a restriction of First Amendment rights (especially if the survey data is commissioned by an interested party); and (2) whether the *Central Hudson* test is too complicated and should be replaced by a simpler, less subjective framework under which to analyze the constitutionality of

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144. See *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 22-25 (5th Cir. 2011).

145. See *In re R.M.J.*, 455 U.S. 191, 202-03 (1982).

146. For a related analysis, cf. Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 465-67 (2006). Note that while the Fifth Circuit stated early in its opinion that "it is . . . *obvious* that a nickname or motto that might imply an ability to obtain results can be employed in a non-deceptive fashion," *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 219 (2011) (emphasis added), the survey data the court later cited may indicate that what seemed obvious was actually not. See *Pub. Citizen*, 632 F.3d at 225.

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restrictions on commercial speech.

### 1. IS SURVEY DATA ENOUGH TO SUPPORT A BAN ON SPEECH?

The federal courts have been notably permissive with the types of survey data they allow to support a restriction on commercial speech. For example, according to the Supreme Court, survey data used to support an advertising regulation need not necessarily come from the state in which the regulation applies,<sup>147</sup> and according to the Second and Fifth Circuits, the survey data used to support a regulation need not even exist prior to its enactment.<sup>148</sup> While the Supreme Court has never explicitly held that survey data, *by itself*, is sufficient to uphold a prohibition of commercial speech,<sup>149</sup> the Fifth Circuit has established such a precedent with *Public Citizen*.

In upholding the restriction on the use of nicknames or mottos that state or imply the ability to obtain results, the only evidence the court relied on was the LSBA's survey data.<sup>150</sup> This may be seen as a troubling precedent, especially because, as the Fourth Circuit has already warned, it is dangerous to base a decision on "the shifting sands of polling data, which change according to techniques, sample populations, and even the phrasing of questions."<sup>151</sup> Notably absent from the Fifth Circuit's opinion is any analysis of the statistical methodology or scientific validity of the LSBA's survey.<sup>152</sup> Perhaps even more troubling, much of the strongest evidence used to support the prohibition of lawyers using certain trade names or mottos came from survey responses from other members of the Bar,<sup>153</sup> whose opinions, at

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147. Fla. Bar v. Went For It, 515 U.S. 618, 628 (1995).

148. Pruet v. Harris Cnty. Bail Bond Bd., 499 F.3d 403, 410 (5th Cir. 2007) (cited in *Public Citizen*, 632 F.3d at 221); Alexander v. Cahill, 598 F.3d 79, 91-92 (2d Cir. 2010).

149. Of course, the Court has also never explicitly held that survey data by itself may *not* uphold such a prohibition, and in *Went For It*, the Court certainly considered polling data in its decision, drawing criticism from Justice Kennedy in his dissent. See *Went For It*, 515 U.S. at 640-42. *But see* Ficker v. Curran, 119 F.3d 1150, 1154 n.2 (4th Cir. 1997) (noting that the *Went For It* Court used the surveys in only a narrow manner and not "rest[ ] its decision on the polling data").

150. See *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 224-26 (2011).

151. See *Ficker*, 119 F.3d at 1154 (4th Cir.); see also *supra* note 47.

152. See also *Went For It*, 515 U.S. at 640-42 (Kennedy, J., dissenting) (noting that the record "includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results").

153. See *Pub. Citizen*, 632 F.3d at 225 and *supra* note 109.

best, may not be instructive of the public at large and, at worst, may have been motivated by less than legitimate interests.

But even if the LSBA's survey was scientifically sound, and even if a consensus emerges that survey data *is* strong enough evidence to uphold a restriction of commercial speech, the precedent set by the Fifth Circuit's reliance on survey data may still be seen as troubling for practical reasons. As the Second Circuit observed in *Cahill* and the Fifth Circuit demonstrated in *Public Citizen*, a restriction that is invalidated under *Central Hudson* for lack of evidence may later be reenacted validly, if only the state finds a way to support the restriction with better evidence.<sup>154</sup> Therefore, especially when coupled with the Supreme Court's assertion that survey data from other jurisdictions may be used to support an advertising restriction, following *Public Citizen* there seems to be little preventing the New York Bar from readopting their restriction on the use of trade names or mottos that *Cahill* struck down for lack of evidence—if the rule is challenged again, the New York Bar can simply point to the LSBA's survey as evidence.

