National First Amendment
Moot Court Competition

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2007

National First Amendment Moot Court

Competition Problem

IN THE STATE SUPREME COURT OF GEORGIA

CHRISTIAN WRIGHT USSERY, Petitioner, v. STATE BAR OF GEORGIA, Respondent	)))))))	Case No.: No. VLS - 12-4-4674-62

MEMORANDUM OPINION AND ORDER

February 2, 2006

BEFORE: Rottit, Dortch, Darius, Gother, and Joyce, Supreme Court of Georgia Justices

ROTTIT, J. delivered the Opinion of the Court, in which GOTHER, J. and DARIUS, J. joined.

DORTCH, J, filed a dissenting opinion.

JOYCE, J. filed a dissenting opinion.

Justice ROTTIT delivered the opinion of the Court:

This case is before the Court on an Exception filed by Christian Wright Ussery, pursuant to Rule 4-219, to a Review Panel Report recommending a one-year suspension of Mr. Ussery from the practice of law in the State of Georgia. The Review Panel's recommendation is based on the finding that Mr. Ussery violated the Georgia False Advertising of Legal Services statute (Ga. Code Ann. §10-1-427(a)) and the accompanying Georgia Rule of Professional Conduct 7.1(a). The Review Panel's recommendation also is based on a second finding that Mr. Ussery's actions violated Georgia Rule of Professional Conduct 7.3(b). Insofar as it is applicable in this case, Georgia Code §10-1-427(a) and the accompanying Georgia Rule of Professional Conduct 7.1(a) prohibit an attorney from using advertising that is false, fraudulent, deceptive, or

misleading. Professional Rule 7.3(b) requires that a written communication to solicit a prospective client include at the top of each page the term "Advertisement" in type no smaller than the largest type used in the advertisement.

Mr. Ussery's Exception to the Review Panel Report and his written and oral arguments in support of this exception assert that as applied to his actions in this case the Georgia statute and the two Rules of Professional Conduct violate the First Amendment to the U.S. Constitution.

I. FACTUAL BACKGROUND

The facts of this case are not in dispute. The parties have stipulated to the following detailed statement of the relevant facts.

Christian W. Ussery is an attorney licensed by the State of Georgia since 1975. He began his career in Denne, Georgia as an associate at the law offices of Mitchell & McCarthy. He has been an active member of the State Bar as a solo practitioner since 1983. Although he conducts a general practice, for the last several years Mr. Ussery has focused on the law of entitlements, particularly Social Security, Medicare, Medicaid, and other state and federal assistance programs. Denne, Georgia is a city of 23,000 residents located in the heart of Bryan County. Bryan County currently is one of the most economically depressed areas in the state.

The economy in the entire county experienced a precipitous downturn after the departure of Taylor Textile Mills. Taylor Textile Mills started as a cotton mill in the early 1800's. It gradually grew to be one of the largest manufacturers of textiles in the state. Taylor Textile Mills was for many years the largest employer in Bryan County. Because of competition from foreign textile mills utilizing lower cost labor, Taylor Textiles fell into financial hardship beginning around 1995. Faced with bankruptcy, the company reorganized and a significant number of the jobs formerly held by Bryan County residents were "outsourced" to countries

where labor and other manufacturing costs were significantly lower. The bulk of the work formerly performed for Taylor Textiles in Bryan County was outsourced to a factory operated by a Taylor Textiles subsidiary in Mexico. The Taylor Textiles mill in Denne closed completely in early 2002. Among other serious consequences, the loss of jobs from the Taylor Textiles mill had an adverse affect on the availability of health care benefits to many Bryan County residents. Denne has the largest number of citizens in the state receiving disability payments, unemployment compensation, and Social Security.

After the departure of Taylor Textiles, the economy in Bryan County reverted to being primarily agricultural. The agricultural activity in turn attracted significant numbers of low skill, low wage, legal and illegal Hispanic immigrant workers. This immigrant influx severely strained the already underfunded county schools and placed substantial added burdens on the health and social services agencies of Bryan County. The result was an increasing tide of resentment toward the new arrivals in the county. A series of articles in spring of 2005 in the Denne Daily newspaper both reflected and contributed to the increasing resentment. The articles focused on both the depressed state of the Bryan County economy and the increasing numbers of Hispanic immigrants filling low wage, agricultural jobs in the county. The culmination of that series was an editorial titled: “Illegal Immigrants: They want it all!”

