

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: GARY E. PEEL, Petitioner V. ATTORNEY
REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS

CASE NO: 88-1775

PLACE: Washington, D.C.

DATE: January 17, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY E. PEEL, :

4 Petitioner :

5 v. : No. 88-1775

6 ATTORNEY REGISTRATION AND :

7 DISCIPLINARY COMMISSION OF :

8 ILLINOIS :

9 - - - - -x

10 Washington, D.C.

11 Wednesday, January 17, 1990

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:06 a.m.

15 APPEARANCES:

16 BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf
17 of the Petitioner.

18 STEVEN J. MARZEN, ESQ., Assistant Solicitor General,
19 Department of Justice; Washington, D.C.; on behalf of
20 the Federal Trade Commission, as amicus curiae,
21 supporting the Petitioner.

22 WILLIAM F. MORAN, III, ESQ., Springfield, Illinois; on
23 behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning No. 89-1775, Gary Peel v. the Attorney Registration and Disciplinary Commission of Illinois.

Mr. Ennis.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

ON BEHALF OF THE PETITIONER

MR. ENNIS: Mr. Chief Justice, and may it please the Court:

Petitioner's letterhead contains the truthful and verifiable statement of fact that he has been certified as a civil trial specialist by the National Board of Trial Advocacy, a highly respected organization of judges and lawyers whose certification program has been endorsed by the --

QUESTION: How do we know that? That it's highly respected?

MR. ENNIS: Your Honor, there is no dispute in this record that the National Board of Trial Advocacy is a reputable and nonbogus organization. It is sponsored by seven national organizations, including the National District Attorneys' Association, the Association of Trial Lawyers of America. On its governing board sit many judges, including judges in --

1 QUESTION: And this is all in the record, I take
2 it?

3 MR. ENNIS: This is in the record below. Yes,
4 that's correct, your Honor.

5 QUESTION: Uh-huh.

6 MR. ENNIS: There is no dispute about that fact.

7 QUESTION: Does the state recognize it as a --
8 as an organization that certifies specialists?

9 MR. ENNIS: The state does not recognize any
10 organizations to certify specialists. In the hearing
11 below, the state took the position that it was not going
12 to argue one way or another about whether the National
13 Board of Trial Advocacy provided meaningful information or
14 not.

15 The state was willing to assume that the
16 National Board of Trial Advocacy certification did provide
17 meaningful information to consumers.

18 Nevertheless, the state thought that in order to
19 prevent bogus organizations from springing up, the state
20 needed to have a complete categorical ban, a prophylactic
21 rule which prohibited all statements of certification.

22 QUESTION: How much of your case, Mr. Ennis,
23 depends on the stature of this particular organization?

24 MR. ENNIS: In this particular case, Your Honor,
25 it does not matter at all because this Court's decisions

1 made clear, beginning with R.M.J and followed in Shapero
2 and Zauderer, that the states cannot place an absolute ban
3 on potentially misleading speech.

4 QUESTION: So if it were the Sangamon County
5 Trial Lawyers' Association with a membership of about six
6 in rotating musical chairs, that would still be true, so
7 long as the statement were not false?

8 MR. ENNIS: No, Your Honor. We do not quarrel
9 with the ability of the state to regulate, to make sure
10 that statements by certifying organizations do provide
11 significant and meaningful information to consumers.

12 The state could adopt a regulatory scheme and
13 could prohibit statements about certification by bogus
14 organizations. That is not this case.

15 Illinois has not tried to distinguish between
16 bogus organizations and meaningful organizations.
17 Illinois has attempted to prohibit --

18 QUESTION: Well, what if it isn't a bogus
19 organization but some little two-bit club that the lawyer
20 truthfully says he belongs to and they've recognized him
21 and given him some certificate? That's fine, I take it.
22 And --

23 MR. ENNIS: No, Your Honor. I think --

24 QUESTION: And the state has to permit that?

25 MR. ENNIS: Your Honor, I think that the same

1 test would apply but in that circumstance application of
2 the test may permit the state to ban statements of
3 certification by that particular organization on the
4 ground --

5 THE WITNESS: On what theory?

6 MR. ENNIS: -- on the ground that those
7 statements of certification do not provide significant or
8 meaningful information to consumers and are potentially
9 deceptive and cannot be proved --

10 QUESTION: Well, how does an average consumer
11 know anything at all about this organization? They're not
12 even listed in the telephone directory in some cities.
13 And how is the average person to have any feeling at all
14 about what that organization represents?

15 MR. ENNIS: Well, Your Honor, as the FTC will
16 argue as amicus, Petitioner's statement, like statements
17 like physicians that they are board certified, does
18 provide meaningful and relevant information to consumers.

19 Consumers, if they want, can go to the trouble
20 to find out what being a board certified --

21 QUESTION: Well, so it really does make a lot of
22 difference, contrary to what you said earlier, what kind
23 of an organization this is.

24 MR. ENNIS: Your Honor -- Justice White, I think
25 if the state had a regulatory process, it would make a lot

1 of difference whether --

2 QUESTION: Well, you seem to say it does make a
3 lot of difference. It has to provide -- this statement
4 has to provide meaningful information. And I take it from
5 what you've said in your answers that whether it provides
6 meaningful information or not depends on what kind of an
7 organization it is.

8 This two-bit club? No. But this group, yes.

9 MR. ENNIS: Yes, Your Honor, that is correct.
10 Our position is, and I think it is the same test, the same
11 rule this Court applied unanimously in R&J and later in
12 Shapero and Zauderer, that the state cannot have a blanket
13 prohibition on potentially misleading speech, as a speech
14 by a bogus organization might be, if there are regulatory
15 mechanisms which could eliminate the deception.

16 Here there are at least four, and maybe five,
17 simple and reasonable regulatory mechanisms that Illinois
18 could use to eliminate any potential for deception by
19 bogus organizations.

20 First, Illinois could itself on an ad hoc basis
21 approve certifying organizations as meeting its standards
22 for what provides meaningful information.

23 Second, Illinois could --

24 QUESTION: You say that's a simple step, Mr.
25 Ennis. But actually, that could involve a fairly

1 substantial commitment of resources on the part of the
2 Supreme Court of Illinois, couldn't it?

3 MR. ENNIS: Justice Rehnquist, it certainly
4 could provide -- require some commitment of resources, but
5 less, I think, than the administrative burden this Court
6 has already upheld in the other attorney advertising
7 cases.

8 In Zauderer and in Shapero this Court upheld
9 requirements and suggested that in order to regulate
10 potentially misleading speech the state could require
11 filings of all speech with the state and then on a case-
12 by-case basis the state could make a decision about
13 whether that particular speech was or was not misleading.

14 THE WITNESS: Well, what if --

15 MR. ENNIS: That is a greater --

16 QUESTION: -- if this is commercial speech.

17 MR. ENNIS: Justice White?

18 QUESTION: What if this is commercial speech
19 that these -- that he's putting out? Is your rule of
20 applying a narrower -- or the requirement that they use a
21 less-restrictive means is that really -- will that really
22 get you very far if it's (inaudible).

