Florida State University Law Review

Volume 23 | Issue 1 Article 4

1995

Protecting Truthful Advertising By Attorney-CPAs: *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 S. Ct. 2084 (1994)

Edward L. Birk
1@1.com

FLORIDA STATE UNIVERSITY
LAW REVIEW

PROTECTING TRUTHFUL ADVERTISING BY ATTORNEY-CPAS: *IBANEZ V. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY*, 114 S.CT. 2084 (1994)

Edward L. Birk

VOLUME 23 SUMMER 1995 NUMBER 1

Recommended citation: Edward L. Birk, Note, *Protecting Truthful Advertising by Attorney-CPAs:* Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 S.Ct. 2084 (1994)*, 23 FLA. ST. U. L. REV. 77 (1995).

PROTECTING TRUTHFUL ADVERTISING BY ATTORNEY-CPAs—*IBANEZ V. FLORIDA DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY*, 114 S. CT. 2084 (1994)

EDWARD L. BIRK*

I. INTRODUCTION

When Winter Haven attorney Silvia S. Ibanez advertised her qualifications as a member of The Florida Bar, as a certified public accountant (CPA), and as a certified financial planner (CFP), she knew she was telling the truth about her qualifications. She also thought she was providing information to her clients and potential clients that would help them make informed choices. The Florida Board of Accountancy[1] (the Board), however, saw Ibanez's advertisements quite differently. The Board attempted to reprimand her for using the initials JD, CPA, and CFP in her telephone advertisements, on her

* Law Clerk to the Honorable Lacey A. Collier, United States District Court, Northern District of Florida. B.A., 1983, University of Massachusetts; J.D., 1995, Florida State University.

1. The Board of Accountancy is a unit of the Florida Department of Business & Professional Regulation.

business cards, and on her firm letterhead.[2] The Board proposed a reprimand and accused Ibanez of engaging in false, misleading, and deceptive advertising.[3]

Ibanez fought back, challenging the Board's action before a state administrative tribunal, in state court and, ultimately, in front of the United States Supreme Court, asserting her right to advertise truthful information that could be useful to potential clients.[4] The Supreme Court decided in Ibanez's favor by upholding her right to advertise her professional qualifications.[5] In doing so, the Court affirmed the standards for government regulation of commercial speech that it announced in 1980 with *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[6] and has consistently affirmed in the years since.[7] The popular press heralded Ibanez's fight and the Court's decision in her case as a vindication of free speech.[8] Others,

---

2. In its reprimand, the Board charged Ibanez with three counts of violating Florida statutes and administrative regulations governing accountants. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2086 (1994). For a discussion of the precise charges, see *infra* notes 22-42 and accompanying text.

The day before she argued her case pro se in front of the United States Supreme Court, Ibanez was quoted as saying: "What I'm trying to do is to vindicate our constitutional right to express ourselves so long as it's truthful and valuable to the public." Rosalind Resnick, *Accountant Takes Case to Highest Court; Argues for Right To Advertise as CPA but Not Practice*, MIAMI HERALD, Apr. 18, 1994, Business Magazine at 9.

3. Telephone Interview with Silvia S. Ibanez (Dec. 19, 1994). The Board had initially considered a $5,000 fine in addition to the letter of reprimand but did not approve that additional sanction. *Id.*

4. *Ibanez*, 114 S. Ct. at 2086.

5. *Id.*

At several points in its opinion, the Court noted that the State had failed to meet its burden. For example: "We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here." *Id.* at 2091. *See also infra* note 48 and accompanying text.

Ibanez was the third professional commercial speech case from Florida that the Court has accepted in as many terms. *See* Edenfield v. Fane, 113 S. Ct. 1792 (1993) (holding that Florida's ban on in-person solicitation by CPAs violated First Amendment protection of truthful, nondeceptive information proposing lawful commercial transactions); *see also* Went For It, Inc. v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 42 (1994), *rev'd*, 115 S. Ct. 2371 (1995) (upholding as constitutional The Florida Bar's 30-day ban on targeted direct-mail solicitation of potential personal injury and wrongful death clients).

6. 447 U.S. 557 (1980) (setting out a four-part test for the regulation of commercial speech). For a discussion of the *Central Hudson* test, see *infra* notes 107-112 and accompanying text.

7. *See, e.g.*, Edenfield v. Fane, 113 S. Ct. 1792 (1993) (reaffirming that a regulation of truthful commercial speech must advance substantial state interests in a "direct and material way" and be in "reasonable proportion to the interests served").

8. *See* Resnick, *supra* note 2; *see also* Paul Anderson, *Lawyer Wins Right To Advertise as a CPA; Florida Attorney Argued Own Case*, MIAMI HERALD, June 14, 1994, Business at C1 (quoting Sydney Traum, president of the 150-member Florida Association of Attorney-CPAs as

however, have been less enthusiastic about the holding in *Ibanez* and the impact it will have on regulation of professional advertising.[9]

This Note examines *Ibanez* and considers the substantial government interests states must demonstrate before they may regulate truthful commercial speech.[10] It concludes that the *Ibanez* Court failed in its reasoning and holding to extend—under its own precedent—the maximum possible protection to consumers who may be misled, or at least left uninformed, by professional advertising similar in content and form to that used by Ibanez.[11]

II. *IBANEZ*: ATTEMPTING TO REGULATE TRUTHFUL COMMERCIAL SPEECH

As case law in general and *Ibanez* in particular indicate, the Supreme Court's rules for regulating professional advertising have been on a course toward increasingly well-settled doctrine.[12] This trend notwithstanding,[13] state interpretation and application of those rules has been less settled as state bar associations and other regulatory agencies explore their power in an attempt to prevent public disrespect for the practice of law and other professions through restrictions on otherwise protected professional commercial speech.[14]

---

saying "The impact is that the chilling restrictions against commercial speech are lifted . . . .").

THE ATTORNEY-CPA, a newsletter of the American Association of Attorney-Certified Public Accountants, announced the decision under a bold headline declaring *"The Ibanez Decision: Silvia Wins!"* 30 THE ATTORNEY-CPA 1 (Summer 1994). USA TODAY reported the decision under a headline stating *High Court Rallies to Free Speech*. Tony Mauro, *High Court Rallies to Free Speech*, USA TODAY, June 14, 1994, at A1.

9. Telephone Interview with Edward A. Tellechea, Assistant Ethics Counsel for The Florida Bar (Dec. 19, 1994) [hereinafter Tellechea Interview]. Mr. Tellechea, who attended the Ibanez oral arguments, views the *Ibanez* decision as relatively unremarkable in the area of attorney advertising and instead suggests the case should be viewed as a poorly handled prosecution of an unlicensed accounting practice. *Id.*

10. *See infra* notes 15-152 and accompanying text.

11. *See infra* notes 153-57 and accompanying text.

12. *See infra* notes 86-115 and accompanying text. Although one recent case, *Went For It, Inc. v. The Florida Bar*, may have caused some unsettling in the Court's commercial speech doctrine, just how much unsettling remains to be seen after the five-to-four decision because the Court specifically distinguished generalized advertising from targeted direct-mail advertising as less-intrusive and less-offensive to individuals. 115 S. Ct. 2371 (1995). In dissent, Justice Kennedy proclaimed the Court's decision a "serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech." *Id.* at 2386 (Kennedy, J., dissenting).

13. *See* Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084 (1994).

14. *See infra* notes 116-31 and accompanying text.

