2015

False Advertising: How the Third Circuit Misused The Free Speech Standard to the Benefit of New Jersey Lawyers and the Detriment of the Public

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Part I: Introduction

Though free speech is a pillar of American society, it is appropriate at times, to qualify or even restrict speech. This Note argues in favor of one such restriction on attorney advertising and critiques the Third Circuit's reasons for striking down the restriction. In *Dwyer v. Cappell*,[1] the Third Circuit reviewed the constitutionality of "Guideline 3," a Rule of Professional Conduct.[2] Guideline 3, adopted by the New Jersey Supreme Court in 2012, stated that attorneys could not include subsections of a court opinion "about the attorney's abilities or legal services" in any advertising.[3] Ultimately, the Court held that Guideline 3 violated the First Amendment's guarantee of free speech.[4] In particular, it held that Guideline 3 failed to meet the low threshold established in *Zauderer v. Officer of Disciplinary Counsel of Supreme Court of Ohio*,[5] which pertains to "disclosure requirements" on commercial speech.[6] Because of this, the Court failed to explore the heightened standard articulated in *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.,*[7] which pertains to "restrictions" or bans on commercial speech.[8]

The Court held that Guideline 3 failed to meet the threshold for disclosure requirements because it practically banned commercial speech by demanding "unduly burdensome" requirements.[9] To support that reasoning, the Third Circuit looked to cases where disclosure

[1] Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014).
[2] *Id.* at 284-85.
[3] *Rules of Professional Conduct*, Guideline 3 (effective June 1, 2012), http://www.judiciary.state.nj.us/rules/apprpc.htm.
[4] *Dwyer*, 762 F.3d at 276.
[5] *Id*. at 284.
[6] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).
[7] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557 (1980).
[8] *Cent. Hudson*, 447 U.S. at 564-5; *Dwyer*, 762 F.3d at 284.
[9] *Dwyer*, 762 F.3d at 284.

requirements were unduly burdensome and posited that Guideline 3 was equally burdensome.[10] This Note posits that the Third Circuit incorrectly held that Guideline 3 was unconstitutional.

Part II of this Note will provide background information regarding the origin and evolution of the New Jersey Rules of Professional Conduct.[11] It will also give the procedural history and facts of the case at issue.[12] Part III begins by discussing relevant legal background surrounding the Third Circuit's holding and this Note's response, discussing the standards the Supreme Court established for analyzing issues involving free speech and commercial speech.[13] Then, this Note explains how and why the Third Circuit incorrectly applied the legal standards.[14] Part IV explores the impact of the Third Circuit's ruling on attorney advertising, free speech, and public trust in the legal system moving forward.[15] Lastly, Part V concludes by reasserting this Note's legal arguments and the effect of the Third Circuit's ruling.[16]

This Note will not, however, discuss Guideline 3's effect on other forms of advertising, such as billboard or television ads, nor whether Guideline would be able to meet the *Central Hudson* standard for commercial speech restrictions. It only suggests that if *Dwyer* were appealed to the Supreme Court, the Third Circuit's decision should be reversed; moreover, Guideline 3 should be viewed as an appropriate disclosure requirement in light of *Zauderer*, and perhaps a necessary form of speech restriction in the legal community.

Part II: Background

A. New Jersey Rules of Professional Conduct

[10] *Id.* at 283-84.
[11] *See infra* Part II A.
[12] *See infra* Part II B.
[13] *See infra* Part III A, B, and C.
[14] *See infra* Part III D, E, and F.
[15] *See infra* Part IV.
[16] *See infra* Part V.

This Note deals with a Third Circuit case involving a specific provision within the New Jersey Rules of Professional Conduct (RPC). Though New Jersey only recently established its own rules governing attorneys, rules of this sort date back farther than one hundred years within the general legal community.[17] In 1908, the ABA effectuated the "Canons of Professional Ethics," which New Jersey later adopted as its own professional regulation framework.[18] In 1971, New Jersey adopted the "Disciplinary Rules of the ABA's Code of Professional Responsibility," which the ABA created to replace the Canons of Professional Ethics.[19] In fact, New Jersey did not establish its own independent code of professional conduct until 1984, as it had previously chosen to adopt whatever the ABA standard at the time.[20] In 1984, however, the New Jersey Supreme Court, guided by Chief Justice Wilentz, appointed the "Debevoise Committee" to study the ABA's "Model Rules of Professional Conduct" and make any necessary revisions.[21]

The Supreme Court's power to create the committee originated from the New Jersey Constitution itself.[22] The New Jersey Constitution gives the New Jersey Supreme Court the right to "make rules governing the administration of all the courts in the State, and subject to the law, the practice and procedure in all such courts."[23] The Supreme Court has long understood this provision as a grant of authority to "exercise exclusive power over the disciplining of

[17] 2 New Jersey Institute for Continuing Legal Education, PROFESSIONAL RESPONSIBILITY IN NEW JERSEY 318 (2000).
[18] *Id.*
[19] *Id.*
[20] Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 362 (1997).
[21] *Id.*
[22] N.J. CONST. art VI, §2, ¶3.
[23] *Id.*

attorneys."[24] Part of this power encompasses the ability to establish a code of professional conduct that guides how attorneys in New Jersey are to carry out their professional endeavors.[25]

The Commission on the Rules of Professional Conduct has made sporadic amendments to the New Jersey RPC over the past thirty years. Two larger scale reforms came in 1995, via the "Michels Commission,"[26] and in 2003, via the "Pollock Commission."[27] Even so, the Rules of Professional Conduct established by the Debevoise Committee remain largely intact today.