23 MR. ENNIS: Your Honor, I hope so because I'm
24 relying principally on your opinion for the Court in
25 Zauderer, which was a commercial speech case, which

1 squarely ruled that states cannot prohibit potentially
2 misleading information if reasonable regulatory measures
3 would suffice to cure the deception. Zauderer --

4 QUESTION: Is this commercial speech?

5 MR. ENNIS: Your Honor, we argue in our briefs
6 that this speech should be categorized as fully protected
7 speech rather than commercial speech.

8 But because this case can and should be decided
9 on the narrower ground that even if it is commercial
10 speech it cannot be categorically prohibited, I will rely
11 on the arguments in our brief to support the broader
12 ground.

13 Let me make clear that Illinois has not argued
14 that its prophylactic ban is a reasonable accommodation
15 between First Amendment interests and the state's
16 interests. Instead, Illinois has argued that no
17 accommodation is necessary because there is no First
18 Amendment interest to be protected.

19 That argument is based solely on the conclusory
20 assertion, without any support in the record, that all
21 statements of certification or specialization will
22 inevitably and necessarily mislead consumers.

23 But as the Federal Trade Commission will argue
24 as amicus, Petitioner's statement, like the statements by
25 physicians that they are board certified, provides

1 relevant and meaningful information that will promote
2 informed consumer decisions.

3 Petitioner's statement, according to the FTC, is
4 not even potentially misleading, and even if it were,
5 there are numerous reasonable regulatory measures that
6 would eliminate any potential for deception. And Illinois
7 has not even bothered to consider those regulatory
8 measures, much less prove that they would not suffice.

9 QUESTION: Mr. Ennis, what does the
10 certification here tell the consumer? Does it tell the
11 consumer that the lawyer has had a good win/loss record in
12 cases in court?

13 MR. ENNIS: No, Your Honor, not at all. And
14 that is a quite different situation. A good win/loss
15 record, a statement about a good win/loss record, might
16 imply success, that the attorney will be able to be
17 successful for the client.

18 This is not that at all. A statement of
19 certification --

20 QUESTION: Well, what do you think the average
21 non-law-trained person would think that it might indicate
22 or might encompass? Specialized training or --

23 MR. ENNIS: I think that the --

24 QUESTION: -- win/loss or lots of experience?
25 What is it --

1 MR. ENNIS: I think --

2 QUESTION: -- we're -- we're to think that that
3 means?

4 MR. ENNIS: I think, Justice O'Connor, that the
5 average person might reasonably think that certification
6 by the National Board of Trial Advocacy would imply
7 something about experience in civil trials and a knowledge
8 of basic procedures in civil trials, which is exactly what
9 NBTA certification does.

10 In order to be certified by NBTA, as the
11 Minnesota Supreme Court ruled, NBTA certification is based
12 upon a rigorous and exacting set of requirements which
13 require proof of five years of practice in civil trials,
14 including at least 30 percent concentration in each year
15 in civil trials; lead counsel in 15 completed trials,
16 including five jury trials and at least 45 full trials
17 days; lead counsel in an additional 45 litigated matters;
18 45 hours of continuing legal education in civil trial
19 practice in the previous three years; confidential peer
20 review by both judges and lawyers of the attorney's trial
21 abilities; a substantial trial brief; and a day-long
22 written examination which tests knowledge of evidence,
23 ethics, substantive and procedural law and trial tactics.

24 QUESTION: But, as you've said, Mr. Ennis,
25 that's -- that's really just incidental. I mean, the

1 principle you're arguing for is that even if that weren't
2 all true, the state's absolute ban would not be any good.
3 They -- it would be up to the state to show that this was
4 not a reputable organization, isn't that -- that's your
5 point.

6 MR. ENNIS: That's right, Justice Scalia.

7 QUESTION: What would you -- what would you do
8 if -- if Mr. Peel put on his letterhead -- instead of
9 certified by this organization it just says on the
10 letterhead "The best in legal representation; new improved
11 lawyering"?

12 (Laughter.)

13 MR. ENNIS: The same test would apply.

14 QUESTION: The same test?

15 MR. ENNIS: The same test. But under that test,
16 the statement has --

17 QUESTION: So the Supreme Court of Illinois
18 would have to show case by case that this individual is
19 not the best -- isn't providing the best in lawyering?

20 MR. ENNIS: That's not exactly my answer,
21 Justice Scalia. That is a different factual circumstance
22 from this case because it's a statement of opinion. "I am
23 the best lawyer in the East Coast," is a statement of
24 opinion. It is not verifiable.

25 A statement by Peel that he has been certified

1 by the National Board of Trial Advocacy is a statement of
2 fact.

3 QUESTION: He says he's the best lawyer in
4 Sangamon County. You think that's not verifiable?

5 MR. ENNIS: No, I think it's certainly not
6 verifiable, Your Honor. I'm sure that some other lawyers
7 in Sangamon County would disagree with that assessment.

8 It's a very different circumstance to say a
9 statement of opinion, "I'm the best lawyer in the
10 universe," on the one hand and say, "As a matter of fact,
11 I have been certified by a highly reputable organization."

12 QUESTION: Which says that in their opinion I'm
13 a good lawyer.

14 MR. ENNIS: Which says that --

15 QUESTION: So, a second-hand opinion is better
16 than a first-hand opinion.

17 MR. ENNIS: It's not just -- it's not just their
18 opinion. It's not an ad hoc basis, Justice Scalia.

19 NBTA certification is based upon a rigorous set
20 of preexisting standards and qualifications.

21 QUESTION: Well, that isn't what is -- what he
22 -- what he says. He doesn't say anything about the
23 organization. He just says that I'm certified by so and
24 so and so and so.

25 And I thought you said a while ago that if he

1 put on his letterhead that I've been certified by this
2 little club that no one ever heard of that, as applied,
3 this blanket ban would be all right.

4 MR. ENNIS: Your Honor, I believe that --

5 QUESTION: Well, would it or not?

6 MR. ENNIS: I believe that a blanket ban is
7 never acceptable in this circumstance.

8 QUESTION: So, he could put on -- he could -- he
9 could put on his letterhead that -- that he had been
10 certified by some club that no one had ever heard of and
11 he could use it -- and he could say you cannot keep me
12 from doing that --

13 MR. ENNIS: No.

14 QUESTION: -- because --

15 MR. ENNIS: No.

16 QUESTION: Now, wait a minute. You cannot get
17 -- you cannot make me -- you cannot keep me from doing
18 this under this blanket ban. As applied to me even, this
19 ban is bad.

20 MR. ENNIS: Well, Your Honor --

21 QUESTION: Is that right?

22 MR. ENNIS: Well, that is not necessarily
23 correct because this Court's opinions made clear
24 that (inaudible).

25 QUESTION: Well, what -- yeah, but what's your

1 view? What's your view of how he would come out if he put
2 on his letterhead that this little club name that no one
3 ever heard of --

4 MR. ENNIS: My -- my view is that that statement
5 could not be banned if the justification for the ban is a
6 prophylactic ban that all such statements must be banned.

7 QUESTION: So, it's just overbroad is it, or
8 what?

9 MR. ENNIS: No. It's not just overbroad because
10 it applies to Peel. He's not arguing --

11 QUESTION: Yes. Right.

12 MR. ENNIS: -- about the rights of other people
13 and saying that his speech would not be protected but the
14 rights of others would. He is arguing that his speech
15 itself is constitutionally protected because it provides
16 meaningful information.