A. The Facts

1. Advertising the Truth

Silvia Ibanez is a sole legal practitioner who holds degrees in business administration[15] and law;[16] she has been licensed to deal in securities, annuities, and insurance; she is a certified circuit court mediator; and she established her own financial planning firm in 1985 and operated it until 1988, when she started her law practice.[17] She has been a member of The Florida Bar since 1983.[18] As a CPA, she is licensed by the Board of Accountancy to perform the "attest" function of auditing.[19] She also holds the designation of CFP, issued by the Certified Financial Planner Board of Standards, a private, non-profit group.[20] Ibanez believed that all of these qualifications could be important to potential clients, so she included them on her letterhead, on her business cards, and in telephone book listings.[21]

2. The Complaint

The Florida Board of Accountancy issued a complaint against Ibanez after an anonymous source sent a page torn from the Winter Haven Yellow Pages directory.[22] Circled on the telephone book page was

---

15. University of Miami. 5 MARTINDALE-HUBBELL LAW DIRECTORY FL446P (1995).

16. University of Puerto Rico, 1983. *Id.*

17. Brief for Petitioner at *5, 1993 WL 723402 (Feb. 28, 1994), Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084 (1994) [hereinafter Petitioner's Brief].

18. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2086 (1994).

19. Under the Florida Public Accountancy Act, only licensed CPAs can attest that the presentation of financial information is reliable and fair. *Ibanez*, 114 S. Ct. at 2085.

Ibanez earned her CPA license in 1982 and for a time worked with the accounting firms of Coopers & Lybrand and Main Hurdman, where she performed all aspects of tax practice for individuals and businesses. Brief for Respondent at *2, 1994 WL 114666 (Mar. 30, 1994), Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084 (1994) [hereinafter Respondent's Brief].

20. Respondent's Brief, *supra* note 19, at *2.

21. Respondent's Brief, *supra* note 19, at *6. The state hearing officer who tried the Board's disciplinary complaint agreed.

> The use of the term CPA implies a specific competency to the public. The fact the Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

Id.

Ibanez's use of her JD designation in her advertising was not at issue with The Florida Bar. The Florida Bar rules allow the designation of JD, as well as CPA and CFP. FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(n)(3) (1993).

22. Petitioner's Brief, *supra* note 17, at *5.

Ibanez's attorney advertisement, which included the initials CPA and CFP next to her name.[23] Upon investigation, the Board discovered her other uses of CPA and CFP.[24] In spite of the veracity of her advertisements,[25] the Board charged in its administrative complaint that she violated the Board's "holding-out" rule, which prohibited Ibanez and others from advertising her status as a CPA unless she practiced as one.[26] The three-count complaint also charged that Ibanez was practicing public accountancy in an unlicensed accounting firm,[27] was using a specialty designation—CFP—not approved by the Board[28] and, by advertising her CPA designation, was implying that she had complied with the Public Accountancy Act's prohibition against "fraudulent, false, deceptive, or misleading" advertising.[29] The Board asserted Ibanez was holding herself out as a CPA through an unlicensed accounting firm—a fact Ibanez readily acknowledged—and therefore "an uninformed person may not be able to differentiate whether she is in the practice of public accounting."[30]

---

23. She was listed in the yellow pages of the telephone book under the attorneys heading as "Ibanez, Silvia, S., CPA, CFP." In the white pages, she was listed as "Ibanez, Silvia S., CPA CFP atty." Her business card stated "Silvia Safille Ibanez, JD, CPA, CFP." Respondent's Brief, *supra* note 19, at *2.

24. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2086 (1994).

25. "Notwithstanding the apparently truthful nature of her communication—it is undisputed that neither her CPA license nor her CFP certification has been revoked—the Board reprimanded her for engaging in 'false, deceptive, and misleading' advertising." *Id.* at 2086.

26. *See* Petitioner's Brief, *supra* note 17, at *5; *see also* Respondent's Brief, *supra* note 19, at *2. The Board filed its complaint on June 13, 1991. The "holding-out" rule allowed *only* the display of a CPA license by any Florida CPA who is not practicing public accountancy. FLA. ADMIN. CODE ANN. r. 61H1-20.012 (1994).

27. *Ibanez*, 114 S. Ct. at 2087.

See FLA. STAT. § 473.3101 (1993). Just days before the administrative hearing on these charges, the Board dropped the count alleging that Ibanez was operating an unlicensed accounting firm. *Ibanez*, 114 S. Ct. at 2087. *See also* FLA. ADMIN. CODE ANN. r. 61H1-24.001(1)(g) (1994).

The Board's dropping of the unlicensed accounting firm charge perplexed members of the Court, who made clear during oral argument that they were frustrated with having been presented a "botched" licensure case in the form of a professional advertising case. Tellechea Interview, *supra* note 9. "It was a lousy case. It shouldn't have been up there in the first place." *Id.* The Florida Bar filed an amicus curiae brief on behalf of Ibanez. *Ibanez*, 114 S. Ct. at 2086.

28. *Id. See* FLA. ADMIN. CODE ANN. r. 61H1-24.001(1)(g) (1994).

29. *Ibanez*, 114 S. Ct. at 2087.

30. Respondent's Brief, *supra* note 19, at *4. The charges alleged violations of Title 21, *Florida Administrative Code*, and chapter 473, *Florida Statutes*. Respondent's Brief, *supra* note 19, at *4. Specifically, she was charged with "[a]dvertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content . . . ." FLA. STAT. § 473.323(f) (1993). The "holding-out" rule provides for a violation under section 473.302(4), *Florida Statutes*, when a

> licensee is a certified public accountant when providing, or offering to provide services

Ibanez responded to the Board's disciplinary complaint and filed an additional complaint under the Florida Administrative Procedure Act[31] challenging the validity of the Board's "holding-out" rule.[32] During the administrative challenge, Ibanez freely admitted her use of the CPA designation, asserted that her legal clients derived benefit from her training and experience as an accountant, and protested the Board of Accountancy's attempt to impose jurisdiction over her legal practice.[33] The hearing officer decided in favor of Ibanez, finding the "holding-out" rule to be an invalid exercise of delegated legislative authority because the rule

> seems intended to prohibit publication of a licensee's CPA status when that publication would confuse or mislead consumers as to whether the licensee is performing public accounting services . . . . The rule does not accomplish that intent, but rather utterly confuses a licensee as to when an activity, legitimate on its face, is proscribed and subject to disciplinary prosecution.
>
> The Board seeks to impose disciplinary oversight to protect the public against both fraud and negligence, but one statutory and regulatory scheme ranges far beyond that legitimate purpose, contrary to the expressed legislative intent for the Board. The rule is overbroad, vague, contradictory, and ambiguous.[34]

In her disciplinary proceeding, Ibanez argued that she was practicing law, not accountancy, and therefore should not be subject to the Board's regulatory power.[35] She argued that her advertising was nothing more than "nonmisleading, truthful, commercial speech."[36] For

---

> or products to the public, in such a manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the Department of Business and Professional Regulation shall not constitute holding out under the terms of this rule. All other publication of the fact that a licensee is a CPA constitutes holding oneself out.

FLA. ADMIN. CODE ANN. r. 61H1-20.012 (Sept. 1994) (repealed Nov. 21, 1994).

31. FLA. STAT. ch. 120 (1993).

32. Respondent's Brief, *supra* note 19, at *5; 14 F.A.L.R. 1396 (Fla. Dept. of Bus. & Prof. Reg. 1992) (declaring invalid FLA. ADMIN CODE ANN. r. 21A-20.012 (1992)).

