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Recent Developments: Zauderer v. Office of Disciplinary Counsel: Attorney Advertising

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alleviate fears that this exception might be abused by pointing out that: (1) if properly applied by the courts, this exception prohibits action by those persons deriving an *indirect* benefit from the transaction; and (2) the Code of Professional Responsibility requires an attorney to zealously represent his clients within the bounds of the law and to refrain from representing clients with conflicting interests. *Id.* at 131, 492 A.2d at 626.

—Marc Minkove

Zauderer v. Office of Disciplinary Counsel: ATTORNEY ADVERTISING

In *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985), the United States Supreme Court continued to delineate the path between an attorney's constitutional right to advertise and the valid police power of the state in regulating the conduct of lawyers. The plurality opinion secures the attorney's first amendment right to solicit business through nondeceptive printed advertisements, yet maintains the state's authority to compel disclosure of information so that the ads are not deceptive.

The *Zauderer* case involved an Ohio attorney who placed advertisements in thirty-six newspapers within the state to publicize his willingness to represent women who had suffered injuries from the use of the Dalkon Shield Intrauterine Device. The ad featured a line-drawn illustration of the contraceptive, and included the following textual information:

The Dalkon Shield Interuterine (*sic*) Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also

alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by the clients.

Zauderer, 105 S.Ct. at 2271.

The attorney received numerous responses to the ads, and initiated suit for over one hundred clients.

The Office of Disciplinary Counsel filed a complaint against Zauderer claiming that the advertisement violated several of the state's disciplinary rules. The Supreme Court of Ohio found that Zauderer violated the disciplinary rules by his failure to disclose the clients potential liability for costs, by using an illustration in the advertisement, and because the ad constituted an impermissible self-recommendation. The Ohio court found this conduct warranted a public reprimand.

Zauderer filed his appeal to the Supreme Court of the United States, contending that Ohio's disciplinary rules violated the first amendment by authorizing the state to discipline him for the content of the Dalkon Shield ad.

While most states have adopted a code of professional responsibility which regulates the conduct of attorneys, the Supreme Court has recognized several constitutional problems with these general rules. The Supreme Court has recognized that an attorney has a constitutional right to advertise, and found that state regula-

tions which provide blanket bans on advertising prices for routine legal services violated the first amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Supreme Court has also found that rules prohibiting attorneys from using nondeceptive terminology to describe their fields of practice were an unconstitutional infringement on an attorney's first amendment rights. *In re R.M.J.*, 455 U.S. 191, (1978). Yet, the Supreme Court has allowed state regulations which prohibit in-person solicitation of clients, in certain circumstances. *Ohralik v. State Bar Assn.*, 436 U.S. 447 (1978).

It is against this background that Zauderer challenged the constitutionality of Ohio's disciplinary rules prohibiting the solicitation of legal business through printed advertisements containing advice and information regarding specific legal problems. He also challenged Ohio's restrictions on the use of illustrations, and the state's disclosure requirements relating to contingent fees.

The Supreme Court found that while the state could prohibit advertising that is inherently misleading, they could not use this reasoning to justify disciplining an attorney for running nondeceptive advertisements geared to persons with specific legal rights. The Court noted that Zauderer's ads did not provide deceptive or misleading information about Dalkon Shields, and, in fact, were totally accurate. *Zauderer*, 105 S.Ct. at 2276-77. The Supreme Court also noted an important distinction between in-person solicitation and printed advertising. While "in-person solicitation was a practice ripe with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," *Ohralik*, 436 U.S. at 464-65, printed advertising is a "means of

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conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer." *Zauderer*, 105 S.Ct. at 2277.

Ohio argued that a prophylactic rule was needed to prohibit attorneys from using legal advice in false or misleading advertisements. However, the Supreme Court found that the prophylactic ban was not the least restrictive way to secure the state's interests in preventing public deception. The Supreme Court noted that the Federal Trade Commission carries out a similar mission in eliminating unfair or deceptive advertisements in commerce, and found that distinguishing deceptive from nondeceptive legal advertisements would be no more difficult. *Id.* at 2278-80. The Court concluded that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of others.

