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Recent Developments: Peel v. Illinois: The First Amendment's Commercial Speech Standards Allow an Attorney to Advertise His Certification

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the "laboratory" of the states. *Id.* at 2859 (O'Connor, J., concurring).

Justice Scalia also concurred with the Court's analysis but preferred that the decision pronounce that the federal courts have no business in this field. *Id.* (Scalia, J., concurring). He noted that American Law has always accorded the state power to prevent suicide. He added that the cause of death in suicide and starvation is the suicidal person's conscious decision to "pu[t] an end to his own existence." *Id.* at 2860 (Scalia, J., concurring) (quoting 4 W. Blackstone, Commentaries 189).

In a vigorous and lengthy dissent, Justice Brennan, joined by Justice Marshall and Justice Blackmun, opined that the majority's opinion failed to respect the best interests of the patients. He stated that "the right to be free from unwanted medical treatment [was] categorically limited to those patients who had the foresight to make an unambiguous statement of their wishes while competent." *Id.* at 2879 (Brennan, J., dissenting).

Justice Stevens, dissenting, questioned the majority's definition of "life" by suggesting that, for patients like Nancy, there is a serious question as to whether the mere persistence of their bodies is "life." *Id.* at 2892 (Stevens, J., dissenting). He emphasized that "[t]he meaning and completion of her life should be controlled by persons who have her best interests at heart — not by a state legislature concerned only with the 'preservation of life.'" *Id.* (Stevens, J., dissenting).

The Supreme Court recognized that a "right to die" exists by virtue of the Due Process Clause and mandated that it be respected in states that have such legislation. Missouri properly chose to limit this right by requiring clear and convincing evidence of the patient's wishes. Other limits on the right to die are left to the states to define in their own "laboratories." It would appear that the confusion over the right to die has just begun.

— Lesley A. Davis

Peel v. Illinois: THE FIRST AMENDMENT'S COMMERCIAL SPEECH STANDARDS ALLOW AN ATTORNEY TO ADVERTISE HIS CERTIFICATION

In *Peel v. Illinois,* 110 S. Ct. 2281 (1990), the United States Supreme Court held that an attorney had a constitutionally protected right, under the first amendment's commercial speech standards, to advertise his certification as a trial specialist. States are, thereby, prohibited from completely banning these advertisements but may use less restrictive measures to regulate them.

In 1987, the Attorney Registration and Disciplinary Commission of Illinois ("Commission") filed a complaint alleging that Gary Peel held himself out as a certified legal specialist in violation of the Illinois Code of Professional Responsibility. *Peel,* 110 S. Ct. at 2285.

Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility provides that "a lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice... no lawyer may hold himself out as 'certified' or a 'specialist.'" *Id.* at 2286. Peel's professional letterhead included the notation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" ("NBTA"), followed by the words "Licensed: Illinois, Missouri, Arizona." *Id.* at 2285.

The Illinois Supreme Court held that the letterhead was misleading in three ways. First, on the letterhead, the certification was listed prior to the licensure, and the court found that the public could mistakenly construe that Peel's authority to practice trial advocacy came from the NBTA, thereby "impinging on the exclusive authority" of the courts to license attorneys. *Id.* at 2286. Second, the NBTA certification implied that Peel's legal services as a trial advocate were superior to other attorneys' services, and thirdly, that NBTA certification was a product of state licensure. *Id.* at 2287. Therefore, the Illinois Supreme Court followed the Commission's recommendation and censured Peel. *Id.* at 2286.

The Supreme Court found that NBTA was a well recognized organization requiring exacting standards for certification. These standards included jury and non-jury trial experience as lead counsel, successful completion of a day-long examination, continuing legal education requirements, and demonstrated writing ability. *Id.* at 2284-85. The Court also found that certification must be renewed every five years and that several states, including Minnesota and Alabama, recognized NBTA certification. *Id.*

The Court next examined which standards should be used in determining whether the State could regulate this type of advertisement. The Supreme Court agreed with the state court that the standards for commercial speech under the first amendment applied because Peel's letterhead was a "form of commercial speech governed by the 'constitutional limitations on the regulation of lawyer advertising.'" *Id.* at 2287 *(quoting In re Peel,* 126 Ill.2d 397, 402, 534 N.E.2d 980, 982).

In the case of *In re R.M.J.,* 455 U.S. 191 (1982), the Court summarized these standards as:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.

Peel, 110 S. Ct. at 2287. However, the Court in *In re R.M.J.* also held that the states may not place an absolute prohibition on certain types of potentially misleading information. *Id.* (citing *In re R.M.J.,* 455 U.S. at 203.)

The Court then evaluated whether the letterhead was misleading and whether state censorship was justified. The Court assumed that some consumers might infer from the sequential listing of the certification that it exceeded the qualifications for admission to a state bar. *Id.* at 2288. However, since the NBTA's requirements were verifiable factually, and not statements of quality or opinion, they were not misleading. *Id.* In addition, the Court emphasized that NBTA's certification was like a trademark, in that, the quality of the certification was recognized because of the organization granting it. *Id.*

The state court had argued that the statements were misleading because consumers might identify the certification as being issued by the state. The Supreme

Court disagreed, and stated that "we are satisfied that the consuming public understands that licenses. . . are issued by governmental authorities and that a host of certificates. . . are issued by private organizations." *Id.* at 2289.