Not surprisingly, Ussery’s law practice experienced a significant decline as did almost all other non-agricultural economic activity in Bryan County after Taylor Textiles left Denne. In an attempt to increase the visibility of his practice, Ussery designed a one-page printed flyer, measuring eight and one-half inches by eleven inches, that could be easily handed out at various gathering spots in the county. The complete text of Ussery’s handbill consisted of the following questions or statements.

- “DID YOU KNOW--- that Social Security will go bankrupt in the near future?”

- "DID YOU KNOW--- that the government is considering making it easier for illegal aliens to get your hard earned Social Security benefits?"
- "ARE YOU OUTRAGED--- by what they are doing with your money?"
- "COME SEE ME--- and let's talk about your rights, before it is too late"

The first phrase in each of the questions or statements was printed in red ink using all block capital letters in 24 point bold-faced type. The remainder of each question or statement was printed in black ink using regular 16 point type. At the bottom of the page, the handbill listed the name "CHRISTIAN USSERY" in the same block capital letters and the same 24 point bold-faced type used for the first phrase in each of the "bullet points" above. On the lines beneath Ussery's name appeared the words "Attorney at Law" and the address and phone number of Ussery's law office, all in simple black 14 point type. The word "Advertisement" did not appear at the top of the page or at any other place on the single page flyer.

On July 3, 2005, former employees of Taylor Textiles held a protest outside the Denne Chamber of Commerce offices on the town square in Denne. Approximately 2,000 people from all over the county gathered in the town square to express their sentiments regarding the lack of economic growth and the widespread unemployment in the area. During the protest, Mr. Ussery inserted one of his flyers under the windshield wiper of every car located in the parking areas designated for participants in the rally. Calesa Weaver, a lawyer and community organizer for the Latino American Association ("LAA") attended the rally and found one of the flyers on her windshield when she returned to her parked car.

LAA is a community organization that works with Latino families in adapting to life in the United States. Its principal mission is to promote and support the domestic and international development of Latino individuals and businesses in Georgia. To fulfill this mission, LAA is committed to serving as a link between non-Latino entities and the Latino community. LAA has

a number of different departments designed to work with and for the Latino community. For example, the Legislative Committee serves as the non-partisan, active voice of the LAA to promote the interests of the Latino community before federal, state, and local governments. The LAA Legal Department works primarily with issues of immigration.

On July 12, 2005, the Governor's Office of Consumer Affairs (OCA) received a formal complaint signed by Calesa Weaver. The complaint alleged that Ussery's printed flyer constituted a false, deceptive, and misleading advertisement in violation of the Georgia False Advertising Statute. Georgia Code §10-1-427 states, in part, that no person or firm with intent to perform legal services should advertise using information that is untrue, fraudulent, deceptive, or misleading and which would be known to be misleading with the exercise of reasonable care. Ga. Code Ann. § 10-1-427. On August 12, 2005 OCA completed its review of the advertisement and complaint. On August 21, 2005 OCA filed a signed grievance with the State Bar of Georgia against Christian Wright Ussery for violation of Georgia Code § 10-1-427. Upon receipt of the grievance, the State Bar of Georgia initiated disciplinary proceedings under the Georgia Rules of Professional Conduct.[1] Those proceedings ultimately resulted in a Review Panel Report finding Ussery in violation of Georgia Code § 10-1-427, Professional Conduct Rule 7.1 (a), and Professional Conduct Rule 7.3 (b). The Report recommended that this Court impose a sanction

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[1] The Supreme Court of Georgia possesses authority "to regulate and govern the practice of law" in the state. O.C.G.A. § 15-19-31 (1994). Pursuant to legislative permission, the supreme court established "as an administrative arm of the court a unified self-governing bar association ... known as the 'State Bar of Georgia,' composed of all persons licensed to practice law" in the state. O.C.G.A. § 15-19-30. The State Bar recommends standards of lawyer conduct, but they do not become binding on lawyers until the Supreme Court adopts them. *See* O.C.G.A. § 15-19-31. *Falanga v. State Bar of Ga.* 150 F.3d 1333, 1336 (C.A.11 (Ga.),1998)

of a one-year suspension of Ussery's license to practice law in the State of Georgia. When the Review Panel's Report was filed with this Court, Ussery filed his formal "Exception" supported by written arguments and accompanied by a request for oral argument. This Court granted Ussery's request, and oral argument was heard in this Court on December 4, 2005.

