"COMMERCIAL SPEECH DOCTRINE"

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court opined that commercial speech is entitled to some protection. Based on the public's right to receive the free flow of commercial information, the Court held that commercial speech is protected First Amendment speech and may not be prohibited absolutely. Subsequently, in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court extended the "Commercial Speech Doctrine" to lawyer advertising, holding that a total prohibition on the advertisement of routine legal services is unconstitutional.

Lawyer advertising, as a form of commercial speech, receives a level of constitutional protection that is above unprotected speech (e.g., false, deceptive or misleading statements or advertisements concerning unlawful activities) but below that provided completely protected speech (e.g., political statements). Under the "Commercial Speech Doctrine," a state may totally prohibit misleading advertising and may impose restrictions if the particular content or method of advertising is inherently misleading or if experience demonstrates that the advertising is subject to abuse. *In re R.M.J.*, 102 S.Ct. 929, 937 (1982). If the content of the advertisement is not misleading, the state may regulate it only when there is a substantial government interest being served. *Id*. However, the state may place reasonable restrictions upon the time, place, and manner of lawyer advertising, so long as the content or subject matter is not regulated. See, *Bates*, 97 S.Ct. at 2709.

The standard for regulating the content of commercial speech was first articulated by the Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). There the Court found that the content of non-misleading commercial speech can be constitutionally regulated only when a substantial government interest is at stake, the regulation directly advances that interest, and the regulation is no more extensive than is necessary to serve that interest. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court clarified the *Central Hudson* test for regulating commercial speech by announcing that only a "reasonable fit" must be necessary between the state interest and the regulation. The "fit" need not be perfect, only reasonable.

The following decisions on lawyer advertising by the Supreme Court are recommended reading for a comprehensive understanding of the application of the "Commercial Speech Doctrine" to attorney advertising:

A. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) -- upholding total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain.

B. *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) -- holding that when the attorney is motivated by the desire to promote political goals rather than pecuniary gain, direct in-person solicitation is treated as "political speech," rather than "commercial speech," and is entitled to greater constitutional protection against state regulation.

C. *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 65 (1982) -- deciding that a state may not completely prohibit attorneys from accurately listing their areas of practice; however, certain disclosure language may be necessary to avoid potentially misleading the public.

D. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) -- discussing lawyers use of illustrations in their advertising; also holding that a state may require an advertisement for contingent fees to state that an unsuccessful litigant may be responsible for court costs.

E. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) -- holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems; the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban.

F. *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) -- holding that a state may not totally ban an attorney from advertising certification as a trial specialist by a recognized national certification organization; however, appropriate disclosure statements may be required to avoid any potentially misleading implications.

G. *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994) -- holding that it is not misleading for attorney/accountant to use the designations of CPA and CFP, without further clarification, on letterhead and advertisements as long as the designations are true.

H. *The Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) -- holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the State's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system.

I. *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) -- holding that "[t]he use of trade names is a form of commercial speech." The Court in *Friedman*, upheld, however, a prophylactic prohibition on the use of trade names by optometrists due to specific concerns based upon actual experience which established possibilities for deception of the public.

J. *The Florida Bar v. Fetterman*, 439 So.2d 835, 840 (Fla. 1983) -- finding the trade name "The Law Team, Fetterman and Associates" to be "neither inherently nor operatively misleading" because the lawyer had two associates at the time the firm name was established and continues to have at least one associate. However, if the law firm stops employing any associates, the name would be misleading.

K. *The Florida Bar v. Herrick*, 571 So.2d 1303, 1305 (Fla. 1990) -- concluding that "[S]tate rules [on attorney advertising and solicitation] may be no broader than reasonably necessary to prevent the perceived evil."