Ibanez appeared pro se at the disciplinary proceedings, in her administrative challenge of the "holding-out" rule and before the Supreme Court. She later moved for nearly $50,000 in attorney fees but was denied. 14 F.A.L.R. 5582 (Fla. Dept. of Bus. & Prof. Reg. 1992).

33. Respondent's Brief, *supra* note 19, at *5.

34. 14 F.A.L.R. 1396 (Fla. Dept. of Bus. & Prof. Reg. 1992).

35. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2087 (1994). Ibanez argued that she does not perform the "attest" function and that none of the work she does in her law practice could be considered services requiring a CPA license. *Id.* She eventually acknowledged, however, that the Board had jurisdiction over her as a CPA. *Id.*

36. *Id.*

some reason, the Board dropped its single count of practicing public accounting in an unlicensed firm, and subsequently, the hearing officer ruled in Ibanez's favor on all remaining counts.[37]

The Board, however, rejected the hearing officer's recommended order, substituted its own final agency order and found Ibanez guilty of "false, deceptive, and misleading" advertising.[38] The final agency order reasoned that to attach the initials CPA to one's advertising was to invoke the Board's jurisdiction.[39] The Board asserted that Ibanez had so invoked its jurisdiction, but then denied the Board's authority to regulate her activity as an attorney.[40] This, the Board reasoned, was to render her use of the CPA designation misleading to the public because the Board protects the public by regulating CPAs. For Ibanez to flout Board jurisdiction, members reasoned, was to leave the public not knowing to whom Ibanez should answer for regulatory violations.[41] The Board also held against Ibanez for her use of the CFP designation, reasoning that any use of the word "certified" to refer to any organization other than the Board "inherently misleads the public into believing that state approval and recognition exists."[42]

B. The Holding

Ibanez appealed the Board's final order, and the First District Court of Appeal issued a per curiam affirmance without opinion.[43] The U.S. Supreme Court granted certiorari[44] and subsequently reversed the Board's final order.[45]

---

37. *Id.*

38. *Id.* at 2088. Under the Administrative Procedure Act, an agency may override a hearing officer's ruling and enter a final order contrary to the officer's ruling. FLA. STAT. ch. 120 (1993); FLA. CONST. art. IV.

39. *Ibanez*, 114 S. Ct. at 2088.

40. *Id.*

41. *Id.*

> [Ibanez] advertises the fact that she is a CPA, while performing the same 'accounting' activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors [of which] she may be guilty when delivering her services to her clients.

Id.

42. *Id.*

43. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 621 So. 2d 435 (Fla. 1st DCA 1993). Under the Florida Administrative Procedure Act, parties substantially affected by an agency action have a right of direct appeal to the District Court of Appeal. FLA. STAT. ch. 120 (1993); FLA. CONST. art. IV.

44. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 751 (1994). *Ibanez* was the only case of more than 5,000 that the First District Court of Appeal considered in 1993 that went directly to the U.S. Supreme Court. Judge Robert Benton, remarks

Ibanez, issued on the same day as another noteworthy decision upholding First Amendment principles,[46] was a strong reaffirmation of the principle that state actors must show substantial government interest if they seek to regulate truthful advertising.[47]

> The record reveals that the Board has not shouldered the burden it must carry in matters of this order. It has not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez's constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes. We therefore hold that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action.[48]

The Court unanimously upheld Ibanez's right to use the CPA designation in her attorney advertising and on her law office letterhead.[49] The Court, by a 7-to-2 vote, also upheld her right to advertise her CFP status without a disclaimer identifying the organization that had conferred the designation.[50]

C. *The Reasoning*

Stated broadly, the Court was faced with two issues: whether Silvia Ibanez was subject to the jurisdiction of the Board of Accountancy even though she was practicing only law and not accountancy; and whether, in spite of the apparent truthfulness of her advertising, the Board could restrict her use of professional designations she had earned and maintained according to the requirements of reputable conferring organizations.[51]

Initially, Ibanez asserted that, although she was a licensee of the Board, the Board had no power to exercise jurisdiction over her

---

to students visiting the court with Professor Eleanor Hunter's Florida State University College of Law class in Florida Constitutional Law, Oct. 13, 1994.

45. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2088 (1994).

46. City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (striking an ordinance banning yard signs after a homeowner opposed to Operation Desert Storm was barred from posting a yard sign in protest of the Persian Gulf War).

47. *Ibanez*, 114 S. Ct. at 2084. For a discussion of the hierarchy of First Amendment protections for speech, see *infra* notes 86-90 and accompanying text.

48. *Ibanez*, 114 S. Ct. at 2086-87.

49. *Id.*

50. *Id.*

51. *Id.* Licensure for certified public accountancy is regulated by chapter 473, *Florida Statutes*. FLA. STAT. §§ 473.306-.308, .312 (1993). To become a CPA, applicants must have earned a baccalaureate degree in accounting or its equivalent, must be of good moral character, and must sit for a state exam. *Id.* §§ 473.306-.308.

because she did not engage in any professional services that could be construed as public accountancy.[52] The Board argued to the Court that by using the CPA designation in her advertising, Ibanez was telling the public that she abided by all rules and regulations of the Board. But by denying the Board's jurisdiction, the Board argued that "she believes and acts as though she is not" subject to its jurisdiction.[53] The Board provided no evidence beyond Ibanez's assertions denying Board jurisdiction to prove that she actually was flouting Board regulations.[54] Ruling on this first issue, the Court held that regardless of the Board's ability to exert regulatory jurisdiction over her, Ibanez's beliefs alone were not grounds for sanction.[55] The Court relied on *Baird v. State Bar of Arizona*[56] in holding that neither Ibanez's beliefs nor the Board's mere assertions of her unwillingness to comply with Board regulations would be sufficient to justify official discipline:

> To survive constitutional review, the Board must build its case on specific evidence of noncompliance. Ibanez has neither been charged with, nor found guilty of, any professional activity or practice out of compliance with the governing statutory or regulatory standards. And as long as Ibanez holds an active CPA license from the Board, we cannot imagine how consumers can be misled by her truthful representation to that effect.[57]

The Court next addressed the Board's contention that use of the CFP designation was inherently or potentially misleading, a threshold requirement for state regulation of commercial speech. The Board contended that otherwise uninformed consumers would know that the state had "certified" Ibanez as a public accountant and would

---

52. Petitioner's Brief, *supra* note 17, at *28.

53. *Ibanez*, 114 S. Ct. at 2089; *see also* Respondent's Brief, *supra* note 19, at *20 (stating "use of the CPA designation . . . where the licensee is unwilling to comply with the provisions of the [statute] under which the license was granted, is inherently misleading and may be prohibited.").

54. 114 S. Ct. at 2089.

55. *Id.* Curiously, the Board had dropped the only charge that might have supported its allegations in this regard. *Id.* By dropping the charge of practicing accountancy through an unlicensed firm, the Board closed its only avenue to imposing some type of sanction on Ibanez. For a discussion of this point, see *infra* notes 82-85 and accompanying text. This charge was later refiled after the Court's decision suggested refiling.

56. 401 U.S. 1, 6 (1971) (holding by a 5-to-4 vote that "[t]he First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs").