B. Summary of Dwyer

One of these provisions, a rule restricting attorney advertising, was as the focus of the court's attention in *Dwyer v. Cappell*.[28] There, the Third Circuit heard an appeal regarding the District Court's grant of summary judgment to Cappell, who represented the New Jersey Committee on Attorney Advertising.[29] Andrew Dwyer was a New Jersey attorney who displayed several quotes of unpublished judicial opinions, including apparent endorsements of his skills as an attorney and advocate, on a website advertising his legal services.[30] These "endorsements" came in the context of cases concerning the New Jersey Law Against Discrimination, which contains fee-shifting provisions mandating that the judges "assess the abilities and legal services of plaintiffs' attorneys" in deciding the cases.[31]

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[24] In re Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 678 (1984).
[25] *Id*. ("[O]ur constitutional responsibility is so clear as to leave no doubt of our duty to adopt a rule that we think is needed...").
[26] Report of the New Jersey Ethics Commission ("Michels Comm'n Report"), 133 N.J.L.J. 905 (March 15, 1993).
[27] *Administrative Determinations in response to the Report and Recommendation of the Supreme Court Commission on the Rules of Professional Conduct*, (September 10, 2003), https://www.judiciary.state.nj.us/notices/reports/admin-deter-rpcs.pdf.
[28] Dwyer v. Cappell, 762 F.3d 275, 277-78 (3d Cir. 2014).
[29] At the time of trial, Cynthia Cappell served as Chair of the Supreme Court of New Jersey Committee on Attorney Advertising.
[30] *Dwyer*, 762 F.3d at 276.
[31] N.J. STAT. § 10:5-27.1 (2002); Dwyer, 762 F.3d at 276.

In 2008, Judge Wertheimer, one of the judges Dwyer had quoted on his website, sent a letter to Dwyer asking him to remove the quote.[32] Knowing the true context in which the statements were made, Wertheimer feared that, though the quotes were technically accurate, Dwyer's potential clients would believe Wertheimer had given Dwyer a "blanket endorsement."[33] When Dwyer refused, arguing that the quote was neither false nor misleading, Judge Wertheimer contacted the New Jersey Bar's Committee on Attorney Advertising.[34]

The Committee eventually submitted a guideline, Guideline 3, that stated "an attorney or law firm may not include, on a website or other advertisement, a quotation from a judge or court opinion . . . regarding the attorney's abilities or legal services."[35] Dwyer maintained that Guideline 3 unconstitutionally restricted his free speech, going so far as to post an additional quote on his website, after the Committee's decision.[36]

In 2012, the New Jersey Supreme Court approved the Guideline 3.[37] At its core, Guideline 3 banned attorneys from using excerpts of court opinions in their advertisements, but allowed them to "present the full text of opinions, including those that discuss the attorney's legal abilities."[38] Before Guideline 3 went into effect, however, Dwyer filed a motion to keep it from being enforced.[39]

During trial, Carol Johnston, an agent for the Committee on Attorney Advertising, testified that, "even if the quotations include hyperlinks to the full text of the judicial opinions, they would still violate the Guideline."[40] She also admitted that the Committee had no evidence

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 277.
[37] *Dwyer*, 762 F.3d at 277.
[38] Guideline 3, *supra* note 3.
[39] *Dwyer*, 762 F.3d at 278.
[40] *Id.*

of complaints from anyone other than Judge Wertheimer, but that they used "common sense" to conclude that clients could be misled by the excerpts.[41]

The Court decided the legal issue revolved around "whether Guideline 3 is most appropriately characterized as a 'restriction' on speech, or whether it instead is a regulatory requirement of 'additional disclosure.'"[42] If characterized as a restriction, Guideline 3 would have to satisfy much more stringent qualifications to be constitutional than if it were simply a disclosure requirement. Positing that the guideline only amounted to a disclosure requirement, however, the District Court upheld the Guideline as constitutional.[43] Dwyer then appealed to the Third Circuit.[44]

The Third Circuit reversed, holding that Guideline 3 failed to meet the Supreme Court's *Zauderer* standard for disclosure requirements.[45] The Court focused heavily on the requirement that disclosure statements not be "unduly burdensome."[46] In positing that Guideline 3 is unduly burdensome, the Third Circuit interpreted two cases, *Ibanez v. Fla. Dep't of Bus. & Prof. Reg., Bd. of Accountancy*[47] and *Public Citizen Inc. v. La. Att'y Disciplinary Bd.*.[48]

In *Ibanez,* the "detail required in the disclaimer . . . effectively rule[d] out" the specific ways the plaintiff attempted to advertise, which were by "business card, letterhead, and in a yellow pages listing."[49] In *Public Citizen*, the court required attorneys employing televised or electronic advertisements to include numerous pieces of information both audibly and in

[41] *Id.*
[42] Dwyer v. Cappell, 951 F. Supp. 2d 670, 673 (D.N.J. 2013), *rev'd*, 762 F.3d (3d Cir. 2014).
[43] *Id.* at 675.
[44] *Dwyer,* 762 F.3d at 275.
[45] *Id.* at 287.
[46] *Id.*
[47] Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994).
[48] Pub. Citizen, Inc. v. La. Att'y. Disciplinary Bd., 632 F.3d 212 (5th Cir. 2011).
[49] *Ibanez*, 512 U.S. at 146-48.

writing.[50] The Fifth Circuit held that this requirement made the attorneys "unable to effectively use short . . . television or radio advertisements."[51]