17 QUESTION: Well, yes, but you seem to say that
18 if the -- if the state sorted groups out and said here are
19 the groups that we recognize and here are the groups that
20 we don't, that they could -- that they could do that.

21 MR. ENNIS: I'm sorry, but I didn't quite follow
22 that, Your Honor.

23 QUESTION: Well, why don't you go ahead. Maybe
24 I can follow you.

25 MR. ENNIS: Let me -- let me point out that the

1 three ways in which Illinois claims that Petitioner's
2 speech could be misleading are not self-evident and they
3 are not based on any empirical evidence, any study, or any
4 expert opinion that that speech would be misleading.

5 Illinois first suggests that a statement of
6 certification will imply that the state itself has
7 certified or has endorsed the certification. But as the
8 FTC will argue, it is implausible to believe that
9 consumers will think certification by the National Board
10 of Trial Advocacy is certification by the State of
11 Illinois.

12 Furthermore, even if there were evidence that
13 Petitioner's statement was potentially misleading in that
14 way, there are many simple regulatory measures to cure
15 that misleading statement.

16 First is a simple requirement for a disclaimer.
17 Illinois could require attorneys to say on their
18 letterheads that certification does not mean or imply
19 certification or approval by the state.

20 Second, there could be ad hoc approval of
21 certifying organizations.

22 Third, there could be approval of certifying
23 organizations pursuant to preexisting standards and
24 criteria that Illinois would find to be meaningful.

25 Fourth, there could be case-by-case review of

1 all such statements, as this Court found would be a
2 reasonable regulatory burden in Zauderer and in Shapero.

3 And finally, the states themselves could engage
4 in certification of attorneys, as 11 states have done.

5 Under NBTA requirements, if a state provides
6 itself for certification of attorneys, NBTA will not
7 certify an attorney until the attorney has first been
8 certified by that state.

9 In all these ways the entirely speculative fears
10 of Illinois could be cured through reasonable regulatory
11 measures.

12 With respect to the burden point that you
13 raised, Justice Rehnquist, let me simply say that in
14 Zauderer the Court said, quote, "Our recent decisions
15 involving commercial speech have been grounded in the
16 faith that the free flow of commercial information is
17 valuable enough to justify imposing on would-be regulators
18 the costs of distinguishing the truthful from the false,
19 the helpful from the misleading and the harmless from the
20 harmful."

21 QUESTION: So if -- putting aside opinion
22 problems, if there were -- if they were on the letterhead,
23 you know, graduated first in his class from the University
24 of Chicago Law School, more hours on his feet in a
25 courtroom than any other lawyer in Sangamon County and a

1 few other things, what would -- the state would have to
2 allow that and its only remedy would be to investigate
3 those allegations one by one?

4 MR. ENNIS: I think, Your Honor, that so long as
5 the state has not bothered to distinguish at all between
6 the harmful and the harmless, the answer would be yes, the
7 state would be relegated to a case-by-case approach.

8 So --

9 QUESTION: It's a lot of work.

10 MR. ENNIS: But our argument is that the state
11 could adopt reasonable regulatory mechanisms to review
12 that kind of speech as well as this kind of speech, which
13 is a very different kind of speech.

14 The state in Illinois has not bothered to do
15 that. And as this Court's decisions made clear, Illinois
16 cannot impose a prophylactic ban on useful speech simply
17 to, quote, "spare itself the trouble" of distinguishing
18 between the harmful and the harmless.

19 I'd like to reserve my remaining time for
20 rebuttal, if I may.

21 QUESTION: Very well, Mr. Ennis.

22 Mr. Marzen, we'll hear now from you.

23 ORAL ARGUMENT OF STEPHEN J. MARZEN
24 ON BEHALF OF THE FEDERAL TRADE COMMISSION
25 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

1 MR. MARZEN: Mr. Chief Justice, and may it
2 please the Court:

3 On behalf of the Federal Trade Commission I'd
4 like to make two submissions this morning.

5 First, that Mr. Peel's certification claim, and
6 other claims like it, are valuable commercial speech. And
7 second, that certification claims cannot be entirely
8 prohibited by the state on the record in this case.

9 First, information about lawyer certification is
10 valuable commercial speech. The First Amendment protects
11 commercial speech on the theory that it performs a
12 valuable function in allocating resources in a free-market
13 economy. Among other things, such information helps
14 consumers pick out desirable goods and services.

15 The First Amendment theory, as applied to this
16 case, would indicate that information about lawyer
17 certification would help consumers pick out lawyers who
18 are particularly competent to handle their particular
19 problems.

20 QUESTION: Mr. Marzen, how would this particular
21 certification on Mr. Peel's letterhead help consumers?

22 MR. MARZEN: Well, if a consumer had a problem
23 that involved litigation, they could look for someone who
24 is certified as a civil trial specialist by the National
25 Board of Trial Advocacy, in comparison to another

1 practitioner who didn't have any certification or also
2 didn't, through looking at Martindale-Hubbell or something
3 else -- didn't have any indication that he had courtroom
4 experience for example.

5 QUESTION: You think that would -- that a lay
6 person would understand the significance of that
7 certification?

8 MR. MARZEN: A lay person certainly isn't going
9 to know that NBTA certification means all the specific
10 things that are required to get the certification. He's
11 not going to know that it requires 15 trials, five jury
12 trials or a minimum of 45 days trial experience.

13 At the same time, the vast majority of people in
14 this courtroom probably wouldn't know what tests a product
15 had to go through to get an Underwriter's Laboratory
16 certification.

17 He or she will know, however, that the
18 certification implies that the attorney has passed some
19 tests, some tests with bite, that are related to the
20 subject area of the certification.

21 And that's -- that's the sort of implied claim
22 that a certification statement makes. And in that case
23 it's true.

24 I detected in the questions posed to previous
25 counsel some limits as to what -- or some questions as to

1 what is left for the states if you recognize the ability
2 of an attorney to say that I'm a certified civil trial
3 specialist, or any other certification claim. And in the
4 Federal Trade Commission's view, substantial leeway is
5 left within a wide zone of reasonableness for states to
6 continue regulating.

7 Within the certification area, for example, if
8 the organization had a musical chairs requirement or just
9 had the requirement that one pay a certain fee, a state
10 could of course prohibit that in their entirety.

11 The reason -- the theory would be that those
12 claims do not -- or that the requirements of the
13 certification organization have no relationship at all to
14 the implied claim the consumer would read from the
15 certification.

16 In addition, depending on what the state
17 reasonably finds the reasonable consumer to understand the
18 claim to be, the state could prohibit claims by
19 certification organizations with insufficient
20 requirements.

21 For example, in this case if the State of
22 Illinois had found that a reasonable consumer assumes that
23 a civil trial specialist has at least tried one case, they
24 could forbid organizations from -- or forbid people from
25 making claims that they are certified as a civil trial

1 specialist by an organization that didn't have those
2 particular requirements.