II. LEGAL ANALYSIS

Petitioner Ussery asserts that because his flyer was not "misleading" as that term is used in Georgia Code § 10-427 and Rule 7.1(a), the Review Panel erred in its finding that Ussery violated those bans on "misleading" advertising. Ussery also asserts that because the requirements of Rule 7.3(b) should not be understood to apply to the flyer in question in this case, the Review Panel erred in its finding that Petitioner violated Rule 7.3(b). No argument advanced by Petitioner Ussery has persuaded us that we should reject the carefully considered findings of the Review Panel on those two questions. Thus, we hold that Petitioner Ussery violated the bans on "misleading" advertising in Georgia Code §10-1-427 and Rule 7.1(a). We also hold that the restrictions of Rule 7.3(b) are applicable to Petitioner Ussery's flyer, and Petitioner has stipulated that his flyer did not conform to those requirements.

We now must address Petitioner's primary contentions that as applied in this case GCA §10-1-427 and Rule 7.1(a) violate the First Amendment and that Rule 7.3(b) as applied in this case violates the First Amendment.

A. Attorney Advertising as Commercial Speech

Ussery first asserts that the message or messages in his flyer constitute an exercise in core political speech and that, as such, the flyer's contents are absolutely protected by the First Amendment from regulation by both §10-1-427 and Rule 7.1(a) or under Rule 7.3 (b). There is a short answer to this contention. The U.S. Supreme Court has firmly established that attorney

advertising should be treated as commercial speech for constitutional purposes and not as political speech. *Bates v. State of Arizona*, 433 U.S. 350 (1980). Our esteemed colleague argues in dissent that the text of Petitioner's handbills should be treated as fully protected political speech. Immigrant access to the benefits of the American Social Security system is indeed a topic of intense politicking. However, that does not change the character of Petitioner's speech. Petitioner's speech was directed at influencing public conduct but only in the interest of pecuniary gain. We find that the handbills in question constitute commercial speech. Thus, any regulatory restrictions on Ussery's advertising flyer must be measured by the standards articulated in the Supreme Court's *Central Hudson* decision for the protection of commercial speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980). We therefore proceed to an application of the *Central Hudson* analysis to each of the two regulations that Ussery has been held to have violated.

B. False, Deceptive, and Misleading Advertisements

In *Central Hudson,* the Supreme Court made it clear that for commercial speech to fall within the protection of the First Amendment at all, it "must concern lawful activity and not be misleading." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation,* 512 U.S. 136 (1994) *Edenfield v. Fane,* 507 U.S. 761 (1993); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990); *Board of Trustees v. Fox,* 492 U.S. 469, (1989); *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Because of the value inherent in truthful, relevant information, a state may ban only false, deceptive, or misleading commercial speech. *Mason v. Florida Bar,* 208 F.3d 952, 955 (C.A.11 (Fla.),2000) (*citing Ibanez,* 512 U.S. at 142). However, a state may restrict commercial speech that is not false, deceptive, or misleading

upon a showing that the restriction "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* In other words, if the contents of Ussery's flyer are found misleading as that term was used by the Supreme Court in *Central Hudson*, the contents of the flyer will not receive any constitutional protection, and both sets of regulations challenged by Ussery will be held constitutional as applied in this case.

Ussery asserts that his advertisement is not false, deceptive, or misleading. Ussery asserts that his statements neither omit necessary information nor create unjustified expectations as to his abilities, although they may be perhaps potentially misleading with regard to the condition of the Social Security system. Ussery correctly notes that the Supreme Court has repeatedly recognized that potentially misleading speech is insufficient to warrant a state's outright prohibition of commercial speech. *In re R. M. J.*, 455 U.S. 191 (1982); *Borgner v. Brooks*, 284 F.3d 1204, 1211 (11th Cir. 2002); E.g., *Mason v. Fla. Bar*, 208 F.3d 952 (11th Cir. 2000). Therefore, he concludes, the state is not entitled to freely regulate the advertisement in question on the grounds that it is misleading under *Central Hudson*.