Relying on those cases, the Third Circuit held that Guideline 3 "effectively precludes advertising" by requiring the full text of opinions instead of excerpts.[52] The Court did not analyze Guideline 3 under the *Cent. Hudson* standard for restrictions because "the Guideline is not reasonably related to preventing consumer deception . . . Hence, it is unconstitutional under the even less-stringent *Zauderer* standard of scrutiny."[53] The *Zauderer* standard requires that disclosure requirements be reasonably related to the goal of preventing consumer deception.[54]

Part III: Analysis

Though the Third Circuit determined that Guideline 3 impermissibly restricted Dwyer's First Amendment rights, the Court inappropriately applied a stricter standard than Supreme Court has required and misused prior case law to rule in Dwyer's favor. Using, among other things, the very cases the Third Circuit used to reach its contrary decision, this Note will argue that the Court should have taken the claims that Dwyer's advertisement was inherently misleading more seriously, because inherently misleading advertisements do not receive constitutional protection.[55] Furthermore, the note will argue that, in the alternative, Dwyer's note is potentially misleading and therefore open to disclosure requirements.[56]

A. Standard of Review

[50] *Pub. Citizen*, 632 F.3d at 228.
[51] *Id.*
[52] Dwyer v. Cappell, 762 F.3d 275, 287 (3d Cir. 2014).
[53] *Id.*
[54] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).
[55] *See infra* Part III E.
[56] *See infra* Part III F.

When a Court analyzes any First Amendment claim, the first step is to determine the type of speech that may be subjected to potential restrictions or disclosure.[57] This is because certain speech receives "less extensive" levels of protection than others.[58]

Both parties in *Dwyer* agreed that the speech at issue was commercial in nature.[59] Commercial speech is speech that serves the financial interest of the speaker and "assists consumers and furthers the societal interest in the fullest possible dissemination of information."[60] Furthermore, the Supreme Court has recognized a "commonsense distinction" between speech that relates to commercial transactions and other varieties of speech.[61] The parties' agreement, that the speech at issue was commercial, helps focus the legal argument, because once the type of speech is ascertained, the only remaining issue was what permissible restrictions or prohibitions could be placed on that speech.[62] While the committee "maintain[ed] that Guideline 3 [was] a disclosure requirement," Dwyer contended that it was an impermissible restriction.[63]

B. Restrictions and Central Hudson

In 1980, the Supreme Court articulated the more repressive of the two types of constraints, which completely restricts commercial speech.[64] In *Central Hudson*, the Supreme Court tackled a regulation that restricted the advertising ability of a gas and electric company.[65] In 1973, the Public Service Commission of New York banned all electric utilities from

[57] Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 309 (1st Cir. 2005) ("the initial question we must confront is the nature of the speech").
[58] *Zauderer,* 471 U.S. at 637; ***See also*** Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 562-63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").
[59] *Dwyer*, 762 F.3d at 280 ("The parties agree that our case involves only commercial speech").
[60] *Cent. Hudson*, 447 U.S. at 561-62.
[61] *Id.* at 562.
[62] *Dwyer*, 762 F.3d at 280 ("[T]his case concerns two possible tracks of analysis, only one of which can apply: restrictions on speech and disclosure requirements").
[63] *Id.*
[64] *Cent. Hudson*, 447 U.S. at 557.
[65] *Id.*

producing any advertising that promoted the use of electricity, while permitting "informational" advertising that encouraged "shifts in consumption" as opposed to increases in consumption.[66] The Commission argued that such advertising would be misleading, "by appearing to encourage energy consumption at a time when conservationa [was] needed."[67] Central Hudson sued, claiming the ban was a violation of its First Amendment right to free speech.[68] The New York Court of Appeals upheld the ban, positing, "the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue."[69]

The Supreme Court reversed, and established the test still used today for determining whether a restriction on commercial speech is constitutional.[70] To analyze the constitutionality of a restriction on commercial speech, a court must first ask whether the speech itself is protected.[71] If the speech advertises illegal activity, or if it is misleading, the government may have the ability to ban it outright.[72] If the advertisement is not misleading or endorsing illegal activity, the court must inquire whether the State has asserted a substantial interest that the restriction aims to further, and whether the restriction "directly advances" the State's interest.[73] Lastly, the restriction is not constitutional if the State's interest "could be served as well by a more limited restriction."[74] The New Jersey Supreme Court has adopted this same framework.[75]

[66] *Id.* at 558-60.
[67] *Id.*
[68] *Id.* at 559.
[69] *Id.* at 561.
[70] *Cent. Hudson*, 447 U.S. at 561-66.
[71] *Id.* at 563.
[72] *Id.* at 563-64.
[73] *Id.* at 564.
[74] *Id.* at 564.
[75] In re Op. 39 of Comm. on Att'y Adver., 197 N.J. 66, 69-71, 79 (2008) (using a four-part Central Hudson test to determine that a ban on the use of the phrase "Super Lawyer" in advertising was unconstitutional).