3 QUESTION: One case.

4 MR. MARZEN: Excuse me?

5 QUESTION: One case. That's pretty tough.

6 MR. MARZEN: Well, what one has to realize is
7 that this is sort of a dynamic proces. There were --
8 there was a time in the medical profession and in -- in
9 certain products where they were just starting
10 certification. And in those cases, consumers did not --
11 you know, the certification took more and more meaning
12 over time.

13 For instance, the Sunkist Grower's Association
14 -- you know, who knew -- who knew what Sunkist meant when
15 it first started out? It was a group of people, you know,
16 growing oranges. Over time, though, it became --

17 QUESTION: But you're not dealing with light
18 bulbs here. You're -- you're dealing with the process of
19 justice that the Illinois Supreme Court has a special
20 responsibility for.

21 MR. MARZEN: That's --

22 QUESTION: And -- and simply because you can
23 allow any organization to certify something -- Good
24 Housekeeping or United Labs, or whatever else for light
25 bulbs -- it doesn't mean you have to do it for the process

1 of justice, for which counselor are -- are members of the
2 bar of the court.

3 MR. MARZEN: Absolutely true and the legal
4 services --

5 QUESTION: And all -- all you tell me the state
6 can look to is whether you have one trial.

7 MR. MARZEN: No. It depends on what the
8 assumption of reasonable consumers are. For example, if
9 one -- over time there may be more and more state
10 certification and certification by more and more private
11 entities.

12 Just as in the medical profession, you may
13 evolve towards higher and higher standards. Unless you
14 allow the process to get started, however, you're never
15 going to reach that higher goal.

16 There's no question but that you're correct that
17 legal services are far more complex, and claims that you
18 wouldn't allow in the areas of products, for example,
19 would not be allowed in terms of legal services.

20 QUESTION: It isn't just a matter of complexity,
21 it's a matter of it being part of the process of justice
22 that the Illinois Supreme Court and other courts are
23 charged with meting out.

24 MR. MARZEN: I understand that it's part of the
25 process of justice, but in fact allowing people to -- to

1 announce and to disseminate information about
2 certification is in the very highest traditions of the
3 standards of the bar in maintaining and improving the
4 quality of advocacy and all other forms of service.

5 As the study cited on page 2 of our brief in
6 this case indicate, more than 90 percent of the people who
7 suffered serious property damage, employment
8 discrimination or had problems with their landlords, don't
9 go see a lawyer. Those exact same studies reveal that the
10 principal barrier is because people don't know that there
11 is a particular -- can't find a particular lawyer who they
12 feel is competent to deal with the problem.

13 That same -- another study cited in that -- our
14 -- our same FTC submission indicates that in certain copy
15 tests with 276 individuals, that when you give them
16 information about professional qualifications they -- the
17 intentions to go out and obtain legal services increases.

18 Justice is a very, very important goal. But the
19 information that is -- that would be disseminated as a
20 result of this case is in -- would actually help promote
21 justice. It would help people who have serious legal
22 problems vindicate public and private rights. And that is
23 a significant interest weighing in the balance on the
24 other side.

25 The state, of course, has substantial leeway to

1 prohibit false or misleading claims but it's not necessary
2 to reach -- to have a prophylactic ban to do so.

3 In fact, in this particular case the State of
4 Illinois had already means to achieve all of its goals
5 with -- with far less intrusion on First Amendment costs.

6 Specifically, the claims of the State of
7 Illinois are that someone reading Gary Peel's
8 certification statement and any other certification
9 statement would think that there was an implied claim of
10 either state sponsorship or an implied claim that Gary
11 Peel is a superior trial lawyer.

12 If those claims are accurate, which we disagree
13 for the reasons in our brief and I can elaborate on, the
14 State of Illinois could have had a prophylactic disclaimer
15 saying that certification is not by the state and infers
16 no claim of expertise.

17 That would have cured any potential confusion or
18 deception, and it would have not trenched nearly on the
19 First Amendment interests that --

20 QUESTION: But it would have pretty well killed
21 the usefulness of the -- of the letterhead, too, wouldn't
22 it? Perhaps you say that Illinois should be pleased with
23 that result. If you -- I mean, are you really winning
24 much for Mr. Peel if you say he can put this on but after
25 it the state can require him to put it, this is not a

1 certification by the state and it does not import any
2 claim of expertise?
3 MR. MARZEN: Not as much as I'd like, Justice
4 Rehnquist. It's better than a flat ban on any
5 certification statements and it would probably require the
6 attorney to make the certification information useful to
7 specify more about what the standards of the certifying
8 organization were.

9 QUESTION: But that's not true, is it? It -- it
10 does imply a claim of expertise. I mean, that -- now
11 we're -- now we're just saying that the state can impose
12 something that isn't true.

13 MR. MARZEN: That's -- we -- okay. The two
14 points I would make is that it's less intrusive. We would
15 -- I entirely agree with your point, though, that on the
16 facts of this case the state should not be allowed to
17 require a disclaimer.

18 Disclaimers are extremely valuable when there is
19 some potential --

20 QUESTION: So -- so you say the state should not
21 be allowed to require a disclaimer as to this ad?

22 MR. MARZEN: Yes.

23 QUESTION: You're saying it's a -- it's a lie,
24 but at least it's constitutional? Is that your position?

25 MR. MARZEN: No. Not at all.

1 (Laughter.)

2 MR. MARZEN: It's not a lie at all. The express
3 statement in this case is: I have been certified as a
4 civil trial specialist by the NBTA. That is absolutely
5 true.

6 There are implied claims, however, which may or
7 may not be intentionally made that could be confusing or
8 deceptive. When one is dealing with such implied claims,
9 the experience of the Federal Trade Commission is that you
10 can address an implied claim by an express statement that
11 is -- an express statement that that is not what I meant.

12 QUESTION: So -- so where do we come out here?
13 That the State of Illinois in your view could not
14 constitutionally require a disclaimer in this case?

15 MR. MARZEN: I would not think that a disclaimer
16 would be appropriate.

17 QUESTION: No, I -- I --

18 QUESTION: I thought you said it would be.

19 MR. MARZEN: Okay.

20 QUESTION: It's not a question as to whether
21 it's appropriate. It's whether or not it's permitted.

22 MR. MARZEN: We -- the -- on behalf of the
23 Federal Trade Commission, a disclaimer would not be
24 permitted by the Constitution in this case. My -- my
25 initial claim was directed to the fact that the state had

1 lesser intrusive measures that it -- that it could have
2 considered --

3 QUESTION: Well, I thought you said --

4 MR. MARZEN: -- that would have entirely
5 remedied what it had --

6 QUESTION: I thought you said a moment ago that
7 the state could require not only the disclaimer but that
8 this does not imply any claim of expertise. What's your
9 answer to that?

10 MR. MARZEN: My answer is no. The state --

11 QUESTION: No, that you didn't say it or no that
12 you wish you hadn't said it?

13 (Laughter.)

14 MR. MARZEN: The latter, Justice Rehnquist.

15 (Laughter.)

16 QUESTION: Mr. Moran.

17 ORAL ARGUMENT OF WILLIAM F. MORAN, III

18 ON BEHALF OF THE RESPONDENT

19 MR. MORAN: Mr. Chief Justice, and may it please
20 the Court:

21 The Illinois Code of Professional Responsibility
22 prohibits attorneys from holding themselves out as being
23 either certified or a specialist.