The First Amendment's concern for commercial speech is about the informational function of advertising. *Central Hudson,* 447 U.S. at 563. The government may prohibit commercial speech that is more likely to deceive the public than inform it. *Id.* (See also *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979); *Ohralik v. Ohio State Bar*, 436 U.S. 447, 464-465 (1978). Specifically the Supreme Court has said that there can be no constitutional objection to suppression of commercial messages that do not accurately inform the public about lawful activity. *Central Hudson*, 447 U.S. at 563.

A legal ad can be considered a false advertisement if it misrepresents the facts by omitting necessary information or creates unjustified expectations of attorney abilities.

Ussery's ad served no informational function whatsoever. The flyer offered no evidence that could be depended upon with any degree of certainty. Taken together with the other statements in the flyer, the statement that "the government is considering legislation that makes it easier for illegal aliens to gain access to your hard earned Social Security benefits" implies that illegal aliens are responsible for any perceived impairments of the Social Security system. Ussery's assertion that the Social Security system is facing imminent bankruptcy is likely to be understood as a suggestion that prompt action is necessary to assure the receipt of benefits. The handbill is misleading in that creates the clear impression that somehow governmental immigration policies influence viability of this country's Social Security system. Finally, Petitioner's suggestion that potential clients should see him about their rights before it is too late creates an unjustified expectation about the power of his expertise or ability to influence the Social Security administrative mechanism.

As part of its duty to regulate attorneys, it is an interest of the Bar to ensure that the public has access to relevant information to assist in the comparison and selection of attorneys. *Bates*, 433 U.S. 374-75. The state must ensure and encourage the flow of helpful, relevant information about attorneys. See *Peel*, 496 U.S. at 110 (" If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."). Ussery's statements were neither helpful nor relevant to the objective selection of legal services by a consumer.

While there may indeed be some experts that have predicted that without reform the United States Social Security System may go bankrupt at some point in time, there are a number of contingencies that affect the likeliness of that occurring. Ussery's statements are mere speculation. Even the experts who address such an issue have already said that while it is

possible, it is not likely to occur. When experts are unsure about the complexities of our national Social Security system, it is unreasonable to expect that consumers of legal services in the state of Georgia would be able to sort through the implications of Mr. Ussery's statements. *Bates,* 433 U.S. at 383 n.37.

The most reprehensible aspect of Ussery's flyer is its attempt to exploit both the anxieties of its audience members about their economic suffering and their growing anxieties about legal and illegal immigration. The resulting poisonous mixture of anti immigrant sentiment and economic anxiety may well get Ussery the attention he desires, but it also will certainly exacerbate racial and ethnic tensions in Bryan County and it discredits the profession of which Ussery is a member. Mr. Ussery intentionally targeted participants at a protest who were voicing their pain regarding their economic issues. Petitioner targeted individuals that he believed would be particularly susceptible to his message. This Court finds that Ussery's handbill is an affront to the standards of conduct expected of the members of the learned profession of the law.

We hereby hold that GCA §10-1-427 and Rule 7.1 (a) are constitutional as applied to the contents of Christian Ussery's printed flyer. As misleading commercial speech, the flyer is entitled to no First Amendment protection.

B. Requiring the inclusion of the heading "Advertisement"

Even if we are wrong in our conclusion that Ussery's handbill is misleading under *Central Hudson* entitling it to the protection afforded to commercial speech, Ussery's "conviction" for the violation of Rule 7.3(b) remains constitutionally sound.

Georgia Code of Professional Conduct Rule 7.3(b) requires that written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment

shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

As applied in this case, Rule7.3(b) requires that Ussery include in his flyer a statement (that the flyer is an “Advertisement”) that Ussery wishes to exclude from his communication. The right of free speech protected by the First Amendment against state interference includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, a requirement that one speak words that one wishes not to speak is treated for constitutional purposes in the same manner as a prohibition against speaking words that one wishes to utter.

According to *Central Hudson*, commercial speech that does not concern unlawful activity and is not misleading may be regulated if the government satisfies a test consisting of three related prongs: (1) the government must establish a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be "narrowly drawn.” *Central Hudson,* 447 U.S. at 563-64; *Florida Bar v. Went For It,* 515 U.S. 616, 624 (1995). The interests commonly asserted in support of challenged rules of professional responsibility include: (1) the regulation of the legal profession; (2) prevention of consumer harm by assuring that communications about legal services are accurate, complete and not misleading to potential clients; (3) protection of the privacy rights of Georgia citizens; (4) prevention of consumer harm by restricting those aspects of legal advertising that involve fraud, undue influence, intimidation, overreaching, and other forms of unprofessional conduct; and (5) increasing confidence in the profession.