It must be noted that the Supreme Court has clearly established a difference between "inherently" misleading advertisements and "potentially" misleading advertisements.[76] Inherently misleading advertisements are subject to restrictions whereas potentially misleading advertisements are not.[77] When an advertisement is potentially misleading, disclosure requirements may be enforced to prevent its audience from being misled.[78]

C. Disclosure Requirements and Zauderer

In an effort to clarify the constraints the State could place on commercial speech, the Supreme Court revisited the issue in 1985.[79] In *Zauderer*, the Supreme Court decided "whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertisements certain information regarding fee arrangements."[80]

There, attorney Philip Zauderer ran several successful newspaper advertisements.[81] Though the "Office of Disciplinary Counsel" believed that all Zauderer's advertisements violated provisions of Ohio's Disciplinary Rules[82], the Supreme Court only considered one of the advertisements.[83] In it, Zauderer marketed to women who had used a particular I.U.D., noting, "[t]he cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."[84] The Office argued that this advertisement violated a provision under the Disciplinary Rules that required advertisements for contingent-fee rates to disclose "whether percentages are computed before or after deduction of court costs and expenses," and that it would deceive potential customers by suggesting they might not be

[76] In re R. M. J., 455 U.S. 191, 203 (1982); S*ee i*n*fra* Parts III E and F for a more detailed discussion on "potentially" and "inherently" misleading advertising.
[77] *In re R. M. J.*, 455 U.S. at 203.
[78] *Id.*
[79] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 629 (1985).
[80] *Id.* at 629.
[81] *Id.* at 629-31.
[82] *Id.* at 631-33.
[83] *Id.* at 636.
[84] *Id.* at 630-631.

required to pay anything at all if their claim was unsuccessful.[85] Zauderer's responded by stating that the Disciplinary Rules were unconstitutional as applied to him because they violated his First Amendment free speech right.[86]

The Supreme Court held that "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception," because disclosure requirements are less burdensome on the party washing to advertise than restrictions.[87] Furthermore, the Court held that disclosure requirements are constitutional as long as they "are reasonably related to the State's interest in preventing deception of consumers"[88] and are not "unduly burdensome."[89] The Court rejected Zauderer's First Amendment defense.[90]

In doing so, the Supreme Court created a second way for the State to restrict a party's commercial speech, which commands less scrutiny from the Court than it would under *Central Hudson*. Because disclosure requirements need only be reasonably related to preventing deception, the burden of persuasion for a disclosure requirement is substantially lower than when the State, wishing to restrict commercial speech, is required to establish that the restriction is supported by a "substantial" State interest and is narrowly tailored to achieving that interest.[91]

D. Guideline 3 and Commercial Speech

Though the Third Circuit believed Guideline 3 overly burdened Dwyer's right to advertise, it erred in reversing the District Court's holding that Guideline 3 permissibly constrained free speech under *Zauderer*.[92] Below, this Note puts forth two arguments

[85] *Zauderer*, 471 U.S. at 632-634.
[86] *Id.* at 634.
[87] *Id.* at 651.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 655.
[91] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 563-64 (1980).
[92] Dwyer v. Cappell, 951 F. Supp. 2d 670, 675-76 (D.N.J. 2013), *rev'd*, 762 F.3d (3d Cir. 2014).

demonstrating why Guideline 3 is a permissible constraint on commercial speech.[93] First, Dwyer's advertising on his website was deemed, in the estimation of the source it cited, to be inherently misleading. As such, it is not deserving of First Amendment Protection.[94] Secondly, even if Dwyer's advertisement was not inherently misleading, it is potentially misleading and therefore the State may enforce disclosure requirements.[95] Guideline 3 amounts to a disclosure requirement, which is not unduly burdensome, as opposed to an effective ban as the Third Circuit claims.[96]

E. Dwyer's Advertising Was Deemed Inherently Misleading

The Supreme Court in *Central Hudson* posited, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[97] It reasoned that government's power is only circumscribed when the commercial speech is not misleading.[98] Two years later, the Court further developed this framework in *In re R. M. J.*,[99] holding that while the State could not impose absolute restrictions on information that is only potentially misleading, it was within its constitutional authority to prohibit inherently misleading advertising entirely.[100] Though the Supreme Court has never explicitly defined "inherently misleading," it hinted in *Friedman v. Rogers*[101] that an issue arises when "there is a

[93] *See supra* Part III A and B.
[94] In re R. M. J., 455 U.S. 191, 203 (1982).
[95] *Id.*
[96] Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014).
[97] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 563 (1980).
[98] *Id.* at 564.
[99] *In re R. M. J.*, 455 U.S at 191.
[100] *Id.* at 203.
[101] Friedman v. Rogers, 440 U.S. 1, 13 (1978).

significant possibility" the public will be misled.[102] The Third Circuit has also used this "inherently misleading" framework as recently as a few months before *Dwyer*.[103]

Therefore, it is disconcerting that the Court did not inquire into whether Dwyer's advertising was misleading at all, but rather proceeded immediately to their belief that Guideline 3 is "not reasonably related" to the State's interest.[104] This was not the appropriate analysis, as explained in *Zauderer*, where the Supreme Court determined that when "the possibility of deception is as it is in this case," the State bears no other burden to support its disclosure requirement.[105]

While the Court admits that the Committee considers Guideline 3 to be "inherently misleading," it also noted that Guideline 3 is "not reasonably related to preventing consumer deception."[106] But, it was a mistake for the Court to fail to go beyond a cursory discussion of whether Dwyer's advertisement was inherently misleading.[107] The entire analysis would have shifted if the Court had first determined that Dwyer's advertising was, in fact, inherently misleading and therefore not entitled to any constitutional protection from restrictions.[108] For the Court to ignore such a significant portion of commercial speech analysis is surprising and might be the reason the erred in its reasoning.