57. *Ibanez*, 114 S. Ct. at 2089. Ibanez eventually acknowledged she was a licensee of the Board and subject to its regulation. *Id.*

therefore assume erroneously that because Florida had conferred the CPA designation on Ibanez, the State also had "certified" her as a financial planner, when in fact it was a private organization that had conferred the CFP designation.[58] This, the Board asserted, would be inherently misleading.[59]

In rejecting the Board's claim that Ibanez's advertising was inherently misleading, the Court relied on *Peel v. Attorney Registration and Disciplinary Commission of Illinois*[60] when it ruled seven-to-two that "[t]he Board's justifications for disciplining Ibanez for using the CFP designation are scarcely more persuasive" than its justification for sanctioning Ibanez's defiant attitude toward the Board's authority.[61] Following *Peel*, the Court further held that absent any evidence of actual deception, the Board's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment."[62]

The *Ibanez* majority noted that the *Peel* decision left open the possibility for regulation of professional advertising when the materials had the real potential to confuse consumers.[63] For example, if an organization conferring a professional designation were not well known, the potential for misleading consumers would grow as would the state's justification for regulation. The *Ibanez* Court, however, noted that more than 27,000 people nationwide have earned the CFP designation and that more than fifty accredited universities and colleges have established courses of study in financial planning approved by

---

58. *Id.* at 2090 n.9.

59. *Id.* at 2091 n.11.

60. 496 U.S. 91, 108 (1990) (holding that only false, deceptive, or misleading commercial speech may be banned because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information").

Attorney Gary E. Peel had included on his letterhead a designation indicating he held a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy (NBTA). *Id.* at 96. The Court reversed the state court's censure of Peel because the information on his letterhead was neither actually nor inherently misleading; it was true, it was verifiable, and there was no finding that Peel's representation could be misinterpreted as a basis for government certification. *Id.* at 108.

> We are satisfied that the consuming public understands that licenses—to drive cars, to operate radio stations, to sell liquor—are issued by governmental authorities and that a host of certificates—to commend job performance, to convey an educational degree, to commemorate a solo flight or a hole in one—are issued by private organizations.

Id. at 103.

61. *Ibanez*, 114 S. Ct. at 2089.

62. *Id.* at 2090 (citations omitted) (quoting *Peel*, 496 U.S. at 91). *See also* Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977) ("It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.").

63. *Ibanez*, 114 S. Ct. at 2091.

the Certified Financial Planner Board of Standards.[64] The CFP Board also requires rigorous examination of candidates before conferring the CFP designation.[65]

As in *Peel*, the *Ibanez* majority was satisfied that the layperson would be well protected from such potential confusion and well informed simply by telephoning the organization conferring the specialty status of certified financial planner.[66] Although the Board of Accountancy regulates the use of non-Board specialty designations by requiring *automatic* disclosure of a conferring organization's full identity, the Court on this issue deferred to the rules of The Florida Bar.[67] The Bar's rules require attorneys to disclose details of their experience, training, and specialty certifications *only* when asked.[68] Further, the majority held that to require as detailed a disclaimer as the Board had sought from Ibanez in her advertisements might prohibit advertising in the Yellow Pages or on business cards because of space limitations.[69]

The Board had attempted to justify its disclaimer requirement by arguing that placement of the CFP and CPA designations close to one another was potentially misleading.[70] In response to that contention, the Court relied on *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[71] The *Ibanez* Court held that the phrase

---

64. *Id.*

65. To earn the CFP designation, candidates not only must undergo a course of study but must pass a licensure exam similar in concept to a CPA or bar exam, must complete CFP-related work experience, must agree to abide by the CFP Code of Ethics & Professional Responsibility, and must meet an annual continuing education requirement. *Id.*

As Justice Scalia noted during the *Ibanez* oral arguments, while many people may have a sense that CPA is a state-conferred designation, few are likely to know the meaning of CFP. If CFP has no meaning to a person, that person cannot be misled by the CFP designation. Tellechea Interview, *supra* note 9.

66. 114 S. Ct. at 2090 n.9 ("The Board that reprimanded Ibanez never suggested that such a call would be significantly more difficult to make than one to the certifying organization in *Peel*, the National Board of Trial Advocacy.").

67. *Id.*

68. *Id.* (citing FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.3(a)(2) (1993), which would require Ibanez to provide "written information setting forth the factual details of [her] experience, expertise, background, and training" to potential clients who ask for such information).

Bar rules permit the use of JD, CPA, CFP, and other "technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions." FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.2(n)(3) (1993).

69. 114 S. Ct. at 2090-91.

70. *Id.* at 2090.

71. 471 U.S. 626, 638 (1985).

In Zauderer, the appellant attorney had advertised that clients' legal fees would be returned if they were convicted of "drunk driving." *Id.* at 629. This violated a state bar rule against

"potentially misleading" could not operate as a shibboleth, the mere invocation of which would allow those seeking to regulate commercial speech to overcome their heavy burden of "demonstrat[ing] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[72]

The *Zauderer* Court quoted *In re R.M.J.*, when it noted that "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty."[73] The *Ibanez* Court affirmed that in the case of truthful advertisements that are only *potentially* misleading, disclaimers are an appropriate and narrowly tailored response.[74] The *Ibanez* Court, however, did not find the CFP designation or its placement confusing.[75] Had Ibanez's

---

contingent fee arrangements in criminal cases. *Id.* The attorney later advertised his willingness to represent women injured by the Dalkon Shield intrauterine device (IUD) contraceptive. *Id.* The ad, which included a line-drawing of the IUD and also stated that clients would owe no fees if there were no recoveries, generated 106 clients. *Id.* at 631. The bar charged that he had violated a rule against using illustrations in advertisements and failed to state that clients might have been liable for administrative costs even under the IUD contingency fee arrangements. *Id.* at 632.

The bar rule against illustrations was based on a desire to maintain the decorum of the profession, but the Court rejected that argument because, in this case, the line-drawing was accurate and not misleading. *Id.* at 647-48.

> There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule.

Id.

72. 114 S. Ct. at 2090 (citing Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

> In Fane . . . the Court emphasized that once the threshold test is met, i.e., the speech is not misleading and related to a lawful activity, the burden is on the State to justify the restrictions. If the justification advanced by the State is imprecise or not the actual State interest, it is improper for the Court to supplant or interpolate where the State's true interest lies.

Petitioner's Brief, *supra* note 17, at *26.

73. *Zauderer*, 471 U.S. at 641 (quoting *In re* R.M.J., 455 U.S. 191, 201-03 (1982)).

74. *Ibanez*, 114 S. Ct. at 2088. *See also In re* R.M.J., 455 U.S. at 203. In that case, the Court announced:

> [T]he States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.

Id. at 203.

75. 114 S. Ct. at 2089.

advertisements been demonstrably false, the Board would have been able to regulate those claims, perhaps by imposing an outright ban on their use.[76]

In concluding, the majority noted that Ibanez is a sole *legal* practitioner, and she did not engage in any professional conduct reserved exclusively for CPAs.[77] For this reason, the Court found significance in the fact that *The Florida Bar Rules of Professional Conduct* authorize use of the CFP designation.[78] Additionally, Ibanez was not advertising a specialty designation conferred by an organization that had "made no inquiry into petitioner's fitness" or had simply issued the designation for a fee.[79] Such a designation would be per se misleading and thus subject to state regulation.[80] Finally, the majority reminded the Board that it had presented a record so bare of substantive justification for the restriction of commercial speech, that "[t]o approve the Board's reprimand of Ibanez would be to risk toleration of commercial speech restraints in the service of . . . objectives that could not themselves justify a burden on commercial expression."[81]

D. The Dissent

Justice O'Connor and Chief Justice Rehnquist concurred in the majority decision permitting Ibanez's use of the CPA designation. They dissented, however, on the issue of displaying the CPA and CFP designations in close proximity without requiring a disclaimer identifying the conferring organizations, arguing that Ibanez may have created the potential for misleading the public into believing that the state had issued, and would monitor, both certifications, rather than just the CPA certification.[82] According to the dissent, had Ibanez included

---

76. *Id.*

77. *Id.* at 2092.