24 The policy supporting this prohibition is that
25 Illinois does not recognize or sanction any certification

1 or specialization process. Therefore --

2 QUESTION: Do you -- Mr. Moran, do -- do -- does
3 Illinois do it on the medical side?

4 MR. MORAN: The state does not do it, Your
5 Honor. Doctors -- the medical profession -- are allowed
6 to hold themselves out as being specialists or board
7 certified.

8 QUESTION: And the state doesn't object to that?

9 MR. MORAN: They do not regulate it, though it
10 is our argument that if the state chose to regulate those
11 board certifications, it would be with -- it would be
12 within their authority to do so.

13 QUESTION: May I ask one -- one? Does the state
14 permit a member of the bar to list on his letterhead that
15 he's a member of the United States Supreme Court Bar?

16 MR. MORAN: Yes. Like in R.M.J, an attorney can
17 list the court where he is admitted to practice.

18 QUESTION: Don't you think that's perhaps more
19 misleading than this -- this -- particular --

20 (Laughter.)

21 MR. MORAN: Well, Your Honor, because this Court
22 sets the qualifications --

23 QUESTION: Doesn't that imply that they've been
24 here a lot and argued a lot of cases and we know them very
25 well?

1 (Laughter.)

2 MR. MORAN: Well, they would be allowed to say
3 that they were admitted in the Court --

4 QUESTION: Yeah.

5 MR. MORAN: -- to practice and -- and --

6 QUESTION: But do you think that's more or less
7 misleading than this particular letterhead?

8 MR. MORAN: I obviously think that it's less
9 misleading than this particular letterhead.

10 QUESTION: Well, what's misleading about this
11 letterhead?

12 MR. MORAN: There's three reasons why
13 Petitioner's letterhead is misleading.

14 The first and most obvious reason it's
15 misleading is that to the reader Petitioner's statement
16 implies that his certification is sanctioned by the state
17 or a governmental authority when there is no question on
18 the record that it is not..

19 QUESTION: Of course that could, as your
20 opponent just suggested, easily be corrected by saying not
21 a government organization or something like that.

22 MR. MORAN: Your Honor, we -- we believe there's
23 three reasons why it's misleading. The first, that it
24 implies sanction. The second, that it impinges upon the
25 inherent authority of the Supreme Court of Illinois to set

1 qualifications for the practice of law in Illinois.

2 QUESTION: Yes, but they can't set
3 unconstitutional qualifications, can they?

4 MR. MORAN: That's correct, Your Honor. And the
5 third reason is that on this record Petitioner's claim is
6 an unverifiable claim as to the quality of services he
7 provides.

8 Petitioner in his reply brief even admits or
9 argues that a disclaimer in this case would be highly
10 burdensome, and it is our argument that a disclaimer that
11 would have to be created to vitiate the three components
12 of why Petitioner's statement is misleading would have to
13 be so long, so detailed as to be even --

14 QUESTION: On the unverifiable point --

15 MR. MORAN: -- more confusing to the public.

16 QUESTION: -- is there any distinction between
17 this and the -- and the board certification in the medical
18 fields that Justice Blackmun asked about?

19 MR. MORAN: Well, the unverifiable claim on this
20 record, Your Honor, is that before the Illinois court the
21 various amicus who filed briefs on behalf of Petitioner
22 and Petitioner all stated that there were different
23 qualifications. Each one had a different set of --

24 QUESTION: Well, I suppose they've changed over
25 the time. But there isn't really any doubt about the fact

1 that this is a pretty reputable organization, is there?

2 MR. MORAN: We believe that it's irrelevant one
3 way or another whether it's a reputable organization. We
4 believe the important focus is on the terms themselves:
5 certified and specialist.

6 QUESTION: But, again, going back to the medical
7 because -- do you think that this is less verifiable than
8 the number of examinations a particular specialist in some
9 medical field might have had?

10 MR. MORAN: I don't know if it would be more or
11 less but in the case of the medical profession research
12 shows that the medical profession has been certifying
13 specialists, board certifying physicians, for 40 to 50
14 years.

15 QUESTION: Yeah, but how -- but how can these
16 people ever get started? That's -- that's one of the
17 arguments your opponents made.

18 MR. MORAN: Well, in -- in the comments to our
19 rule, the legislative history, our court sets forth that
20 some day the court may see fit to implement a
21 certification or specialization program in Illinois.

22 Obviously, the opinion in this case is
23 indicative of the fact that the court does not feel that
24 now is the time to implement a certification process.

25 We argue that it's within the inherent authority

1 of the Supreme Court of Illinois to decide when it is
2 appropriate to join the 11 other states who have their own
3 certification processes.

4 QUESTION: Well, now, Illinois does, however,
5 permit lawyers to disclose their specialization in some
6 areas -- patent, admiralty and what's the other?

7 MR. MORAN: And trademark.

8 QUESTION: Trademark.

9 MR. MORAN: In those cases, Your Honor, the
10 attorneys who practice in those areas are now allowed to
11 use the inherently misleading terms "certified" and
12 "specialist."

13 QUESTION: What are they allowed to do in those
14 areas?

15 MR. MORAN: I'll go directly to the rule. And a
16 lawyer admitted to practice before the United States
17 Patent and Trademark Office may use a designation patents,
18 patent attorney, patent lawyer or registered patent
19 attorney, or any combination of those terms on his
20 letterhead.

21 A lawyer engaged in the trademark practice may
22 use the designation trademarks, trademark attorney or
23 trademark lawyer or a combination of those terms.

24 And a lawyer engaged in the admiralty practice
25 may use the designation admiralty, proctor in admiralty or

1 admiralty lawyer or a combination of those terms.

2 QUESTION: But a lawyer who is engaged primarily
3 in civil litigation practice cannot so indicate?

4 MR. MORAN: We believe that an attorney could
5 indicate that he was a civil trial advocate or a civil
6 trial attorney, because that statement would not be
7 misleading for the three reasons that we've set out.

8 That does not imply state sanction, that doesn't
9 set a qualification for the practice of law. In other
10 words, a reader could not look at that statement and
11 think, but for that certification the attorney could not
12 practice in that area of the law.

13 QUESTION: And Illinois would permit that,
14 although it isn't expressly allowed?

15 MR. MORAN: That's correct. And also because
16 though a reader might infer a term of quality or a certain
17 quality because of that statement that would be readily
18 verifiable. All attorneys in Illinois --

19 QUESTION: How would it be readily verifiable?

20 MR. MORAN: All attorneys in Illinois are
21 presumed to be competent to handle matters in which they
22 are retained to represent a client.

23 Factually, if an attorney -- and we cited in our
24 brief the case of Zimmerman from New York where they
25 determined the -- the New York court determined that an

1 attorney who held himself out as available to practice and
2 was experienced in 25 areas of law was --

3 QUESTION: Well, if -- if the lawyer chose to
4 engage in a civil litigation practice and so indicated on
5 the letterhead, and the lawyer in fact was newly admitted
6 to practice and had had only a trial or two before doing
7 this, Illinois would nonetheless permit that chosen
8 designation on the letterhead?