Similarly, the Supreme Court struck down Ohio's restrictions on the use of illustrations in attorney advertisements. The Court noted that "the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." *Id.* at 2280. Since commercial illustrations are entitled to the first amendment protection of verbal commercial speech, the state had the burden of showing a substantial government interest justifying the restriction. The Court found that the state's interest that attorneys maintain dignity did not justify the abridgement of their first amendment rights. Furthermore, since advertising could be policed

on a case-by-case basis, the prophylactic ban on all illustrations in printed attorney advertisements was unconstitutional.

Zauderer finally challenged the state's disclosure requirements in contingent fee advertisements. Under the Ohio disciplinary rules, an attorney must state that the client may have to bear certain expenses even if he loses. Zauderer felt this compulsion violated his first amendment rights. The Supreme Court found that since commercial speech was principally justified by its value to consumers, Zauderer's protected interest in not providing factual information in his advertising was minimal, and his interest was adequately protected by the requirement that the disclosures be reasonably related to the state's interest in preventing deception of consumers. The Court then found that the Ohio requirement of disclosure in contingent fee ads was rationally related to the state's goals. The Court noted that a layman may not be aware of the distinction between "legal fees" and "costs," and may wrongfully feel that he will entail no expenses. The Court concluded that Ohio's ruling was reasonable enough to support a requirement of disclosure, and did not violate the first amendment.

The Supreme Court's opinion in *Zauderer* protects an attorney's first amendment right to advertise, yet recognizes the state's interest in protecting the public from deception. While the state may no longer issue blanket bans to prevent an attorney from offering legal advice or using illustrations in printed advertisements, the state may evaluate these ads on a case-by-case basis in order to ensure that the ads are not deceptive. The state may also compel the disclosure of specific information to prevent an ad from being decep-

tive. As attorneys begin to exercise their constitutional rights, they should be aware of the potential of the state to create an advertising review board, and should endeavor to prevent deceptive printed advertisements from entering into the marketplace of ideas.

—Lawrence M. Meister

***Virgil v. "Kash N'Karry":* CIRCUMSTANTIAL EVIDENCE SUFFICIENT IN PRODUCTS LIABILITY**

In a case of first impression, the Court of Special Appeals of Maryland has ruled that circumstantial evidence, in a products liability action, is sufficient to establish the existence of a defect, thereby enabling the case to survive motions for a directed verdict and reach the jury. In *Virgil v. "Kash N'Karry" Service Corporation*, 61 Md. App. 23, 484 A.2d 652 (1984), the court reversed in part a directed verdict, at the close of the claimant's case, entered by the Circuit Court for Howard County Guy J. Cicone, J. in favor of the defendant manufacturer, Aladdin Industries, Incorporated and seller, "Kash N'Karry" Service Corporation. The court reversed the trial court with respect to the implied warranty of merchantability and strict liability in tort counts. The counts sounding in negligence, including failure to warn, were affirmed by the court.

The factual circumstances of the case involved the implosion of a pint-size thermos purchased at "Kash N'Karry" two or three months prior to the accident. Testimony by the plaintiff, Irma Virgil, revealed that the thermos was filled with coffee and a small amount of milk every weekday morning. The thermos was then carried to work, either by its handle or in a bag containing her shoes. On Saturdays, the thermos was carried downstairs to her den, where the plaintiff spent the day studying.

Mrs. Virgil cleaned the thermos by filling it at night with a solution of baking soda and warm water. In the morning, she would wash the thermos with a bottle brush. The label bore the words, "Easy to Keep Clean," but there were no instructions on how to clean the thermos or what constituted a normal manner of cleansing the thermos. One Saturday morning the thermos imploded, causing the hot coffee and glass to be spewn into the face and eye of Mrs. Virgil. Mrs. Virgil testified that she did not drop, misuse, abuse, or damage the thermos in any way, but the plaintiff failed to present any expert "to give any scientific explanation for the implosion." *Id.* at 27, 484 A.2d at 654.

