



# Office of the Attorney General of Guam

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Hon. Leevin Taitano Camacho  
Attorney General of Guam

November 26, 2019

OPINION MEMORANDUM

Ref: DPHSS 19-0317

TO: Chair, Guam Board of Allied Health Examiners

FROM: Attorney General ↙

SUBJECT: Enforceability of Prohibitions on Patient Testimonials.

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We have received your request for a legal opinion concerning the enforceability of statutory prohibitions on advertising by health professionals licensed by the Guam Board of Allied Health Examiners (“GBAHE”) which contain testimonials from patients or other persons.

## Question Presented

Does the statutory prohibition on testimonials from patients or others in advertising impermissibly infringe on speech protected by the First Amendment? We believe so.

## Discussion

Guam law provides that health professionals licensed by the GBAHE are “prohibited from advertisements, which include . . . testimonials from patients or other persons.” 10 GCA § 12816(b)(10). The Guam Board of Dental Examiners has a practically identical restriction in its administrative rules and regulations that prohibits advertising which contains “testimonials from patients or other persons.” 25 GAR § 8103(n)(1)(x). The restriction on testimonials in advertising by health professionals first appeared in the *Guam Allied Health Practice Act of 1999*, P.L. 24–32, signed into law December 31, 1999. Since then, similar restrictions on the use of patient testimonials in advertising by licensed professionals have been held unconstitutional by federal and state courts in other jurisdictions.

The United States Supreme Court has held that advertising is commercial speech protected by the First Amendment. *See Virginia State Board of Pharmacy v.*

*Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The fact that speech involves a commercial transaction does not lessen its value or its protection under the First Amendment. “[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (citing *Virginia Pharmacy Board*). Commercial speech “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 561–62 (1980) (citing *Virginia Pharmacy Board*, 425 U.S. at 761–762). “Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.” *Id.* 447 U.S. at 562 (citing *Bates*, 433 U.S. at 374).

Not all commercial speech is entitled to the same level of protection. “Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.” *In re R.M.J.*, 455 U.S. 191, 203 (1982). “A regulation that restricts potentially misleading commercial speech will pass constitutional muster if ‘the regulation directly advances a substantial government interest’ and ‘is not more extensive than is necessary to serve that interest.’” *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (quoting *Central Hudson*, 447 U.S. at 566).

Thus, although commercial speech may be protected by the First Amendment, not all regulation of it is unconstitutional. *Thompson v. Western States Medical Center.*, 535 U.S. 357, 367 (2002) (citing *Virginia Bd. of Pharmacy*, 425 U.S. at 770). But a restriction on commercial speech will survive First Amendment scrutiny only if it can satisfy the Supreme Court’s test articulated in *Central Hudson*:

Under that test [the courts ask] as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, [the courts] next ask “whether the asserted governmental interest is substantial.” If it is, [the courts must] “determine whether the regulation directly advances the governmental interest asserted,” and, finally, “whether it is not more extensive than is necessary to serve that interest.” Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.”

*Thompson*, 535 U.S. at 367 (quoting *Central Hudson*, 447 U.S. at 566). “This test is motivated by the principle that ‘people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.’” *Public Citizen Inc.*, 632 F.3d at 219 (quoting *Va. Bd. of Pharmacy*, 425 U.S. at 770).

Applying *Central Hudson* to Guam’s allied health professions licensing law we first ask whether the restriction on commercial speech advances a substantial government interest. Here, we may presume that it does. The Legislature’s intent is “to protect the public against unprofessional, improper, incompetent, unlawful, fraudulent or deceptive practices by persons who practice the healing arts.” 10 GCA § 12801(b). The government has a substantial interest in “ensuring the accuracy of commercial information in the marketplace” and “maintaining standards of ethical conduct in the licensed profession.” *Edenfield v. Fane*, 507 U.S. 761, 769–70 (1993). We believe that courts would agree the government of Guam’s interest in protecting the public is substantial.

The next question is whether the prohibition on “testimonials from patients or other persons” found in § 12816(b)(10) restricts speech that is inherently misleading or speech that is only potentially misleading. *Central Hudson*, 447 U.S. at 563–64. It has been argued, unsuccessfully, “that testimonials can be misleading because they may suggest that past results indicate future performance.” *Alexander v. Cahill*, 598 F.3d 79, 92 (2d Cir. 2010). But even if *some* testimonials may have the potential to mislead by suggesting that past performance predicts future results, testimonials are not, in and of themselves, inherently misleading. *Id.* “Even if . . . the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a ‘fear that people would make bad decisions if given truthful information.’” *Public Citizen Inc.*, 632 F.3d at 222 (quoting *Thompson*, 535 U.S. at 359). The government’s “paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996) (discussing *Va. Bd. of Pharmacy*, 425 U.S. at 765). Here the law becomes more difficult to defend.

Even if we presume that the government’s interest in protecting the public against unprofessional or unscrupulous healthcare professionals is substantial, we must be able to demonstrate to the courts that a wholesale prohibition on all patient testimonials “directly advances” that interest. The government’s burden “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). We do not believe we will be able to meet this burden.

“Under *Central Hudson*, a restriction of speech must serve ‘a substantial interest,’ and it must be ‘narrowly drawn.’ This means, among other things, that ‘[t]he regulatory technique may extend only as far as the interest it serves.’” *Matal v. Tam*, 582 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1744, 1764 (2017) (quoting *Central Hudson*, 447 U.S. at 564–565). Guam’s restriction on commercial speech by healthcare professionals is not narrowly drawn. Compare, *Snell v. Dept. of Professional Regulation*, 318 Ill. App. 3d 972, 980, 742 N.E.2d 1282, 1287 (2001) (“we fail to see any commonsense link between a categorical ban on testimonials, which . . . are not inherently misleading, and the purported harms the State seeks to prevent. In our judgment, such an outright ban does not directly and materially advance the State’s substantial interests.”). Accordingly, we do not believe that Guam’s absolute prohibition on the use of patient testimonials by licensed healthcare professionals will withstand a constitutional challenge.

### Conclusion

It is our opinion that the Guam Allied Health Practice Act’s prohibition on “testimonials from patients or other persons,” 10 GCA § 12816(b)(10), if challenged in court, would be found unconstitutional. The same is also true of the Guam Board of Dental Examiners’ administrative rules and regulations found at 25 GAR § 8103(n)(1)(x). The courts are likely to find them both unconstitutional and therefore unenforceable.

We trust we have sufficiently addressed your inquiry. For further information concerning this matter, please use the reference number shown above.



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cc: Chair, Guam Board of Dental Examiners