78. *Id.*

79. *Id.* (quoting Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 102 (1990)). The *Peel* Court defined a caveat under which even truthful statements about designations issued without fitness or training standards or issued simply for a fee could be regulated because they are potentially misleading. *Id.*

80. *Id.*

81. *Id.* (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

In one observer's view, the Board's action was more conspicuous as a "botched" prosecution of an unlicensed accounting firm than as a true professional advertising case. Tellechea Interview, *supra* note 9.

82. 114 S. Ct. at 2093.

> Petitioner has of course been licensed as a CPA by the State of Florida. But her use of the CFP designation in close connection with the identification of herself as a CPA . . . would lead a reasonable consumer to conclude that the two 'certifications' were conferred by the same entity—the State of Florida.

Id.

some statement explaining what organization had conferred her certified financial planner designation, the Board's claim would have carried less merit.[83]

Justices O'Connor and Rehnquist also suggested that the Board could refile its only charge that held some chance of success—practicing public accountancy in an unlicensed accounting firm.[84] This would allow the Board to exert its jurisdiction over Ibanez, revoke her CPA license, and then discipline her if she continued advertising as a CPA.[85]

III. THE FIRST AMENDMENT: SOME SPEECH IS MORE EQUAL THAN OTHERS

To non-lawyers, Silvia S. Ibanez was merely *advertising* herself when she listed her name and professional qualifications in the attorney section of the telephone book, on her law practice business cards, and on her law office letterhead. To lawyers, however, she was speaking in the realm of commercial speech—the middle ground of the First Amendment's three-tiered classification of speech protections.[86] Maximally protected against government regulation is political speech, the theoretical core of the First Amendment.[87] On the opposite end of the spectrum is obscenity, which enjoys no protection from government regulation.[88] Adrift in the middle region is commercial speech—protected from government restraint if it is truthful, yet subject to regulation if it has the potential to mislead, is false, or pertains to illegal

---

83. *Id.* ("[I]n the absence of an identified conferring organization, the consumer is likely to conclude that the CFP designation is conferred by the State.").

84. *Id.* at 2094 (O'Connor, J., dissenting in part):

> I would only point out that it is open to the Board to proceed against petitioner for practicing public accounting in violation of statutory or regulatory standards applicable to Florida accountants . . . . And if petitioner's public accounting license is revoked, the State may constitutionally prohibit her from advertising herself as a CPA.

Id.

85. *Id.*

86. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.01 (1992).

87. NIMMER, *supra* note 86, § 1.01.

88. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966) (defining two standards for obscenity: utterly without redeeming social value, and appealing to prurient interest); *see also* Jacobellis v. Ohio, 378 U.S. 184 (1964). *Jacobellis* contains Justice Stewart's famous and vague definition of obscenity:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hard-core pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. at 197 (Stewart, J., concurring).

activity.[89] Commercial speech, formerly unprotected like obscenity, has gained this measured degree of protection in the past twenty years as a method to ensure consumers have access to information they need for decision-making in the marketplace.[90]

This next section gives a brief history of the commercial speech doctrine and commercial speech in the context of advertising by attorneys and other professionals.

A. History of the Commercial Speech Doctrine

Under the theory of our federalist system of democracy, the Constitution ostensibly grants to the central government only those powers the states relinquish.[91] Thus, Alexander Hamilton asked in the *Federalist Papers* why our democracy should need constitutional language expressly protecting the rights of speech, press, religion, and of association when the Constitution granted no powers to the federal government permitting the abridgement of such rights.[92] Several states balked at Hamilton's idealistic thinking.[93] The result of this balking, however, was the Bill of Rights, passed in the first session of Congress in 1789.[94] In retrospect, it was wise of the states to require the First Amendment and the other amendments in the Bill of Rights. Although the language of the First Amendment is absolute—"Congress shall make no law . . ."[95]—Congress has enacted, and the Supreme

---

89. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (striking a Virginia statute declaring unprofessional those pharmacists who advertised prices of prescription drugs).

90. *Id.*

91. Although the Ninth and Tenth Amendments to the Constitution reserve to the states those powers not specifically enumerated as belonging to the federal government, the Supreme Court has managed, through the doctrine of implied powers, to grant more power to the federal government than those expressly mentioned in the Constitution. *See generally* W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 137 (1919); Scott Gardner, *Constitutional Law—Tenth Amendment—State Sovereignty as a Limit of Congressional Power*, 31 DUQ. L. REV. 877 (1993); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

92. THE FEDERALIST No. 84 (Alexander Hamilton). "For why declare that things shall not be done which there is no power to do? Why, for instance should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *Id.*

93. The holdout states were New York, North Carolina, Rhode Island, and Virginia. NIMMER, *supra* note 86, § 1.01.

94. The First Amendment as we know it today actually resulted from Congress's third attempt at drafting the provision, which was ratified in 1791. NIMMER, *supra* note 86, § 1.01.

95. U.S. CONST. amend. I. The First Amendment states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

Court has enforced, many abridgements of the freedoms of speech and press.[96] One can only imagine what Congress or the executive branch might have achieved without First Amendment constraints.[97]

Although the Court has deemed political speech to represent the founding purpose of the First Amendment,[98] commercial speech was, for many years, not deemed part of that founding purpose.[99] As recently as 1942, the Supreme Court held in *Valentine v. Chrestensen* that while governments could not "unduly burden or proscribe" otherwise protected speech in public places, the Constitution imposed "no such restraint on government as respects purely commercial advertising."[100] This rule would remain steadfast until 1976, when the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* that the First Amendment affords a measure of protection for speech pertaining to commercial transactions.[101] The Court based its decision on a policy that consumers receiving product information could make better-informed purchase decisions than consumers kept in the dark by government regulations.[102] In *Virginia State Board of Pharmacy*, the Court rejected *Chrestensen* when it invalidated a Virginia statute declaring pharmacists *unprofessional* if they advertised their prices for prescription

---

96. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("Speech is often provocative and challenging . . . . That is why freedom of speech, although not absolute, . . . is nevertheless protected against censorship or punishment, unless it is shown likely to produce a clear and present danger of serious substantive evil that rise far above public inconvenience, annoyance, or unrest."). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (allowing restriction on an individual's right to speak when he or she uses fighting words).

97. *See, e.g.*, United States v. New York Times, 376 U.S. 254, 269-70 (1964) (holding in the Pentagon Papers case that the government had not met its burden to justify prior restraint).

98. The Court quoted Alexander Miekeljohn in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 n.19 (1976). Miekeljohn, a political scientist, helped shape the idea that political speech resides at the core of the First Amendment. He wrote that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government. It is not a law of nature or of reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MIEKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948), *quoted in* ROME & ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 36 n.4 (Quorum Books 1985).