Dwyer's advertising was deemed to be inherently misleading because, as in *Zauderer*, the average reasonable public citizen would not understand the proper context of Judge

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[102] *See also In re R. M. J.*, 455 U.S. at 202 (where the Court understood it to mean "inherently likely to deceive").
[103] Heffner v. Murphy, 745 F.3d 56, 89-90 (3rd Cir. 2014) (where the Third Circuit explained that, since *Central Hudson*, the Supreme Court has distinguished inherently or actually misleading commercial speech from only potentially misleading commercial speech) (citing Wine & Spirits Retailers v. R.I., 481 F.3d 1, 8 (1st Cir. 2007)).
[104] Dwyer v. Cappell, 762 F.3d 275, 280-82 (3d Cir. 2014).
[105] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 652 (1985) (upholding a disclosure requirement regarding an advertisement that claimed no legal fees would be required but upon a successful lawsuit because it was held to mislead clients into believing that no fees, whatsoever, would be required).
[106] *Dwyer*, 762 F.3d at 282.
[107] *Id*.
[108] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 563 (1980); S*ee also* In re R. M. J., 455 U.S. 191, 203 (1982).

Wertheimer's quote and might make an impermissible inference about its content. That is precisely the interpretation made by the advertisement's source itself. Wertheimer was primarily concerned with clients believing his quote was "a blanket endorsement" of Dwyer's skills as an attorney, though this was clearly not the case.[109] Like the others on Dwyer's website, Wertheimer's quote came in the context of determining a fee-shifting application, where the judge is required to make a judgment about the attorney's performance.[110] This quote, therefore, was an obligatory part of Judge Wertheimer's decision and not given freely as an endorsement.[111]

As Cappell argued, Dwyer's advertising, however, could lead a potential customer to believe Judge Wertheimer was endorsing Dwyer as an attorney. Here, as in *Zauderer*, the State argued that the deceit was "self-evident" and therefore required no external proof of consumer deception.[112] No part of Dwyer's website clarified that the quotations were made in a highly specific context, which did not pertain to Dwyer's skills as an attorney in general.[113] Additionally, Dwyer did not retain any mention of fee-shifting in the quotes, depriving the statements of the necessary context to appreciate their appropriate meaning.[114] This is comparable to the deception in *Zauderer*, where an attorney advertised, "[i]f there is no recovery, no legal fees are owed by our clients."[115] There, the advertisement was misleading because "to a layman . . . the advertisement would suggest that employing appellant would be a no-lose proposition," when in fact a client might still be required to pay other costs associated with

[109] *Dwyer*, 762 F.3d at 277.
[110] *Id.* at 277-78.
[111] *Id.*
[112] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 652 (1985).
[113] *Dwyer*, 762 F.3d at 276-77.
[114] *Id*. at 277.
[115] *Zauderer*, 471 U.S. at 631.

trials.[116] Dwyer's advertising is just as confusing to a layperson who might believe these judges are personally endorsing Dwyer above other attorneys. That type of behavior by a judge would most likely violate the New Jersey Code of Judicial Conduct.[117] Because laypersons are unfamiliar with rules against impropriety, common sense indicates that a client would believe such impropriety were taking place and that the judges were speaking about Dwyer's talents in general.

Therefore, because Judge Wertheimer could have reasonably believed Dwyer's advertisements were inherently misleading, and inherently misleading advertisements are not deserving of First Amendment protection, the Court erred in disregarding the analysis. If Dwyer's advertising is inherently misleading, Guideline 3 is permissible.[118]

F. Dwyer's Advertising Was Potentially Misleading And Therefore Constitutionally Subject To A Disclosure Requirement

If Dwyer's advertisements were not inherently misleading, they were at least potentially misleading for the same reasons.[119] The Supreme Courts of both New Jersey and the United States have explicitly stated that attorney advertising can still be subject to certain restrictions or requirements, even when blanket bans are inappropriate.[120] In *Zauderer*, the Supreme Court of the United States held that disclosure requirements must be reasonably related to the governmental interest and must not be overly burdensome.[121] In essence, a requirement is unduly

[116] *Id.* at 652, 634-35.
[117] N.J. Code of Judicial Conduct Canon 1, 2(A) (2014) (stating that a judge should "personally observe" "high standards of conduct so that the integrity and independence of the judiciary may be preserved" and act in ways that promote "public confidence in the integrity and impartiality of the judiciary").
[118] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 563-64 (1980).
[119] *See supra* Part III E.
[120] Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977) ("In holding that advertising by attorneys may not be subjected to blanket suppression... we, of course, do not hold that advertising by attorneys may not be regulated in any way."); *See also* In re Felmeister & Isaacs, 104 N.J. 515, 517 (1986).
[121] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).

burdensome when it is a practical ban on speech, rather than an actual ban.[122] Here, Guideline 3 furthers the dual legitimate governmental interests of preventing deception of potential clients and also "preserving public confidence in the impartiality of the judiciary."[123] Additionally, it is not overly burdensome as applied to *Dwyer* because the nature of websites generally permit a "theoretically endless capacity" to advertise.[124]

A look at how the First Circuit has approached *Zauderer* proves to be informative in determining appropriate disclosure requirements. In *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, the First Circuit dealt with a Vermont statute that required products containing mercury to have their packaging "inform consumers that the products contain mercury" and proper recycling procedure.[125] The Court upheld the statute, reversing the District Court's determination that the statute was "insufficiently precise in producing the desired ends."[126] Responding to this specific objection to the statute, the First Circuit said, "[t]he prescribed labeling would likely contribute directly to the reduction of mercury pollution, *whether or not it makes the greatest possible contribution*."[127] The First Circuit understood that the test established under *Zauderer* was meant to require a "less exacting scrutiny" than the *Central Hudson* test.[128] It is not, therefore, necessary for a disclosure requirement to satisfy the requirement from *Central Hudson* that there be no less restrictive way to serve the government's interest.[129]