In balancing the State's interest in avoiding misleading consumers with the cost of completely banning advertisements of certification, the Court found that less burdensome alternatives existed. The State could create initial screening criteria for certifying organizations or require disclaimers on attorney advertisements about the organizations or their standards. *Id.* at 2292-93.

It is interesting to note that Rule 2-105(a)(3) allows for attorneys to advertise specialties in patent or trademark law. The Court stated that a complete ban on advertising certifications by the state would be undermined by allowing such exceptions. *Id.* at 2291.

In a dissenting opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, argued that the State had a legitimate interest in regulating abuse in attorney advertising and that the public could be readily misled by the juxtaposition on the letterhead of petitioner's licensing and his NBTA certification. Therefore, consumers could mistakenly conclude that Peel's services were of higher quality because of his certification and that the State had approved the certification. *Id.* at 2300 (O'Connor, J., dissenting). As such a misleading advertisement, the State had the authority to prevent Peel from advertising his certification. *Id.* at 2301 (O'Connor, J., dissenting).

In *Peel v. Illinois,* the United States Supreme Court upheld an attorney's right to advertise his certification under the first amendment commercial speech standards. States may regulate advertising certifications but may not ban their use altogether. Future advertising by attorneys of their certifications might, therefore, be required to meet minimum state screening requirements or be forced to include restricting language such as disclaimers.

— Joan Ochoa

Pennsylvania v. Muniz: VIDEOTAPED EVIDENCE CAN BE ADMITTED AT THE CRIMINAL TRIALS OF DRUNK DRIVERS

In the drunk driving case of *Pennsylvania v. Muniz,* 110 S. Ct. 2638 (1990), the United States Supreme Court held that evidence obtained by way of videotape was admissible because the questions fell within the "routine booking" exception to *Miranda v. Arizona,* 384 U.S. 436 (1966). The Court also refused to suppress parts of the videotaped evidence concerning statements made during processing, since they were voluntary and not made during custodial interrogation.

Inocencio Muniz was arrested for driving under the influence of alcohol and transported to a booking center after failing three standard field sobriety tests. *Muniz,* 110 S. Ct. at 2642. In line with police procedure, the proceedings at the booking center were videotaped. The attending officer first asked Muniz the standard questions, including his name, address, height, weight, eye color, date of birth, and current age, to which Muniz stumbled over several responses. The officer then asked Muniz if he knew the date of his sixth birthday which Muniz was unable to provide. Finally, Muniz performed the three sobriety tests that he failed earlier and was requested to submit to a breathalyzer test, at which time he made several incriminating statements. *Id.* When Muniz refused to take the breath test, he was advised of his *Miranda* rights for the first time. The videotape of the proceedings was admitted into evidence at his bench trial. Muniz was subsequently convicted of driving under the influence of alcohol. The Superior Court of Pennsylvania reversed his conviction, holding that once Muniz was arrested and taken into custody, all utterances and responses were clearly compelled by the questions presented him during the booking proceedings. Therefore, the Court concluded that his responses and communications were elicited before he received his Miranda warnings and should have been suppressed. *Id.* at 2643.

The Supreme Court granted certiorari to decide whether various incriminating utterances of a drunk driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the self-incrimination clause of the fifth amendment. *Id.* Eight justices agreed that most of the statements admitted into evidence did not violate the accused's fifth amendment rights, although three reached this conclusion under a different analysis.

The majority opinion began with a discussion of the types of evidence a suspect could not be compelled to produce. The Court noted that *Schmerber v. California,* 384 U.S. 757 (1966), held that the self-incrimination clause did not protect a suspect from being compelled to produce "real or physical evidence." *Muniz,* 110 S. Ct. at 2643. Yet the clause did protect an accused from being compelled to provide evidence of a testimonial or communicative nature. *Id.*

Furthermore, since the utterances were made prior to Muniz's receiving his *Miranda* warnings, the Court also focused on the "informal compulsion exerted by the law enforcement officers during in-custody questioning." *Id.* at 2644 (quoting *Miranda v. Arizona,* 384 U.S. 436, 461 (1966)). Thus, the Court concluded that the case implicated both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. *Id.*

Next, the Court addressed Muniz's responses to the initial questions regarding name, address, weight, eye color, date of birth, and current age. Although Muniz's responses were incriminating, to violate the self-incrimination clause, they must have been either testimonial or elicited by custodial interrogation. *Id.* "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 2646 (quoting *Doe v. United States,* 487 U.S. 201, 210 (1988)). In comparison, the Court cited numerous types of evidence held not to be testimonial including fingerprinting, photographing, appearing in court, standing, walking, writing, speaking, and being forced to provide a blood sample. Finally, the Court concluded that testimonial evidence encompasses all responses that, if asked of a sworn suspect during a criminal trial, would place the suspect in the cruel trilemma of self accusation, perjury, or contempt.