For a history of the freedom of speech, see NIMMER, *supra* note 86, § 1.01, and see Note, *First Amendment—Free Speech—A Prophylactic Ban on Personal Solicitation by Certified Public Accountants in a Business Context Violates the First Amendment's Guarantee of Freedom of Speech*—Edenfield v. Fane, 113 S. Ct. 1792 (1993), 24 SETON HALL L. REV. 1579, 1579-80 nn.1-2 (1994) (providing a synopsis of speech rights from the days of ancient Greece through modern times).

99. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (providing no protection for double-sided handbills including both a political protest against New York City wharfage regulations and an advertisement for the commercial exhibition of a submarine).

100. *Id.*

101. 425 U.S. 748, 771-72 (1976).

102. *Id.*

drugs.[103] The Court reasoned that the statute could leave consumers ignorant of information vital to their health,[104] and that speech does not lose its First Amendment protection simply because money is spent to disseminate the speech.[105] To justify government regulation of commercial speech, there must be a more substantial government interest.[106]

Four years later, when the state of New York attempted to promote energy efficiency by enacting a blanket ban on advertising that advocated the use of electricity, the Court—as it had in *Virginia State Board of Pharmacy*—found the statute's scope was broader than necessary to achieve its stated purpose, in this case conservation.[107] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[108] the Court recognized New York's important state interest in promoting energy efficiency and conservation because of the 1970s oil embargoes and attendant escalation of energy prices.[109] Nevertheless, the Court held that a blanket ban on utility advertising was too broad to meet this interest.[110]

Under *Central Hudson*, a regulation of commercial speech must pass four hurdles to be valid.[111] First, the speech must be truthful, must concern lawful activity, or must not otherwise be subject to regulation. Second, there must be a substantial government interest in regulation. Third, the regulation must directly advance that substantial government interest. Fourth, the regulation cannot reach further than necessary to achieve its intended result.[112]

Since 1980, advertisers generally have received *Central Hudson* and the protection of commercial speech enthusiastically.[113] Professional

---

103. *Id.* at 748.

104. *Id.* at 765 ("It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

105. *Id.*

106. *Id.*

107. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 569-70 (1980).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* In *Central Hudson*, the Court found the New York regulation failed on the fourth prong—narrow tailoring—which often is the weak link in government attempts to regulate speech. *Id.* Instead of a blanket ban on advertising, the Court held, New York could have promoted energy conservation through public education or by allowing advertising that advocated the use of energy-efficient appliances while banning advertising that advocated waste of resources. *Id.*

113. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3 to -4 (2d ed.

advertisers such as attorneys and certified public accountants have enjoyed increasingly well-settled commercial speech doctrines allowing them to advertise free from government regulation in most instances. Regulators of professional advertising, however, have frequently been on the losing side of disputes challenging restrictions of such speech.[114] State bar associations, in particular, have been challenged by the commercial speech doctrine to craft constitutional regulations of attorney advertising that address their concern for the public image of the legal profession yet survive constitutional scrutiny under *Central Hudson*.[115]

1988) (describing the Court's review of traditional speech restrictions); Note, *A Missed Opportunity To Definitively Apply the Central Hudson Test:* Fane v. Edenfield, 26 CREIGHTON L. REV. 1155 (June 1993) (concluding that the court of appeals misapplied the four-part *Central Hudson* test in *Fane v. Edenfield*).

114. *See infra* notes 119-29 and accompanying text.

115. *See* Al H. Ringleb et al., *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perceptions*, 17 PAC. L.J. 1199, 1199 n.1 (1986) (quoting Chief Justice Warren Burger's comment to the American Bar Association's Commission on Advertising that potential legal clients should be warned to "never, never, never under any circumstances" retain an attorney who advertises), *quoted in* 24 SETON HALL L. REV. 1579, 1582 n.6 (1993); Went For It, Inc. v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994), *cert. granted,* 115 S. Ct. 42 (1994), *rev'd*, 115 S. Ct. 2371 (1995) (finding constitutional The Florida Bar's ban on direct mail solicitation of personal injury or wrongful death clients within 30 days of accident).

In spite of its concerns for protecting the image of the legal profession, the court of appeals in *Went For It* adhered to the Supreme Court's commercial speech precedents in the area of professional advertising and solicitation when it affirmed the lower court's invalidation of Florida's solicitation ban as an unconstitutional regulation.

> We are disturbed that [the cases] require the decision we reach today. We are forced to recognize that there are members of our profession who would mail solicitation letters to persons in grief, and we find the Florida Bar's attempt to regulate such intrusions entirely understandable. Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-restraint in this area. To preserve the law as a learned profession demands as much.

Went For It, 21 F.3d at 1045.

The Supreme Court, however, stretched to find the Florida Bar's solicitation ban in conformity with the *Central Hudson* test for allowing state regulation of commercial speech. *Went For It*, 115 S. Ct. 2371 (1995). Concern for the image of the legal profession, previously an inadequate justification for permitting state regulation of professional speech, *see* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638, 647-48 (1985), became a material consideration when the Court relied on anecdotal evidence provided by The Florida Bar indicating citizen anger and disgust with direct-mail solicitations from attorneys. 115 S. Ct. at 2382:

> We believe that the Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the . . . Central Hudson test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Florida Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

Id.

B. The Attorney Advertising Cases

Ibanez,[116] like *Edenfield v. Fane*[117] and *Went For It, Inc. v. The Florida Bar,*[118] falls into a special category of commercial speech that involves advertising and solicitation by attorneys and other professionals.

The *Virginia State Board of Pharmacy* decision in 1976 specifically limited its holding to pharmacists and pointed out that "[p]hysicians and lawyers . . . do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."[119] Only a year later, the Court held in *Bates v. State Bar of Arizona* that an Arizona bar rule against attorney advertising was a direct governmental restraint on commercial speech by lawyers and, therefore, violated the First Amendment.[120] The reasoning used by the Court in *Bates* was similar to that used in *Virginia State Board of Pharmacy.*[121] In *Bates*, the Court found Arizona's contention that advertising undermines attorney professionalism "to be severely strained."[122]

---

116. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084 (1994).

117. 113 S. Ct. 1792 (1993) (striking Florida's ban against in-person solicitation by CPAs as contrary to the First Amendment).

118. *Went For It*, 115 S. Ct. at 2371. Went For It, Inc. is a lawyer referral service that sought to enjoin enforcement of the Bar's ban against direct mail solicitation of personal injury and wrongful death clients within 30 days of an accident. *Id. See also* FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.4 (1993). The United States Court of Appeals for the Eleventh Circuit struck the ban as unconstitutionally broad. *Went For It*, 21 F.3d at 1038. Went For It's owner, G. Stewart McHenry, is a former member of The Florida Bar who had routinely solicited personal injury clients before being disbarred for reasons unrelated to the solicitation ban. The Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992). The court of appeals had found that like many state bar attempts to regulate commercial speech, Florida's 30-day ban on direct mail solicitation failed the fourth prong of the *Central Hudson* test because the ban was crafted too broadly. *Went For It*, 21 F.3d at 1038; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980). For a discussion of *Central Hudson* and its four-part test, see *supra* notes 107-15 and accompanying text. The Supreme Court, however, found the 30-day ban within the confines of the *Central Hudson* test. *Went For It*, 115 S. Ct. at 2371 ("The bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.").

119. 425 U.S. 748, 773 (1976), *quoted in* Went For It, Inc. v. The Florida Bar, 115 S. Ct. 2371, 2375 (1995).

120. 433 U.S. 350, 368 (1977).