A state, as part of its power to protect public health and safety, as well as other valid interests, has broad power to regulate the practice of professions. *Id.* at 625; *Ohralik,* 436 U.S. at 460. States bear a "special responsibility for maintaining standards among members of the licensed professions." *Ohralik,* 436 U.S. at 460 (citing *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).; *Semler v. Oregon State Bd. of Dental Examiners,* 294 U.S. 608 (1935). The state's interest in regulating lawyers "is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts." *Ohralik,* 436 U.S. at 460.

The word "Advertisement" is commonly used; it immediately gives the reader information about the context of the written material included with it. This allows the consumer to choose whether to discard the material without reading it and allows the consumer to evaluate the communication with knowledge from the outset that it is an advertisement. *See Texans Against Censorship v. State Bar,* 888 F. Supp. 1328, 1360-61 (E.D. Tex. 1995) (stating that it is the consumer's right to choose to dispose of attorney solicitation letter without reading it). This gives the reader the right to choose whether they are interested in the information it contains and allows the consumer to read the material with the level of skepticism appropriate to advertising generally. There can be no question that the required affirmative "Advertisement" disclaimer on all direct communications to prospective clients enhances the public's ability to decide whether to read the rest of the communication and enhances the public's ability to assess the reliability of the information contained in the communication.

Applying the final prong of the *Central Hudson* test, we hold that the regulatory requirement is narrowly drawn and not more extensive than necessary to serve the state's interests. The state has not placed a total ban on this mode of protected commercial speech. We are satisfied with the state's response to the problem and we are skeptical that there are any less-

burdensome alternatives available to the state. This requirement represents a reasonable fit between the state's objectives and the means chosen. We thus conclude that Rule 7.3(b) meets the three standards articulated in *Central Hudson* for constitutionally unobjectionable state regulations of commercial speech.

IV. ORDER

It is hereby ordered that Christian Wright Ussery, be suspended from the practice of law in the State of Georgia for a period of one year from today's date. Ussery is reminded of his duties pursuant to Georgia Rule of Professional Conduct 4-219 (c).

Suspension.

Chief Justice Joy Rottit, Justice Joe Gother, and Justice LaKeisha C. Darius

DISSENT1: Justice K. Dortch

DISSENT2: Justice A. Joyce

Decided this 6th day of September, 2006

DORTCH, J. , dissenting

I respectfully dissent.

As a threshold matter, I must address the majority's contention that Petitioner's advertisement is misleading and therefore beyond the realm of First Amendment protection. In my view, the statements singled out by respondent provide helpful, relevant, and, objective information to prospective clients who may be concerned about the status of their Social Security benefits. Mr. Ussery's advertisement merely informs the public that his legal services are available in that regard. Though I do believe that Mr. Ussery's advertisement is an attempt to serve his own economic interests by firing up chauvinistic patriotism, I do not believe, however, that this is sufficient to rise to the level of misleading speech, however alarming it may have been. A fair characterization for sure is that these statements are his opinion, and he is certainly entitled to that. In sum, I simply cannot understand or adopt the majority's finding that Mr. Ussery's advertisement and the statements contained therein are misleading and therefore are not constitutionally protected.

In addition, the majority opinion is clearly mistaken in its assumption that the second regulation at issue here, Rule 7.3(b), is applicable in this case. I agree with Petitioner Ussery that this rule is clearly aimed at letters addressed to specific individuals, not printed handbills distributed to the general public. I find that Mr. Ussery's advertisement is something more akin to a newspaper or yellow pages ad, whereby advertisements are "distributed generally to persons not known to need the particular legal services offered, but who are so situated that they might in general find such services useful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988); see also *Bates v. State Bar of Arizona*, 436 U.S. 350 (1977). Surely, there can be nothing "direct" about this mode of advertising. In the usual case involving direct communication with

prospective clients, the attorney in question has engaged in either face-to-face contact or targeted direct-mail solicitation. See *Ohralik v. Ohio State Bar Ass'n*, 463 U.S. 447 (1978); *Shapero*, 486 U.S. 466 (1988); *Florida Bar v. Went For It, Inc*., 515 U.S. 618 (11th Cir 1995); *Falanga v. State Bar*, 150 F.3d 1333 (11th Cir. 1998). As that is not the case here, I am at odds with the court's interpretation of Rule 7.3(b)'s "Direct Communications" language. A proper interpretation of Rule 7.3(b) would have prevented us from reaching the difficult question of the Rule's constitutionality as applied in this case.