9 MR. MORAN: It would truly be a question of
10 fact, though, Your Honor, whether or not he was a civil
11 trial advocate. I believe that would be something that a
12 hearing board in a preliminary disciplinary matter could
13 determine factually whether or not --

14 QUESTION: Well, is that what Illinois does? Is
15 it -- is it set up to examine those claims individually
16 and determine the extent to which the attorney has in fact
17 had --

18 MR. MORAN: If --

19 QUESTION: -- trial experience?

20 MR. MORAN: If a problem arose and it came to
21 the attention of the administrator of the Commission and a
22 disciplinary investigation was instituted against the
23 attorney, yes, we would determine on a case-by-case basis
24 whether or not that attorney was qualified as a civil
25 trial advocate and whether his statement was --

1 QUESTION: But you say it is too burdensome to
2 do that with regard to this organization's certification
3 even though you're perfectly willing to do it in the other
4 instance?

5 MR. MORAN: That's correct, Your Honor, because
6 for, again, the inherently misleading nature of any
7 certification or specialization term. A specialization --

8 QUESTION: Excuse me. Does Illinois allow you
9 to say practice limited to civil litigation?

10 MR. MORAN: That's correct.

11 QUESTION: It does allow that?

12 MR. MORAN: That's correct, Your Honor.

13 QUESTION: Even if you -- even if you've just
14 been admitted for a day and have never been in court?

15 MR. MORAN: Again, that would be a factual
16 determination. And just as an example, I would again
17 point to the Zimmerman case, where --

18 QUESTION: Well, facts for determination -- I
19 mean, it's true, he won't do anything but civil
20 litigation. That's his intention, and it's hard to
21 disprove that, isn't it?

22 MR. MORAN: But if that was misleading to the
23 public, which is based on the facts of the situation, that
24 an attorney -- an attorney who was just admitted to the
25 practice of the bar very well may be competent to be a

1 civil trial advocate in some situations.

2 But in order to take a case, in order to
3 represent a client, the Code -- our Code -- requires that
4 the attorney be competent to handle that matter. And if
5 he's --

6 THE WITNESS: I thought you presumed that.

7 MR. MORAN: Well, it requires but it -- all
8 attorneys who are presumed to act ethically at all times
9 are presumed to be competent to handle the matters where
10 they are retained.

11 QUESTION: Well, why doesn't that presumption
12 cover this lawyer insofar as he represents he's a
13 competent lawyer able to try civil cases?

14 MR. MORAN: Again, because of the inherently
15 misleading nature of his statement for the reasons that we
16 set forth. And especially on the --

17 QUESTION: Because he thinks the average reader
18 will think that he's specially certified by Illinois even
19 though it doesn't say that?

20 MR. MORAN: That's correct. The reader -- and
21 this is not just -- this was a finding of the Supreme
22 Court of Illinois but it was supported by an ABA study
23 that found that the terms "certified" and "specialist"
24 themselves have acquired a secondary meaning to the
25 public.

1 The public cannot differentiate between terms
2 "certified" and "specialist" and the term "licensed," the
3 term "licensed," which means sanctioned by an official
4 entity. "Certified" and "specialist," especially on this
5 record --

6 QUESTION: The public in Illinois can't make
7 that distinction is what you're saying.

8 MR. MORAN: That's correct. And that was the
9 finding of both the Illinois court and the ABA in their
10 report.

11 QUESTION: And I think that's very true when you
12 said certified -- certified trial specialist. Yes, I
13 think the public would think that means certified by the
14 state.

15 But when you say, you know, certified by Milton
16 Berle or certified by somebody in particular, why does
17 that necessarily indicate the state? I mean, that's just
18 not plausible. It's just not plausible.

19 You -- you're not arguing, are you -- it might
20 be a plausible argument to say that the public might
21 believe that any organization mentioned as being the
22 certifier has been reviewed by the State of Illinois.
23 Maybe that's plausible. But that isn't -- that isn't your
24 argument, is it? And that isn't what the Supreme Court of
25 Illinois relied on.

1 They didn't rely on the fact that the public
2 would think that Illinois, like a lot of other states, or
3 11 other states, has actually examined this -- this
4 association to see whether they're worthy of certifying.

5 That -- but that isn't your point, is it?

6 MR. MORAN: In fact, though, in this case we
7 have argued that one of the things that a reader might
8 imply from Petitioner's statement is that the National
9 Board was recognized by the state.

10 Also, especially when you look at this record,
11 you have to look at the facts. You have to look at
12 Petitioner's letterhead. Specifically, on his letterhead
13 he has the name of his law office, his address, his phone
14 number, and to the left in the same size print he lists
15 his name, then he lists his certification claim. And
16 then, without any spacing, he places the words "licensed"
17 and he places the three states --

18 QUESTION: No, but you omitted the words by the
19 -- certified trial specialist by the National Board of
20 Trial Advocacy. And after that, the licensed by the three
21 states.

22 MR. MORAN: And in this case he is --

23 QUESTION: And you think that when he says civil
24 trial specialist -- I mean, certified by the National
25 Board of Trial Advocacy, the reader will think he was

1 certified by some Illinois organization?

2 MR. MORAN: But I don't believe --

3 QUESTION: I don't understand that.

4 MR. MORAN: -- Your Honor, that the public would
5 be sophisticated enough to determine the true meaning.

6 Now, we as lawyers, we know that Illinois does not
7 recognize his certification or specialization process.

8 But the reader to the public -- or, the reader in the
9 public, would not realize that that claim is not --

10 QUESTION: And what great harm would come if the
11 -- if the uninformed reader thought the organization had
12 been certified by the Illinois Supreme Court when it
13 hadn't. It had been certified by somebody and perhaps
14 looked at a lot more closely than the Illinois Supreme
15 Court looks at all these lawyers who get this presumption?

16 (Laughter.)

17 MR. MORAN: I don't really understand your
18 question, Your Honor.

19 QUESTION: I'm just -- what is the -- supposing
20 a -- a substantial number of readers mistakenly think
21 there was some kind of an Illinois approval of the
22 organization when there wasn't? What harm?

23 MR. MORAN: Well, they would be misled to
24 believe that the state has certified this attorney to be
25 better qualified. He has attained a special qualification

1 in order to practice in the area of civil advocacy. They
2 would be led to believe in an unrealistic --

3 QUESTION: Which is exactly what he has.

4 MR. MORAN: -- an unrealistic expectation would
5 be raised in the reader that this attorney, because of his
6 special qualifications, will do better for my case
7 regardless of what the outcome --

8 QUESTION: Well, not the better for my case. He
9 does in fact have all these extra qualifications, though.
10 He's had a lot of trials, he's passed a lot of exams, and
11 this is an organization which encourages people to take
12 this training so they can make a truthful representation
13 that they have extra training.

14 MR. MORAN: The state --

15 QUESTION: And if the -- if the reader thinks,
16 well, perhaps Illinois sponsored it, and that's wrong, the
17 essential message is still absolutely correct.

18 MR. MORAN: We would still argue, though, that
19 the terms are just inherently misleading to the reader
20 regardless of how there would be any disclaimer to them.
21 And any disclaimer that would be created would be so
22 burdensome and confusing as to even confuse the public
23 even more than Petitioner's statement on its face.