121. *Id.* at 350. A year later, the Court dealt with a related issue of personal solicitations when it decided Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). The Court also has developed a line of cases dealing with direct mail advertising and solicitation. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (holding that the Kentucky Bar's prophylactic ban on direct-mail solicitation was unconstitutional).

122. 433 U.S. at 368.

Notwithstanding the *Bates* holding, the Court laid out in dicta several conditions under which advertising regulation might be justified. The Court said false or misleading advertising could be subject to restraint;[123] controls on personal solicitations might be justifiable;[124] reasonable time, place, and manner restrictions would be permitted;[125] advertisements concerning illegal transactions may be suppressed;[126] and radio and television advertising may present concerns for the legal profession that will warrant special consideration.[127]

In spite of the *Bates* holding, and others like it, the Arizona Bar's attempted justifications for its ban on legal advertising are embraced today by those favoring advertising regulation. They argue that advertising harms professionalism; attorney advertising is inherently misleading and undermines the administration of justice; advertising has undesirable economic impacts; advertising undermines the quality of legal services; and any advertising regulation, short of a blanket prohibition, would be difficult to enforce.[128] These rationales underlie continued bar association efforts to craft advertising regulations that protect attorney free speech rights, ensure the public receives accurate information about available legal services, and shield the legal profession from the excesses of a few advertisers who violate good taste sufficiently to harm the legal profession's reputation generally.

The *ABA Model Rules of Professional Conduct*, for instance, permit advertising in telephone directories, in legal directories, in newspapers, on billboards, on the radio, and on television as long as the advertising is neither false nor misleading.[129] *The Florida Bar Rules of*

---

123. *Id.* at 383.

124. *Id.* at 383-84.

125. *Id.* at 384.

126. *Id.*

127. *Id.*

128. ROME & ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 64 (Quorum Books 1985).

129. Rule 7.1, Communications Concerning a Lawyer's Services, states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

Rule 7.2, Advertising, states:

> (a) Subject to the requirements of Rules 7.1 and 7.3 [Direct Contact with Prospective Clients], a lawyer may advertise services through public media, such as a telephone

Professional Conduct also permit advertising but impose more restrictions on attorney advertising than the ABA rules.[130] Generalized attorney advertising enjoys as much protection today under the commercial speech doctrine as non-attorney advertising, with the exception of targeted mail solicitations soon after personal injury or death.[131]

IV. ANALYSIS

The Supreme Court's commercial speech doctrine is relatively young.[132] It was only fifty years ago, a mere moment in American jurisprudence, when the Court strongly affirmed that commercial speech enjoyed no protection under the First Amendment.[133] Since creating the doctrine in 1976[134] and announcing in 1980 the four-part hurdle that government regulation of commercial speech must clear,[135]

---

directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17 [Sale of Law Practice].

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1983).

130. FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.2 (1993). *The Florida Bar Rules of Professional Conduct* set out provisions allowing attorney advertising in the public media. The rules require television and radio advertising to be articulated by a single voice devoid of any background sound other than music. The voice may not be that of a celebrity recognizable by the public. All advertisements must contain the name of at least one of the lawyers responsible for the ad. Attorney ads require a disclosure indicating that legal representation should not be purchased based solely on an advertisement. Dramatizations are prohibited. Illustrations must be factually substantiated. Ads concerning contingency fees shall include information about any fees for which a client may be liable regardless of recovery. Fee arrangements must be honored for at least 90 days after being advertised. *Id.*

Permissible content for attorney ads includes: name of the firm or lawyers; dates of admission to the Bar; technical and professional licenses granted by the state or other recognized licensing authorities; foreign language ability; fields of practice; and credit card acceptance. *Id.*

131. *See generally* Went For It, Inc. v. The Florida Bar, 115 S. Ct. 2371, 2379 (1995) (distinguishing generalized mail advertising as protected from targeted direct mail advertising soon after a personal injury or death as unprotected).

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

133. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

134. *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

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

the Court has pursued a rather steady course of affirming First Amendment protections for commercial speech and has, until recently,[136] shown predictable hostility toward government regulation of such speech.[137] The reasoning of *Ibanez* supports this view of a Court hostile to almost any regulation of commercial speech.[138] It would seem, however, from *Ibanez*, that the Court has steered the commercial speech doctrine away from its moorings and may have grown too hostile to regulation; *Virginia State Board of Pharmacy* clearly created the doctrine as a device to ensure that consumers would have adequate and accurate information sufficient to make wise decisions in the marketplace rather than as a device to protect some right of businesses to speak commercially. The Court was clear that no such right of business to speak exists independently of the consumer's right to information.[139] Stated plainly, the commercial speech doctrine is founded on consumer protection, not the advancement of business.

Had the *Ibanez* majority viewed Silvia Ibanez's advertising from the consumer's eyes, then it may have been inclined to adopt the dissent's reasoning and permit the Board of Accountancy to require or compel The Florida Bar to mandate a minimal disclaimer indicating where consumers could inquire about Ibanez's qualifications. Instead, the Court fell back on The Florida Bar rule that requires a disclaimer only when a client or potential client inquires about a professional qualification.

The *Ibanez* dissent viewed the facts of the case more from a consumer's view than did the majority. The consumer's view, after all, is what drove the holding in *Virginia State Board of Pharmacy* to support a policy that favors disclosure over concealment in the name of empowering consumers with the information they need to make

---

136. Went For It, Inc. v. The Florida Bar, 115 S. Ct. 2371 (1995).

137. For another recent expression of the Court's approach toward commercial speech, see Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (striking down the Federal Alcohol Administration Act's ban on beer labels that indicate alcohol strength premised on the need to prevent "strength wars" as a violation of the First Amendment). *See also* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (invalidating a restriction on commercial activity in college dormitories because the government interest failed to be sufficiently " 'substantial' and the cost 'carefully calculated' ").

For a well-researched article on commercial speech that suggests the Court in *Fox* redefined the four-part *Central Hudson* test, see Denise D. Trumler, *Perpetuating Confusion in the Commercial Speech Area:* Adolph Coors Co. v. Brady, 26 CREIGHTON L. REV. 1193 (1993).

138. *See also* Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (striking down the Federal Alcohol Administration Act's ban on beer labels that indicate alcohol strength premised on the need to prevent "strength wars" as a violation of the First Amendment).

139. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 478 (1976); *see also supra* note 98 and accompanying text.

informed choices.[140] Somehow the majority saw insufficient potential for consumers to be misled by the side-by-side display of Ibanez's CPA and CFP designations to justify state regulation.[141] Underlying the Court's holding is the assumption that people will know who conferred the various designations or, if they do not know, that they will know where to find out. As the dissent noted, however, the majority failed to apply *Peel* properly.[142] Had the majority followed *Peel*, *Zauderer*, and *In re R.M.J.*, it would have seen the need to require a disclaimer identifying the organization that had conferred CFP status on Ibanez.[143] For instance, in *Peel*, one of the designations indicated it had been awarded by a national association, not a state association. No such distinction is clear in the case of Ibanez's CFP and CPA designations. To rely upon The Florida Bar rule that requires an attorney to provide information about conferred degrees or specialty designations only when asked goes against the consumer-oriented reasoning of *Virginia State Board of Pharmacy*. Why put the burden on the consumer to inquire? When consumers shop for legal services, it is likely that their lives are in turmoil. Even if not in the midst of a crisis, consumers of legal services are shopping for services that will affect their lives much more materially than the purchase of food, clothing, transportation, or entertainment. Therefore, they should be provided more information about legal services than about day-to-day matters.