If the requirements of Rule 7.3(b) are applicable to Ussery's flyer as the majority in this case holds, I am convinced that the requirements as applied to this case constitute compelled speech in violation of the First Amendment. It is well established that compelled speech contravenes core First Amendment values just as do restrictions on speech. Just as the First Amendment prevents the government from prohibiting speech, the Amendment prevents the government from compelling individuals to express certain views, *United States v. United Foods*, 533 U.S. 405, 410 (U.S. 2001) (citing *Wooley v. Maynard*, 430 U.S. 705, 714(1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 87 (1943)). Although we have held and agreed with other courts in the past that the government may require certain statements or disclaimers where necessary to prevent consumers from being wrongfully confused or misled, I have already expressed my view that there is no potential for confusion or deception in Mr. Ussery's case. *Smith v. Regents of University of California*, 844 P.2d 500, 506 (1993). Therefore, I would hold that the state's requirement of an affirmative "advertisement" disclaimer is unconstitutional as applied in this case.

I agree that a First Amendment challenge to a regulation on commercial speech, such as this one, necessarily involves a four-part analysis under *Central Hudson*. I disagree quite strongly though with the court's application of this framework here. The interests the majority

asserts today in support of Rule 7.3(b) are patently insubstantial and are not directly advanced by the application of this rule. Thus, this rule cannot stand under a careful *Central Hudson* analysis. Frankly, I think the state has yet again advanced another spurious argument to disguise its unconstitutional attempt to regulate free commercial speech.

The majority argues that the state has a substantial governmental interest in reducing consumer confusion and assisting the consumer in the evaluation of the printed advertising that he or she receives from a member of the Bar. While the state may claim such an interest in the abstract, and while I might agree in the abstract that such a state interest is substantial, that abstraction is of little use here. I think the majority severely underestimates the intelligence of its citizens. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 351 (U.S. 1986) (Brennan J., dissenting). I seriously doubt that the recipient of Mr. Ussery's advertisement will be confused in any way with regard to the nature or impetus of the communication involved here. It is quite clear on its face that the communication is of a commercial, rather than personal, nature and that Mr. Ussery is advertising his legal services to the public. Requiring that a printed handbill left on one's windshield in a public place be conspicuously labeled "Advertisement" is of marginal value, if any value at all, to the average recipient.

To satisfy the *Central Hudson* standard, the state must meet the burden of showing not merely that 7.3(b) will advance its interest, *but also* that 7.3(b) will advance its interests to a "material degree." *44 Liquormart v. R.I.*, 517 U.S. 584, 505 (1996). In this case, that means it must be demonstrated that 7.3(b) will significantly reduce the potential for consumer confusion. This the state has not demonstrated. Thus, even if I were to agree in the abstract that the asserted state interest is substantial, I would still hold that 7.3(b) is unconstitutional. I simply cannot see how requiring a Social Security lawyer such as Petitioner to include the word "Advertisement" on a handbill will *significantly* reduce the potential for consumer confusion or will enhance the

consumer's ability to evaluate the contents of the advertisement. *See Ficker v. Curran*, 119 F.3d 1150, 1155 (4th Cir. 1997) (arguing that the statutory means for restricting commercial speech must be drawn with sufficient precision to withstand scrutiny). In my view, the relationship is just too tenuous. I therefore would hold that the state has also failed to satisfy the *Central Hudson* test with respect to Rule 7.3(b).

For all of the foregoing reasons, I would find in favor of Petitioner and hold that Georgia's False Advertising Statute, its accompanying rule Rule 7.1(a), and Rule 7.3(b) of the Rules of Professional Conduct unconstitutionally regulate the mode of lawyer advertising involved in this case.