In the New Jersey statute, like the statute in *Nat'l Elec.*, there are other requirements besides Guideline 3 that may potentially better serve the state's interests in preventing consumer

[122] Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014).
[123] Dwyer v. Cappell, 951 F. Supp. 2d 670, 675 (D.N.J. 2013), *rev'd*, 762 F.3d (3d Cir. 2014); *See also* Brief for Appellee at 19-20, *Dwyer v. Cappell*, No. 13-3235, 762 F.3d.
[124] *Dwyer*, 762 F.3d at 284.
[125] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107 (2nd Cir. 2001).
[126] *Id.* at 115.
[127] *Id.* (emphasis added).
[128] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010).
[129] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 564 (1980).

deception and preserving the public's confidence in the impartiality of the judiciary. In fact, the Third Circuit gives insightful suggestions for less burdensome requirements on attorney advertising that would still serve the State's interests.[130] Though those requirements may more effectively further the State's interests, the *Zauderer* test does not require such narrow tailoring of disclosure requirements; all it requires is that the State's interest is "reasonably related" to the disclosure requirement.[131] Here, Guideline 3's requirement to post the entire holding reasonably allows consumers to determine that these judicial quotes were made in the context of a much larger litigation. This will dispel the idea that these quotes were the focal point of the hearing, or that they were unprovoked compliments. In fact, it would be difficult for the Third Circuit to support its conclusion that context, in any situation, does not reasonably give better clarity to an excerpt. This is, in fact, the exact argument the District Court put forth when it ruled in favor of Cappell in upholding the constitutionality of Guideline 3. Specifically, the court said, "A judicial quotation's potential to mislead a consumer is self-evidence. Without the surrounding context of a full opinion, judicial quotations relating to an attorney's abilities could easily be misconstrued as improper judicial endorsement of an attorney."[132] Therefore the Third Circuit wrongly applied the *Central Hudson* standard of scrutiny when determining whether Guideline 3 was reasonably related to the State's interest.

Furthermore, the Third Circuit incorrectly held that Guideline 3 is "unduly burdensome."[133] To substantiate its claim, the Court focused on two other cases wherein disclosure requirements were held to be unduly burdensome, *Ibanez* and *Public Citizen Inc. v.*

[130] *Dwyer*, 762 F.3d at 283 (suggesting there be a disclaimer that states, "This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities").
[131] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).
[132] Dwyer v. Cappell, 951 F. Supp 2d. 670, 674-75 (D.N.J. 2013).
[133] *Dwyer*, 762 F.3d at 284.

La. Att'y Disciplinary Bd..[134] Those cases, however, bear little resemblance to Dwyer's situation.[135] Whereas the disclosure requirements in those cases effectively banned the commercial speech altogether, Guideline 3, at least when applied to websites, does not go that far. Because of a website's vast storage capacity, Dwyer is not inhibited from advertising online like the attorneys in *Ibanez* and *Public Citizen*. The Third Circuit recognized this when it said, "[t]he only realistic medium for quoting a full judicial opinion in an advertisement is, ironically, a website, with its theoretically endless capacity."[136] Websites are a "realistic medium" for Guideline 3, because their vast storage allow for virtually unlimited amounts of content. Though the Third Circuit found this fact "ironic," it ought to have considered it more closely; an understanding that Guideline 3 is not unduly burdensome as applied to websites would have altered the outcome of the case.

Although the Court attempted to look beyond Dwyer's particular case and claimed that "Guideline 3 is all the more stark when applied to attorney advertising in a newspaper or magazine, let alone on the radio or television,"[137] the Court erred in striking down Guideline as it is applied to Dwyer. Guideline 3 is not unduly burdensome as applied to advertising on a website. Other situations where Guideline 3 applies were not before the court to consider, and therefore the Court should not have let them affect their holding.[138]

Part IV: The Effect

In *Central Hudson*, the Supreme Court emphasized the great importance and unwavering power of the First Amendment, stating "[i]f the First Amendment guarantee means anything, it

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[134] *Id.* at 283-84.
[135] Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146-47 (1994); Pub. Citizen, Inc. v. La. Att'y. Disciplinary Bd., 632 F.3d 212, 229 (5th Cir. 2011).
[136] *Dwyer*, 762 F.3d at 284.
[137] *Id.* at 285 n.7.
[138] *See* Terry v Ohio, 392 U.S. 1, 15 (1968) (where the Court, when faced with the magnitude of effects their holding could have on criminal procedure across the country, stated, "...we can only judge the facts of the case before us").

means that, absent clear and present danger, *government has no power to restrict expression because of the effect its message is likely to have on the public*."[139] This authoritative statement represents a pillar of American freedom, and this Note does not undermine it. Therefore, the reader must recognize that where this Note contemplates the effects of the Third Circuit's holding, it does not do so to present any of them as justifications for overturning the Third Circuit. These are separate and distinct issues. Ultimately, the ruling in *Dwyer* should be overturned because the Third Circuit misused the lenient *Zauderer* standard to invalidate Guideline 3.

The Third Circuit's ruling will likely have several prominent consequences. Though there may be other results from the holding, this Note will only focus on the two most likely outcomes. First, the Third Circuit's holding will make it harder, moving forward, to meaningfully restrict attorney's speech to benefit the public. Additionally, and arguably more importantly, the Court's holding will negatively impact public trust in the legal community at large, and in the impartiality of the judiciary.