24 QUESTION: How many claimants do you think
25 understand what the word advocacy means?

1 MR. MORAN: Could I explain what the term
2 advocacy means? Just simply that --

3 QUESTION: Would it be over five? Would it be
4 over 5 percent of the --

5 MR. MORAN: Of the population that would
6 understand?

7 QUESTION: Who understand what the word advocacy
8 means?

9 MR. MORAN: I wouldn't want to hazard a guess,
10 Your Honor, but I think if you use a normal standard of a
11 person who has, let's say, the median intelligence, they
12 very well may have some idea. But I would say that a
13 large segment of the -- of the population would not even
14 know what the term advocacy meant.

15 QUESTION: Well, what's the damage in that?

16 MR. MORAN: Because he's holding himself out as
17 civil trial. I believe that people would understand that
18 he was a trial attorney. I think most people, the
19 majority of people would understand the word trial.

20 QUESTION: Well, if he said trial specialist,
21 they'd understand, wouldn't they?

22 MR. MORAN: But again, you would still have the
23 inherently misleading component of his statement in that
24 the public would be led to believe that the state
25 sanctioned his claim. The public would be led to

1 believe --

2 QUESTION: I think that it gives the person as
3 some sort of an expert over and above the other lawyers.

4 MR. MORAN: And that the state has sanctioned
5 his claim of being an expert --

6 QUESTION: No, no, no. Not that the has
7 sanctioned it. But he just actually is.

8 MR. MORAN: Well, Your Honor, obviously we would
9 disagree with that. In this case we believe, for the
10 reasons that we set forth, the fact that it implies state
11 sanction. Again, state or governmental sanction.

12 Secondly, that it sets a qualification. And I
13 really haven't explained the setting the qualification.

14 QUESTION: Well, how -- how much -- is there any
15 examination given to these advocates?

16 MR. MORAN: As a matter of fact, Your Honor,
17 that came up when we argued the matter before the Supreme
18 Court of Illinois. And there is a written examination
19 that is given in relation to this test.

20 One of the justices, though, on the court asked
21 counsel for Petitioner the question, "How do we know that
22 the janitor doesn't come in during the middle of the test
23 and give all the applicants the answers to the test?" The
24 attorney responded, "Well, Your Honor, I guess you
25 wouldn't know that because the test is given in

1 Massachusetts and in other areas."

2 And Justice Stamos said, "That's exactly my
3 point, Counsel, that when we give the Illinois bar
4 examination which sets the qualification for the practice
5 of law in Illinois, we know that the janitor doesn't come
6 in and give the answers because the test is given under
7 our authority, by our agents, and we control the entire
8 process."

9 In this case, with private bar group
10 associations -- and especially on this record -- how is
11 the Illinois court ever to determine what the real
12 qualifications are to receive this certification and
13 especially --

14 QUESTION: Well, what about -- it seems to me
15 that when you say "ever" what's wrong with -- what's wrong
16 with doing what you say the bar does often? That you go
17 on a case-by-case basis, and you say, well, this is
18 misleading. Well, how do you know it's misleading? Why
19 shouldn't you have a hearing and say, well, is this -- is
20 this claim of some kind of a specialty or expertise
21 misleading and why couldn't you determine that this
22 organization is really a pretty high-class organization
23 that actually tests people's qualifications before they
24 certify them?

25 MR. MORAN: First of all, in response to your

1 question --

2 QUESTION: In a hearing. In a hearing.

3 MR. MORAN: Your Honor, we believe that it's --
4 this Court has held in the Goldfarb decision that the
5 states have a compelling interest in regulating the
6 profession of law within their boundaries. This is
7 especially true because attorneys --

8 QUESTION: Well, what's -- what's wrong with the
9 suggestion that you could really tell what kind of an
10 organization this is that did the certifying in a hearing?

11 MR. MORAN: Well, Your Honor, it would -- first
12 of all, the hearing would have to be -- in this case,
13 let's take, for example, the National Board is located in
14 residence -- whatever that means -- in Boston,
15 Massachusetts.

16 QUESTION: Well, it might be hard but I -- just
17 on the merits of the hearing do you think you could
18 conclude that this organization is a perfectly legitimate
19 high-class organization that really has high standards for
20 admission?

21 MR. MORAN: It very well may be possible that
22 you could do that.

23 QUESTION: Let's assume you had the hearing and
24 you said, you cannot be certified by this organization
25 unless you've had lots of experience and you're highly

1 qualified? What if you made that -- had that conclusion
2 after a hearing?

3 MR. MORAN: Your Honor, it would --

4 QUESTION: Do you think that this man could
5 still be prevented from putting it on his letterhead?

6 MR. MORAN: That's correct because we believe
7 until the state recognizes, sanction -- sanctions, a
8 certification process or a specialization process which we
9 believe is the --

10 QUESTION: Well, the state isn't about to do
11 that, is it?

12 MR. MORAN: Well, in the comments to the rules
13 the state does say that in the future we very well may
14 find that it is appropriate to have a certification --

15 QUESTION: Even though --

16 MR. MORAN: -- or specialization process.

17 QUESTION: Even though indicating that some
18 special expertise might be inherently misleading?

19 MR. MORAN: Depending on what the -- no, because
20 when the state sanctioned a claim of certification or
21 specialization, that would vitiate the misleading nature
22 of the statement.

23 QUESTION: Just like a hearing that showed this
24 organization really was -- really had high standards might
25 do the same?

1 MR. MORAN: An example, Your Honor, is the two
2 supreme courts, Minnesota and Alabama, who, through
3 contested proceedings, have allowed attorneys to hold
4 themselves out as being certified by the National Board
5 found they struck down essentially the same rule that we
6 have here.

7 In both those cases, the courts did not
8 automatically say that attorneys from this day forward can
9 hold themselves out as being certified by the National
10 Board. The court said that we direct that the buyer in
11 those states create a process for recognizing these
12 certifications, and, in fact, I assume have hearings to
13 determine whether or not these -- these boards are --

14 QUESTION: Well, what's wrong with that --
15 what's wrong with that result here?

16 MR. MORAN: Well, that shows, though, that this
17 certification -- this board certification here was still
18 inherently misleading until the court set in motion a
19 sanctioning process for those certifications or for those
20 boards to obtain.

21 We, in this case, again fall back to our three
22 arguments why we believe that it's misleading. One, it
23 sets state sanction; secondly, it implies --

24 QUESTION: Your second one is that it impinges
25 on the authority of the court.

1 MR. MORAN: -- the authority of the court.

2 Thanks.

3 (Laughter.)

4 MR. MORAN: I was looking at the third trying to
5 say the second. And, finally, that it is an unverifiable
6 claim of quality, especially to the general public. This
7 is not dry cleaning or, as the attorney for the FTC said,
8 oranges.

9 There is a tremendous difference between oranges
10 and providing legal services. There's a tremendous
11 difference between providing legal services and the
12 medical profession.

13 We believe in this situation that these
14 misleading statements can be prohibited for the three
15 reasons that we have stated.

16 The history of advertising in Illinois shows
17 that the court was highly concerned with the free flow of
18 nonmisleading commercial information to the public. Also,
19 attorneys were given a wide range of opportunity to
20 advertise.