JOYCE, J., dissenting

The majority's opinion in this case proceeds from an incorrect fundamental premise, and thus reaches an erroneous result, through an application of the incorrect governing law. The majority concludes at the outset that the speech at issue in this case is commercial speech, and thus is subject to the test adopted by the Supreme Court of the United States in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Commission of New York*. 447 U.S. 557 (1980). As I explain below, whether the speech in this case is commercial in nature such that it falls under the purview of *Central Hudson* is far from clear. Indeed, a close analysis of the speech reveals that its message is far more political than commercial, and thus should be protected by a strict scrutiny analysis from any restrictions governing it. For these reasons, I dissent.

I

Central Hudson announced a test that, over time, has baffled many lower courts in their attempts to apply it faithfully. *See* Stuart Banner & Alex Kozinski, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 630-31 (1990). Further, the entire premise of *Central Hudson* is a questionable-at-best departure from the Supreme Court's prior jurisprudence on freedom of speech in the context of commercial advertising.

The Supreme Court, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, stated that advertising whose purpose was to propose a commercial transaction was speech protected by the First Amendment. 425 U.S. 748, 762 (1976) The court further suggested that advertising speech was not deserving of any lesser degree of protection than other speech, commenting specifically that a citizen's "interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. In addition, the court concluded that the regulation at issue in *Virginia Board of Pharmacy* was invalid, because its stated aims were to be achieved "in large

measure on the advantages of [the state's citizens] being kept in ignorance." *Id.* at 769. As Justice Thomas noted in a more recent case, the decisions following *Virginia Bd .of Pharmacy* have "continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information; the near impossibility of severing 'commercial' speech from speech necessary to democratic decision making; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (1996) (citations omitted).

Virginia Board of Pharmacy did make the simple admission that commercial speech is not wholly beyond the reach of state regulation. 425 U.S. at 770-71. However, this was, and is, hardly a novel proposition. To name just two general regulations, speech in all of its forms, commercial or otherwise, has long been subject to restrictions on obscenity, *e.g.*, *Roth v. United States*, 354 U.S. 476 (1957), or maliciously false defamatory content, *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

However, the Court in *Central Hudson*, deemed commercial speech to be of "less constitutional moment." 447 U.S. 562-63, n.5. Claims made in advertising, the Court reasoned, admit more easily of verification, and, as the "offspring of economic self-interest," are "not particularly susceptible to being crushed by overbroad regulation." *Id.* at 564, n.6. Justice Thomas, dissenting several years later in a case that continued *Central Hudson*'s "second-class" treatment of commercial speech, cast doubt on whether that case's foundational distinction between commercial and other types of speech could ever be effectively made. *44 Liquormart, Inc.*, 517 U.S. at 523, n.4 (Thomas, J., *dissenting*). Both commercial and political speech are aimed at influencing citizens' behavior – one aims at influencing Americans' spending behavior,

and one at coloring their behavior in the voting booth. For this reason, Judge Posner has commented that the "notion of the primacy of political speech is a common one, but it is misleading and unhelpful." Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 Yale L.J. 1699, 1704 (2006). I believe that the distinction underlying the entire *Central Hudson* analysis – i.e., that commercial speech can be distinguished on any principled basis from other speech, and that this distinction makes it less worthy of First Amendment protection – is illusory. And I agree with Justice Thomas that this false distinction should be abandoned.

II.

Even accepting for purposes of discussion the *Central Hudson* distinction between commercial speech and political speech, the speech at issue in the instant matter can hardly be deemed merely commercial. It advocates a specific viewpoint on one or more contentious political issues of the day. *In re Primus*, 436 U.S. 412, 421 (1978). The speech in this case may indeed have, as one of its aims, the economic betterment of the advertiser. However, as with most speech that courts applying *Central Hudson* have found to be commercial, mixed motives are readily apparent from both the tone and content of the statements. Immigrant access to the benefits of the American Social Security system is a topic of intense political debate. Petitioner's statements on the topic reflect one of the many viewpoints on this subject, and one that has enjoyed substantial play on the pages and airwaves of the mass media. As such, I can discern no basis on which these statements can be denied the First Amendment's undiminished shield. The majority's mischaracterization of the speech in this case illustrates the fact that commercial speech is functionally indistinguishable from political or other speech. It also reinforces the conclusion that *Central Hudson*'s test is ill suited for the case before us today.