First, the Third Circuit's holding took a large step away from the accepted practice of assuring attorney's free conduct and speech do not impede their vital role as counselors, advocates, and professionals in the legal field.[140] It was not, and is not, uncommon for rules governing attorney's behavior and responsibilities to infringe upon attorney's rights in several ways. In fact, all fifty states have laws governing attorney conduct as it applies to advertising.[141] The "Canons of Professional Ethics" generally restricted an attorney's right to publicize

[139] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 575 (1980) (emphasis added).
[140] MODEL RULES OF PROF'L CONDUCT Preamble ("The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest...").
[141] *See generally*, ARK. RULES OF PROF'L CONDUCT R. 7.2; CONN. PRACTICE BOOK § 2-28A; N.C. GEN. STAT. § 84-38.

regarding pending litigation; and even when it was permitted, attorneys were forbidden from speaking anonymously about it.[142] Even some of the most modern rules substantially limit an attorney's ability to make any "extrajudicial statement" that has the potential to prejudice an adjudicative proceeding.[143] Furthermore, attorneys are still restricted in the manners in which they can advertise. For example, New Jersey attorneys are currently unable to utilize "drawings, animations, dramatizations, music, or lyrics" in commercials.[144] Also, though the New Jersey Supreme Court upheld a "Best Lawyer" rating system, there are twelve "regulatory components" that any advertisement using such a label needs to satisfy.[145]

Some restrictions have been overridden or rewritten over time but the same ideal, that it is appropriate and necessary to restrict attorney's speech and conduct, has been the guiding motivation throughout. This stems from the understanding that attorneys undertake an important professional imperative that deals with the most crucial "system" in the nation, the legal system. Without appropriate restraint, however, the legal profession will cease to be directed primarily at aiding the client and will become a solely commercial enterprise where competing attorneys spend more time on marketing than advocating on behalf of their client. Without restraint, attorneys could forsake the good of their clients, and the public at large, for financial gain. Without restraint, attorneys could use their superior knowledge of the legal system to mislead clients into pursuing options, or spending money, that might not be wise.

For example, if New Jersey attorneys were not restricted from using music or dramatizations in their television advertisements, their commercials could be so distracting, with cartoons and loud music, that the potential clients would have no idea about what services the

[142] CANONS OF PROF'L ETHICS Canon 20 (1908).
[143] N.J. RULES OF PROF'L CONDUCT R. 3.6(a) (2004).
[144] N.J. RULES OF PROF'L CONDUCT R. 7.2(a) (2004).
[145] In re Opinion 39 of Committee on Attorney Advertising, 197 N.J. 66, 76-77 (2008).

attorney actually offers. Additionally, a commercial in which an attorney is dressed as superman might mislead a viewer into believing that the attorney is claiming to be the best attorney in the relevant area. While this specific restriction might make an attorney's commercials dull in comparison to other commercials, it is a helpful tool in preventing viewers from being confused and mislead. Lastly, an attorney allowed to utilize the term "Best Lawyer", without also being required to provide information regarding the twelve regulatory components that fully explain the "Best Lawyer" selection process, could certainly cause a potential client to believe that some third party agency truly labeled that attorney as the best one in New Jersey. These examples demonstrate the necessity for restriction in attorney advertising for the benefit of the public at large.

This does not imply that all restrictions are constitutional, however. For example, the "Canons of Professional Ethics" banned the use of business cards without personal relations because it offended "the traditions and lower[ed] the tone of our profession," but *Bates v. State Bar of Ariz.*[146] invalidated that indiscriminate ban on attorney speech.[147] What it does imply is that a substantial government interest exists in restricting the speech and conduct of attorneys. There is a sense, then, that when men and women take up the noble task of establishing a career in the law, they must accept that certain freedoms must be forfeited when balancing against other societal interests.

By ruling in favor of an attorney who believed his rights were impeded because he could not quote specific judges in the exact way he desired, the Third Circuit has created dangerous precedent where the valuable restraints on attorney conduct may begin to slowly erode and give

[146] Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).
[147] CANONS OF PROF'L ETHICS Canon 27 (1908) (Allowed for use of business cards but stated that advertising, directly, without personal relations, or indirectly, offends "the traditions and lower the tone of our profession and are reprehensible").

way to unrestrained attorneys. These restraints hold a special importance not as applied to all professions in which the public trusts, but specifically in the legal profession. The Supreme Court in *Bates* stated that the legal profession is held to a higher standard of conduct than most other professions, and that "misstatements that might be overlooked or deemed unimportant in other advertising may found quite inappropriate in legal advertising."[148] Although the Court placed some onus on the legal profession to attempt to remove any misunderstandings the public may have about attorney advertising, it eventually ruled that self-evidently misleading advertising can be restricted without appealing to the public or attempting to clarify the advertisement.[149] And even though the Supreme Court, again in *Bates*, wrote, "[w]e are not persuaded that *restrained professional advertising* by lawyers inevitably will be misleading," the Third Circuit's ruling in *Dwyer* may lead to unbridled advertising. [150]

The Supreme Court of New Jersey, through *Cappell*, stated that it had a compelling interest in enforcing Guideline 3 because it aimed to "preserv[e] public confidence in the impartiality of the judiciary."[151] Ruling in favor of the constitutionality of Guideline 3, the District Court recognized this purpose of the guideline when it stated that advertisements that "could be easily misconstrued as improper judicial endorsements" would threaten "the integrity of the judicial system."[152] This confidence extends to the entire legal community, however, and the Third Circuit's ruling threatens to undermine that confidence. The New Jersey Supreme Court has recognized the importance of regulating attorney conduct, stating in *In Re Hearing on Immunity for Ethics Complainants*, "[w]e ask the public to trust and believe that justice is being