Similarly, even though the *Public Citizen* court held that the Louisiana rules restricting testimonials and the portrayal of a judge or jury violated the Constitution, it only did so because the survey evidence in support of those restrictions was insufficient, unspecific, or not narrowly targeted enough.<sup>155</sup> Therefore, there is little preventing the LSBA from continuing to conduct survey after survey until it obtains the results it needs to uphold a reinstated version of the rules. In this way, the precedent furthered by *Public Citizen* may open the door to a nationwide cycle of endless litigation, re-litigation, and “survey-shopping,”

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154. *Alexander v. Cahill*, 598 F.3d 79, 91-92 (2d Cir. 2010) (adopted by *Pub. Citizen, Inc. v. La. Disciplinary Bd.*, 632 F.3d 212, 226 (2011)) (“Invalidating a regulation of commercial speech for lack of evidence under . . . *Central Hudson* does not foreclose a similar regulation being enacted validly in the future. Rather, such invalidation returns the matter to the applicable legislating body . . . to take a ‘second look’ with the eyes of the people on it.”). Recall that this is how the Fifth Circuit justified its finding that the Louisiana restriction prohibiting the use of nicknames or mottos that state or imply the ability to obtain results was constitutionally permissible, even though, just one year earlier, the Second Circuit invalidated a nearly identical rule in New York using the same *Central Hudson* analysis—the New York Bar did not conduct a survey to obtain evidence in support of the restriction, but the Louisiana Bar did. *See Pub. Citizen*, 632 F.3d at 226; *see also supra* Section IV.B.3.

155. *See Pub. Citizen*, 632 F.3d at 223-24 and *supra* Sections IV.B.1-2.

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which may not only add costs and inefficiencies to the entire federal system, but may also undermine the instructiveness and finality of any decision regarding the constitutionality of a restriction on commercial speech.

### 2. IS THE *CENTRAL HUDSON* TEST TOO COMPLICATED?

Perhaps a more basic criticism of the *Central Hudson* test highlighted by the *Public Citizen* decision is that the test is simply too complicated. At least one scholar has commented that justices have become increasingly dissatisfied with the malleability of the test, which is “heavily spiced with reasonableness considerations . . . [and] lead[s] to great subjectivity in analysis and the risk of inconsistent results.”<sup>156</sup> While it is perhaps more obvious that the second and third prongs of the test lend themselves to the greatest subjectivity,<sup>157</sup> even the court’s threshold inquiry as to whether the commercial speech is inherently misleading or merely potentially misleading can sometimes lead reasonable courts to different conclusions.<sup>158</sup>

The arbitrariness inherent in the *Central Hudson* test may be seen as especially invidious considering the fundamental nature of the constitutional rights at stake, and so a simpler, more predictable, analysis may be more appropriate. While a full exposition of other possibilities is beyond the scope of this Casenote, perhaps the Supreme Court should consider abandoning the “common sense” distinction between commercial speech and other forms of speech and giving commercial speech greater First Amendment protection by subjecting prohibitions on advertising to more heightened judicial scrutiny.<sup>159</sup> At the same

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156. Troyd, *supra* note 27, at 128-32. *See also, e.g., supra* Section V.C.1.

157. *See* Troyd, *supra* note 27, at 131-32.

158. *Compare* Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 642 F. Supp. 2d 539, 554 (E.D. La. 2009) (holding that “a portrayal of a judge or jury in an ad is inherently misleading”) *with* Pub. Citizen, Inc. v. La. Disciplinary Bd., 632 F.3d 212, 219 (2011) (5th Cir.) (“The portrayal of a judge in an advertisement may also be presented in a way that is not deceptive.”); *see also supra* Section IV.A. Interestingly, the district court itself may have been unable to decide whether the portrayal of a judge or jury is inherently, or merely potentially, misleading. Even though the district court held that the portrayal of a judge or jury in a lawyer advertisement is inherently misleading, it nonetheless analyzed the regulation prohibiting such content under the three-prong *Central Hudson* test, which only applies to restrictions of potentially misleading commercial speech. *See supra* note 21. Perhaps the district court was just being careful, but either way, this goes to highlight the (over)complexity of the *Central Hudson* analysis.

159. *See* Troyd, *supra* note 27, at 142-43 (offering a similar proposal involving

time, the Court may want to consider encouraging states to require more frequent use of disclaimers in potentially misleading advertisements. Under such a regime, lawyers would be free to advertise however they choose (except for, perhaps, a prohibition against false or fraudulent advertising), and effective, reasonable disclaimer requirements, in addition to tort and contract law, would protect the public from any potentially misleading, or actually misleading, advertising content.

## VI. CONCLUSION

No matter what course the Supreme Court may choose to take, the *Public Citizen* decision makes it clear that even a proper application of the *Central Hudson* test to regulations of attorney advertising is complicated, is teeming with subjective analysis, and leaves the door open for repeat litigation in the future. It has been almost two decades since the Supreme Court has granted certiorari in a lawyer advertising case. Perhaps it is time for the Court to revisit the issue to inject some guidance, clarity, and consistency into the jurisprudence. For now, however, *Public Citizen* establishes the current constitutional limits of the LRPC's regulations regarding advertising—at least until the Bar conducts another survey.

Marc P. Florman