Although the CFP designation was conferred on Ibanez by a reputable organization that had inquired into her qualifications, as was the case in *Peel*, the facts of *Ibanez* lacked the other *Peel* factors permitting such advertising with no disclaimer. Specifically, unlike *Peel*, the CFP designation was not verifiable by a simple telephone call because there was no disclaimer identifying the conferring organization or giving contact information about it.[144] Consumers could inquire of an attorney about these professional qualifications, the Court reasoned. But will such consumers be in a position to question or evaluate attorney qualifications when they are in need of help regarding legal matters? Even if they are up to the task of interviewing potential counsel, will they be informed enough to get all relevant answers? While many consumers may know that CPA is a designation conferred by the state, the CFP designation is not so well-known, nor is the source of

140. *Id.* at 748.

141. Ibanez v. Florida Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084, 2092 (1994).

142. *Id.* at 2093-94 (O'Connor, J., dissenting in part).

143. *See supra* notes 66-71 and accompanying text.

144. *Ibanez*, 114 S. Ct. at 2093-94 (O'Connor, J., dissenting in part).

such a designation commonly known.[145] This lack of widespread public knowledge about the CFP designation, coupled with the close placement of the CFP and CPA designations in Ibanez's advertisements, created just the type of potential for confusion that the Court had contemplated in *Peel* as a justification for requiring an identifying disclaimer.

In *Peel*, the organization in question contained the word "national" in its name, facially distinguishing it from a state organization such as the Board of Accountancy.[146] Therefore, because the two conferring organizations in *Ibanez* were not distinguished facially, and because their designations both contained the word "certified," the dissent correctly concluded there was potential for misleading the public.[147] To ignore the potential for confusion under these facts reveals the weakness of the Court's reasoning.

The dissent reasoned that even if the consumer most likely would know the state had conferred the CPA status and therefore would have some idea of how to verify that designation, the consumer would have no way of knowing how to verify Ibanez's CFP designation.[148] The dissent would have held that if the Board's absolute ban on the use of specialty designations containing the term "certified" could not stand against Ibanez because it was too broad, the Board should have been allowed to require information identifying the CFP-conferring organization.[149] This, it seems, is a better result than the majority's wholesale reliance upon The Florida Bar rule requiring the advertising attorney to disclose only when asked.

If the Court wanted to protect legal consumers from being misled, this was an area where common sense could have justified a minimal restriction on professional commercial speech in the form of a disclaimer. To do so would have been to remain true to the foundations

---

145. *Id.* at 2092.

146. Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 108 (1990).

147. *Ibanez*, 114 S. Ct. at 2093.

> States may not completely ban potentially misleading commercial speech if narrower limitations can ensure that the information is presented in a nonmisleading manner . . . . But if a professional's certification claim has the potential to mislead, the State may "requir[e] a disclaimer about the certifying organization or the standards of a specialty . . . ." The Board has done just that: An advertisement that "[s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting" will be deemed false or misleading, "unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government."

Id.

148. *Id.*

149. *Id.*

of the commercial speech doctrine articulated in *Virginia State Board of Pharmacy*. The Court would not have been breaking any new ground in commercial speech doctrine to have so held.[150]

To require the inclusion of at least the conferring organization's name would have given interested consumers a lead to follow in verifying the advertiser's credentials without burdening the consumer with the task of asking the advertiser for the information. Common sense dictates that attorney advertising may reach the consumers who most need protection from potentially misleading or confusing information. How many first-time legal clients have the experience to know they should inquire about an attorney's qualifications and training? How many first-time clients have the savvy to demand such information?

Frequent legal consumers have the benefit of experience—either to continue a relationship with an attorney with whom they have dealt previously or to look elsewhere. Would these frequent legal consumers not have the benefit of word-of-mouth or other resources to know where to find another attorney? For experienced legal consumers, such advertising and disclaimers are of reduced value. How many corporate clients respond to such advertising and disclaimers? Corporate clients are perhaps the best educated legal consumers and least in need of protection from potentially misleading information about qualifications and experience. It seems plain that first-time legal consumers or infrequent legal consumers are in greatest need of protection from potentially misleading advertising. Their informed decision-making is a government interest sufficient to have permitted the bar's requiring at least a disclaimer in Ibanez's case.

The Court in *Peel* required a disclaimer identifying the organization that had conferred attorney Peel's status as a trial specialist.[151] Requiring a similar disclaimer from Ibanez would eliminate potential confusion, ease the burden on consumers wishing to educate themselves about professional services, and impose no significant restraint on the professional advertiser's ability to speak commercially.[152]

V. CONCLUSION

The Supreme Court adopted a rigid adherence to First Amendment precedent in upholding Silvia Ibanez's right to advertise truthful

---

150. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91 (1990).

151. *Id.*

152. "The ads should not be misleading on their face. The burden should not be on the potential client to decipher what is misleading." Tellechea Interview, *supra* note 9. Mr. Tellechea described as "disturbing" Justice Souter's comment that even if a specialty designation were potentially misleading, a potential client with a simple telephone call could ask the advertising attorney or accountant to explain the designation. *Id.* Justice Souter's comment was embodied in the majority opinion. *Ibanez*, 114 S. Ct. at 2090 n.9.

information about herself. The Court's straightforward analysis sought to protect consumers by placing access to information ahead of government regulation. Yet, the Court slipped into formulaic reasoning when it allowed Ibanez to use the CPA and CFP designations side by side without permitting the state to require an identifying disclaimer. As The Florida Bar recognizes in its *Rules of Professional Conduct*, consumers should not bear the burden of discovering what organizations have conferred various specialty designations.[153] A closer application of the *Peel* standard would have honored the *Virginia State Board of Pharmacy's* policy of disclosure over concealment while also honoring *Central Hudson's* allowance of just enough government regulation to ensure that consumers could receive meaningful commercial information.

A year after the *Virginia State Board of Pharmacy* decision blazed a trail for protecting commercial speech generally, the Court's holding in *Bates* defined a path for attorney advertising.[154] Some saw *Bates* as signaling a decline in respect for the legal profession,[155] while others viewed attorney advertising as necessary to ensure the public receives adequate information to make informed choices, as in *Virginia State Board of Pharmacy*.[156] *Bates* was handed down less than twenty years ago,[157] and the regulation of professional commercial speech remains an evolving field of law. Whether bar associations and other professional regulators will be able to craft restrictions on advertising tailored narrowly enough to meet either *Central Hudson's* test[158]—or the

---

153. *See supra* note 130.

154. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

155. *Id.* at 389 (Powell, J., concurring in part).

> [I]t is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined 'routine legal services.' In my view, this result is neither required by the First Amendment, nor in the public interest.

Id.

156. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 (1976); *see also* Went For It, Inc. v. The Florida Bar, 115 S. Ct. 2371, 2381 (1995) (Kennedy, J., dissenting). In finding little or no justification for The Florida Bar's 30-day ban on direct-mail solicitation, Justice Kennedy agreed with the lower court that the time immediately after a personal injury or wrongful death is exactly the time when potential clients in such matters might need legal counsel and a 30-day ban on solicitation might jeopardize potential clients' ability to protect their legal rights. *Id.*

157. 433 U.S. 350 (1977).

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

more-recent test of *Board of Regents of the State University of New York v. Fox*[159]—while still favoring a policy of disclosure over concealment, remains an open question. Given the Court's willingness to strike commercial speech restrictions, regulators face a difficult task.

---

159. 492 U.S. 469 (1989).