The Court's political speech jurisprudence makes clear that "[d]iscussion of public issues . . . occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio*

Elections Commission, 514 U.S. 334, 346-47 (1995). When such speech is concerned, exacting scrutiny is applied, requiring the state to show that the restriction at issue is narrowly tailored to serve an overriding state interest. *Id.* at 347. In practice, politically themed speech is absolutely protected. *See, e.g., id.* Even false factual statements, when made in political speech, are protected, so long as they are not made with actual malice. *New York Times v. Sullivan*, 376 U.S. at 282-83.

Petitioner's handbill offered two statements of a political nature that can hardly be termed false, much less made with actual malice.[2] I take judicial notice of the fact that Social Security, by nearly all estimates, will become insolvent at some future point, absent substantial corrective measures. Further, I take notice of the fact that some in Congress are considering legislation that would extend Social Security benefits to illegal aliens. Stating these facts in the language of an advocate, rather than that of a disinterested observer, reinforces the political nature of the speech, without diminishing its worthiness for First Amendment protection. Petitioner followed these factual statements with a call to action, appealing to citizens' outrage over the Social Security situation, and an offer to speak with outraged citizens to discuss their rights.[3] These statements, like those protected in *New York Times v. Sullivan*, are "expression[s] of grievance and protest on one of the major public issues of our time." *Id.* at 271. As such, they enjoy the full

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[2] The statements I refer to here are, "[d]id you know that Social Security is expected to go bankrupt in the near future," and "[d]id you know that the government is considering making it easier for illegal aliens to get your hard earned Social Security benefits."

[3] The statements I refer to here are, "[a]re you outraged by what they are doing with your money," and "[c]ome see me and I will help you get the benefits you are entitled to before it is too late."

protections of the First Amendment. We must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. at 270 (citations omitted). I cannot join an opinion that accords Mr. Ussery's statements any less than the full protection of the First Amendment. I would declare invalid the portions of the Georgia statute and Professional Responsibility Rules that punish speech in advertisements paid for by lawyers, except where that speech includes false statements of fact made with actual malice, as allowed under *New York Times v. Sullivan*. *Id.*

"When core speech on controversial matters of public concern is implicated [by default rules that favor speech regulation to protect consumers], there is great danger in leaving the ascertainment of truth so readily to judicial rather than public determination. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1131 (2006). As Justice Blackmun stated, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. *Virginia Board of Pharmacy*, 425 U.S. at 770. Because citizens must be free to be misled by advocacy where that advocacy involves speech on matters of public policy essential to our national discourse, I respectfully dissent.

IN THE

SUPREME COURT OF THEUNITED STATES

NO. VU-SUP 2006

Christian Wright Ussery, Petitioner

v.

The State Bar of Georgia, Respondent

September 26, 2006

Case Below

____S.E.2d ___(Ga. 2005)

Petition for Writ of Certiorari to the
Supreme Court of Georgia is **GRANTED.**

The issues before the court are:

(1) To what extent does the First Amendment provide protection for a lawyer who asserts controversial political positions on printed handbills that advertise his professional services?

Arguments will be heard on an expedited basis. The Petitioner Christian Ussery shall present argument first.

LIST OF RELEVANT SOURCES

Cases

44 Liquormart v. R.I., 517 U.S. 584 (1996).

Bates v. State Bar of Arizona, 436 U.S. 350 (1977)

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

Board of Trustees v. Fox, 492 U.S. 469 (1989)

Borgner v. Brooks, 284 F.3d 1204 (11th Cir. 2002)

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

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

Falanga v. State Bar, 150 F. 3d 1333 (111th Cir 998)

Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997)

Florida Bar v. Went For It, Inc., 515 U.S. 618 (11th Cir 1995)

In re Primus, 436 U.S. 412 (1978)

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

Mason v. Florida Bar, 208 F.3d 952 (C.A.11 (Fla.),2000)

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)

New York Times v. Sullivan, 376 U.S. 254 (1964).

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)

Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)

Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (U.S. 1986)

Roth v. United States, 354 U.S. 476 (1957)

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)

Texans Against Censorship v. State Bar, 888 F. Supp. 1328 (D. Tex. 1995)

United States v. United Foods, 533 U.S. 405 (U.S. 2001)

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

Wooley v. Maynard, 430 U.S. 705(1977)

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

Statutes

Georgia Code §10-1-427(a)

Rules

Georgia Rule of Professional Conduct 7.1(a)

Georgia Rule of Professional Conduct 7.3(b)

Supplemental

Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1131 (2006)

Stuart Banner & Alex Kozinski, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 630-31 (1990).