[148] *Id*.
[149] *Id.* at 375 (stating "If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective"); Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 652-53 (1985).
[150] *Bates*, 433 U.S. at 372 (emphasis added).
[151] Brief for Appellee at 19-20, *Dwyer v. Cappell*, No. 13-3235, 762 F.3d.
[152] Dwyer v. Cappell, 951 F. Supp. 2d. 670, 675 (D.N.J. 2013).

done . . . We ask them to trust a system in which the initial proceedings and the initial appellate review are dominated by lawyers."[153] There, the New Jersey Supreme Court demonstrated an understanding that overseeing and restricting attorney conduct is a vital aspect of public trust in the legal system.[154] Because of the Third Circuit's holding in *Dwyer,* attorneys are now capable of using quotes that can easily be understood by reasonable, but uninformed, persons to be blanket endorsements and the public might begin to believe that attorneys can compete for the favor of judges.[155] This is troubling because of the mandate that judges act in ways that "public confidence in the integrity and impartiality of the judiciary."[156] A judge is unable to show favoritism to any particular attorney. But, this holding threatens the same public confidence that judicial restrictions aim to protect.

This presents a significant problem because of the potential for damaging results when a community loses trust in the propriety of the legal system. Most Americas are familiar with examples demonstrating that the public seeks justice in ways that are less than appropriate when it does not feel as though it can trust the legal profession.[157] This is the reason New Jersey sought to restrict attorney's free speech; public confidence in attorney conduct is of supreme value. If individuals begin to lose their trust in the ability of attorneys to faithfully and selflessly represent them, as opposed to using them as their next paycheck, then all the attorney free speech in the world will not undo the damage done.

Though free speech is a beautiful right and one of the most fundamental rights upon which our nation is built, it must be balanced, in the commercial context, against other important national interests. Because *Dwyer* broadens the limits of attorney conduct and advertising even

[153] In re Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 678-79 (1984).
[154] *Id.* (upholding process that regulated attorney ethical conduct).
[155] *See supra* Part III E.
[156] N.J. Code of Judicial Conduct Canon 1, 2(A).
[157] *See* http://www.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/.

farther for future cases, and may cause the public to lose trust in the impartiality of the legal system as a whole, the Third Circuit's ruling threatens to upset this balance.

Part V: Conclusion

The Supreme Court of New Jersey correctly indicated that "attorney advertising without any restrictions whatsoever might seriously damage important public interests, but that excessive restriction might harm other public interests equally important."[158] This balance ought to be at the forefront of any free speech analysis regarding attorney conduct and advertising. This Note has not endorsed excessive restriction on attorney advertising; rather, that, in ruling that Guideline 3 was unconstitutional as applied to Andrew Dwyer, the Third Circuit was mistaken on both the law and public policy interests that fuel codes of professional conduct across the fifty states and, more importantly, in New Jersey. Because Dwyer's advertising was deemed to be inherently misleading by the source of the quote, Judge Wertheimer, it did not deserve to receive any constitutional protection. In that case, Guideline 3 is constitutional and appropriate.[159]

Alternatively, even if Dwyer's advertising was not inherently misleading, Guideline 3 satisfies the two prongs for disclosure requirements established in *Zauderer*.[160] Guideline 3 meets the first prong that the requirement be reasonably related to the State's interests, which in this case are to prevent deception of potential clients and also preserve public confidence in the impartiality of the judiciary. Providing the full contexts of judicial quotes at least reasonably serves those interests, even if, admittedly, the goals are potentially better served by other measures. This is satisfactory because Circuit Courts have understood that *Zauderer* does not require a narrow tailoring of the disclosure requirement to the goal, only, again, that they be

[158] In re Felmeister & Isaacs, 104 N.J. 515, 517 (1986).
[159] Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 563-64 (1980).
[160] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).

"reasonably" related.[161] Guideline 3 satisfies the second prong because it does not unduly burden Dwyer. It argued that, in attempting to use the Internet as his medium of choice to advertise, Dwyer is still capable of posting his desired text along with the required disclosures Guideline 3 mandates and, because of this, he is not effectively banned from advertising.

Furthermore, this Note examined the public policy concerns with the Third Circuit's holding and suggested that this ruling will have an impact on attorney advertising and then, consequently, a significant impact on the public's view of the legal system in general. This ruling could open the door for future unrest as people lose faith that attorneys are obligated to act in the best interests of their clients, instead behaving more like a commercial entity whose main objective is the bottom dollar. Additionally, the Third Circuit's ruling has a much more direct effect on the public view of judicial biases, as Judge Wertheimer's quotes may reappear on Dwyer's website at any time and a reasonable person could easily conclude that the quote constitutes a blanket endorsement of Dwyer, giving the appearance of favoritism and impropriety.[162]

Ultimately, one can only guess at the future implications of this decision, particularly if other circuit courts rule in like manner. This Note does not endeavor to postulate all potential roads this ruling might lead us down, nor could it do so. One thing can be known for certain—though Andrew Dwyer won before the Third Circuit in the summer of 2014, his was not a victory for the legal profession or for the public at large.

[161] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2nd Cir. 2001).
[162] At the time of writing, Andrew Dwyer's website did not contain any of the judicial quotes that originally instigated Guideline 3. *See* http://www.thedwyerlawfirm.com.