21 The rules relating to advertising are set forth
22 in our brief, and they show that the Illinois court has
23 given attorneys in Illinois every opportunity to advertise
24 in every medium. The only real restriction is that their
25 advertising not be misleading.

1 In this case we ask that this Court affirm the
2 well-reasoned, thoughtful and well-analyzed decision of
3 the Illinois court that Petitioner's letterhead, the
4 statement on his letterhead, is misleading.

5 In this case, Your Honor, Petitioner's -- and I
6 feel that I must mention these -- has also raised two
7 other issues. The first being that Petitioner's statement
8 is not commercial speech. We have two short arguments on
9 this point.

10 The first argument is that Petitioner has waived
11 this argument. Petitioner did not raise this issue at any
12 time below. During five levels of review Petitioner never
13 mentioned that his speech was not commercial speech.

14 QUESTION: Did anybody say it was?

15 MR. MORAN: Well, in fact, Petitioner urged the
16 lower levels to consider his speech as being commercial in
17 nature by defending his statement by using precedents
18 developed by this Court in commercial speech cases.

19 QUESTION: But did the state ever argue that the
20 standards governing commercial speech be applied in this
21 case?

22 MR. MORAN: In response to his arguments in
23 response to his defense that his statements under the
24 attorney advertising decisions of this Court were proper
25 we did, yes, retort that these decisions do apply in this

1 -- in this situation because we believe that it's obvious
2 that even if this Court finds that Petitioner hasn't
3 waived this argument, there is no question that
4 Petitioner's statement is commercial speech.

5 Petitioner's definition that statements which
6 explicitly propose a commercial transaction are commercial
7 speech is meritless. This Court's decisions hold that
8 statements which explicitly and implicitly propose a
9 commercial transaction constitute commercial speech.

10 QUESTION: Well, but this letter was written to
11 your organization, wasn't it?

12 MR. MORAN: Well, the record shows --

13 QUESTION: It didn't promote -- isn't that what
14 the -- the only thing in the record is he wrote to the
15 Disciplinary Commission.

16 MR. MORAN: No, Your Honor. The record shows
17 that Petitioner uses this letterhead during the ordinary
18 course of his practice of law and that he sends his
19 letterhead out to clients, past and present, and other
20 attorneys who he admitted refer a majority of his business
21 to him.

22 QUESTION: I see. And so part of the misleading
23 public were other lawyers who were also terribly confused
24 by this.

25 MR. MORAN: Well, or their clients who the

1 lawyer says: Here's this letterhead; this is the guy I
2 think you should hire.

3 Finally, Petitioner makes two arguments that the
4 Illinois court's prohibition of his statements violates
5 the Equal Protection Clause. Again, I will refer the
6 Court to our brief to these arguments. We feel that there
7 is a rational basis --

8 QUESTION: Suppose that the only way the state
9 claimed this was misleading was that it implied a --
10 approval by the state that this was -- organization was
11 sanctioned by the state or this certification was
12 sanctioned by the state.

13 And suppose, as I think you probably agree, that
14 that could be negated, that inference by a -- something on
15 the letterhead to the contrary. Would you think the state
16 would be required to use that means to cure the problem
17 rather than this blanket ban?

18 MR. MORAN: Following your hypothetical, Your
19 Honor, it may be possible.

20 QUESTION: Well, it may be possible. Do you
21 think the state is required to -- in this commercial
22 speech area to use that -- that less intrusive way of
23 curing the problem?

24 MR. MORAN: Still, though, what the inherently
25 misleading terms "certified" and "specialist" to the

1 public, and the public's unsophistication concerning
2 delivery --

3 QUESTION: Well --

4 MR. MORAN: -- of legal services, we believe
5 that it would be almost impossible to create an effective
6 disclaimer in this case.

7 In summary of our argument, the rules in
8 question clearly advance the state's substantial interest
9 in providing the free flow of commercial information to
10 consumers of legal services.

11 In reading the rules, the comments to the rules,
12 the legislative history and the opinion, it is clear that
13 the Supreme Court of Illinois takes seriously its
14 responsibility to regulate the practice of law in Illinois
15 and to protect the public from misleading information.

16 The Illinois court's finding that Petitioner's
17 statement is misleading is supported by thoughtful well-
18 reasoned analysis. The policy supporting the court's rule
19 is sound. Petitioner's statement can constitutionally be
20 prohibited.

21 We request that this Court affirm the lower
22 court's decision. Thank you.

23 QUESTION: Thank you, Mr. Moran.

24 Mr. Ennis, you have two minutes remaining.

25 REBUTTAL ARGUMENT OF BRUCE J. ENNIS, JR.

1 ON BEHALF OF THE PETITIONER

2 MR. ENNIS: In response to questions from
3 Justice O'Connor and Justice White, the state acknowledged
4 that Illinois does not have a blanket rule which prohibits
5 attorneys from saying they concentrate their practice in
6 civil trials, even though there is no objective standard
7 in Illinois for what concentrate means.

8 Instead, Illinois reviews those claims under a
9 different rule, Rule 2101, which prohibits any misleading
10 claim on a case-by-case basis. That is exactly the rule
11 we are arguing for here. There is no more justification
12 for a blanket ban on this statement than there is for a
13 blanket ban on statements that Illinois -- in Illinois
14 that attorneys concentrate their practice.

15 To the contrary. Concentrate means something.
16 In NBTA certification it means the attorney has spent at
17 least 30 percent of his time in the previous five years in
18 civil trials.

19 Justice Kennedy asked a question about --

20 QUESTION: Mr. Ennis, I've been thinking about
21 your assertion that the source of confusion said to exist
22 by the Illinois Supreme Court is that they think that
23 certified means certified by Illinois.

24 I don't think that's what the court said. I
25 think all the court said is when you say certified by the

1 NBTA the average person would think that that is a
2 permission to practice, that the NBTA is somehow an
3 official organization. The Supreme Court doesn't say that
4 they'll think that constitutes Illinois approval.

5 But when you say "certified by NBTA" and then
6 under that "licensed by the State of Illinois," I think
7 the -- the -- the unsophisticated person reading that
8 might well think that -- that indeed the more important
9 thing is that you're certified by NBTA, which is, for all
10 they know, some official organization.

11 Why isn't that correct?

12 MR. ENNIS: First, Your Honor, that speculation.
13 There is no evidence in this record that there is that
14 potential for deception. Even if there were such
15 evidence, that also could be cured by a simple requirement
16 of a disclaimer statement or by the other regulatory
17 measures we have addressed.

18 So, as in Zauderer, because the potentially
19 misleading statement can be cured through regulation, a
20 prophylactic ban is impermissible.

21 Justice Kennedy raised a question about
22 expertise. In Zauderer the Court ruled that states,
23 quote, "may not prevent an attorney from making accurate
24 statements of fact regarding" --

25 CHIEF JUSTICE REHNQUIST: Your time has expired,

1 Mr. Ennis.

2 The case is submitted.

3 (Whereupon, at 11:05 a.m., the case in the
4 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

NO. 88-1775 - GARY E. PEEL, Petitioner V. ATTORNEY REGISTRATION AND
DISCIPLINARY COMMISSION OF ILLINOIS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

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