
Did You Use This IUD? Legal Advice in Lawyer Advertising: Zauderer v. Office of Disciplinary Counsel

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DID YOU USE THIS IUD? LEGAL ADVICE IN LAWYER ADVERTISING: ZAUDERER v. OFFICE OF DISCIPLINARY COUNSEL

INTRODUCTION

The United States Supreme Court has extended first amendment protection to "commercial speech,"¹ although to a somewhat lesser degree than that

1. Commercial speech in its pure form is speech that "does no more than propose a commercial transaction." *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973) (explaining the result in *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). *But see infra* note 5. In *Valentine*, the Court considered "purely commercial advertising," 316 U.S. at 54, while in *Pittsburgh Press*, the Court described employment advertisements as "classic examples of commercial speech." 413 U.S. at 385. *See infra* notes 11-12 and accompanying text.

The Court's approach to commercial speech prior to its decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748 (1976), *see infra* notes 13-24 and accompanying text, permitted outright bans on certain forms of advertising and solicitation. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951) (upholding conviction for violation of ordinance prohibiting door-to-door solicitation of magazine subscriptions). For relatively recent commentary on the Supreme Court's commercial speech doctrine, *see Symposium on Commercial Speech Held at Brooklyn Law School November 10, 1979*, 46 BROOKLYN L. REV. 389 (1980), especially Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, *id.* at 437 (arguing that commercial speech deserves protection to allow rational decision-making in the marketplace). *See also* Alexander & Farber, *Commercial Speech and First Amendment Theory: A Critical Exchange*, 75 NW. U.L. REV. 307 (1980) (an exchange of views on Professor Farber's theory); Barrett, "Uncharted Area"—*Commercial Speech and the First Amendment*, 13 U.C.D. L. REV. 175 (1980) (noting that the Court left the definition of commercial speech unresolved); Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503 (1982) (the states are in the best position to judge needs of local consumers); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979) (commercial speech may be regulated in the aspects that serve a contractual function not directly implicating first amendment interests); McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985); Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775 (1979) (suggesting framework for balancing benefits of commercial speech against costs of deception); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L.J. 115 (1979) (generally approving of the Court's decisions, but warning against extension of "lesser protection" to other areas); Comment, *Regulating Commercial Speech: A Conceptual Framework for Analysis*, 32 BAYLOR L. REV. 235 (1980) (courts should evaluate commercial speech qualitatively to determine extent of protection); Comment, *The New Commercial Speech Doctrine and Broadcast Advertising*, 14 HARV. C.R.-C.L. L. REV. 385 (1979) (commercial speech deserves full protection, but disclosures or counter-advertising may be appropriate); Comment, *Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego*, 66 MINN. L. REV. 903 (1982) (adopting Professor Farber's views for regulation of billboards).

afforded "noncommercial speech."² The states and the federal government remain free to prohibit commercial speech that is false, deceptive, misleading, or that proposes an illegal transaction.³ States may also regulate commercial speech that does not possess these disfavored attributes. To be valid, however, the regulation must further a substantial government interest in a way that directly advances that interest.⁴ Although the definition of commercial speech may be imprecise,⁵ the Supreme Court has held that both advertising generally and advertisements by lawyers in particular constitute commercial speech.

In *Zauderer v. Office of Disciplinary Counsel*,⁶ the Supreme Court demonstrated that only it knows which state concerns about lawyer advertisements justify restrictions. In *Zauderer*, the Court rejected a state's interest in regulating the use of either unsolicited legal advice or illustrations in advertisements. By declaring that the information and illustration in one legal advertisement were not inherently false, misleading, or deceptive, the Court invalidated Ohio's rule banning the use of unsolicited legal advice or illustrations in lawyers' advertisements.⁷

2. Speech that has no element of commercialism or is not purely commercial in nature, did not fall outside the protection of the first amendment even under the Court's pre-1976 approach to commercial speech cases. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (ads announcing that abortions were legal in New York "did more than simply propose a commercial transaction"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (the advertisements in question were not "purely commercial"); *Martin v. Struthers*, 319 U.S. 141 (1943) (permitting door-to-door distribution of leaflets publicizing a religious meeting). Speech is entitled to first amendment protection even though it appears in a form which is sold for profit. *See, e.g.*, *Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (religious literature).

3. "We foresee no obstacle to a State's dealing effectively with [deceptive or misleading commercial speech]." *Virginia Pharmacy Board v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 771 (1976). In a footnote, the Court goes on to say that the common sense differences between commercial and noncommercial speech may permit a different degree of protection for the former, because the truthfulness of commercial speech may be more easily verifiable by its disseminator than are other kinds of speech, and because advertising may be more durable, and thus less easily chilled by regulation, than other forms of speech. *Id.* at 771 n.24.

4. These factors are part of the four-part test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). *See infra* notes 25-35 and accompanying text.

5. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985). "More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech . . ." *Id.* at 2275. Professor Farber has also noted the "vexing problem of defining commercial speech." He suggests that a useful trait for identifying commercial speech is that it serves as a means of forming commitments that are potentially part of a contract of sale. Farber, *supra* note 1, at 389. Other definitions of commercial speech include speech that does no more than propose a commercial transaction, speech of interest to a nondiverse consumer audience, and speech about a brand name product or service. *See Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

6. 105 S. Ct. 2265 (1985).

7. *Id.* at 2276-81. *See infra* notes 97-107 and accompanying text.

Concerns of federalism⁸ and professional ethics⁹ raise doubts as to whether the *Zauderer* decision was necessary or even correct. The *Zauderer* decision demonstrates that the Supreme Court has embarked on perhaps an unlimited series of decisions directed to passing on the validity of state regulations concerning the ethical conduct of attorneys.¹⁰ State courts should make these decisions with little danger of eroding the protections of the first amendment.

This Note demonstrates that, while the Supreme Court has outlined the approach that the states must take in their attempts to regulate commercial speech, the Court's decision in *Zauderer* has eliminated most state interests on which the states may ground regulation of lawyer advertising. The Court has failed to extend sufficient deference to the states in deciding what is misleading in attorney advertising, and it has unnecessarily blurred the distinctions between commercial and noncommercial speech.

I. BACKGROUND

A. *The Commercial Speech Doctrine*

The 1942 Supreme Court decision of *Valentine v. Chrestensen*,¹¹ established the idea that certain forms of commercial speech fall outside the protection of the first amendment.¹² In 1976, however, the tide turned when the Court announced in *Virginia Pharmacy Board v. Virginia Consumer Council*¹³ that a state could not ban commercial speech advertising the prices of prescription drugs.¹⁴ For the first time the Court extended first amendment protection to speech that clearly had no attributes of otherwise protected, "noncommercial" speech.¹⁵ The Court based its *Virginia Pharmacy* decision largely on society's "strong interest in the free flow of commercial information."¹⁶ The

8. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 403 (1976) (Powell, J., dissenting) (emphasizing that the opportunity for experimentation and innovation is one of the great virtues of federalism). See also Justice O'Connor's dissent from Part III of the Court's decision in *Zauderer*, 105 S. Ct. at 2296-97 (O'Connor, J., dissenting in part).

9. See generally H. DRINKER, *LEGAL ETHICS* 211 (1953). Drinker noted that an exact definition of ethics was impossible, *id.* at xi, but in none of his proffered definitions did he suggest that the content of legal ethics was defined by the Constitution.

10. *Zauderer* is the fifth United States Supreme Court decision on the subject of lawyer advertising since 1977.

11. 316 U.S. 52 (1942) (sustained ban on distribution of handbills).

12. *Id.* at 54. "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.*

13. 425 U.S. 748 (1976).

14. *Id.* at 766-70.

15. *Id.* at 762-76. Cf. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), in which the Court rejected the contention that the first amendment did not protect advertisements for abortion services simply because the advertisements themselves were commercial in nature. The Court further observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 825-26.

16. 425 U.S. at 764.

Court reasoned that any interest in maintaining the professionalism of pharmacists was not sufficient to justify keeping the public ignorant about drug prices.¹⁷ The Court was careful, however, to point out that commercial speech was not totally immune from regulation.¹⁸ The state could still establish reasonable time, place, and manner restrictions¹⁹ and regulate commercial speech that proved false, deceptive, or misleading.²⁰

A footnote to the decision makes it clear that the *Virginia Pharmacy* Court addressed only the regulation of advertising of standardized products, and not professional services such as those performed by doctors and lawyers.²¹ Chief Justice Burger's concurring opinion emphasized the footnoted reservation concerning advertising by physicians and lawyers.²² Justice Rehnquist dissented sharply, warning that the Court's decision would extend first amendment protection to advertisements of potentially harmful products as long as they did not mislead or promote an illegal product.²³ He added, "[I]f the sole limitation of permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind."²⁴

17. *Id.* at 766-70.

18. *Id.* at 770.

19. *Id.* at 771. For examples of regulations of political speech or speech-related activity that the Court has allowed, see *Greer v. Spock*, 424 U.S. 828 (1976) (political activities on military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (political advertising on city-owned buses); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (partisan political activities by federal employees); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (demonstrations near schools); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft-card burning); *Cox v. Louisiana*, 379 U.S. 559 (1965) (picketing near a courthouse); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (loudspeakers in residential areas); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (requirement of permits for parades). *But see* *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ban on posting real estate "For Sale" signs struck down). While voicing various rationales for some of these regulations, the Court usually allows a given regulation if it is content-neutral and is evenly applied regardless of the goals of the prospective speaker. *O'Brien*, in particular, defined the test for justifying a regulation if it furthered "an important or substantial government interest . . . unrelated to the suppression of free expression . . ." 391 U.S. at 377. Although the Court in *Virginia Pharmacy* described Virginia's ban on price advertising as content-based, it might have reached a different result if it had viewed the ban as being applied regardless of the motive of the advertiser.

20. 425 U.S. at 771-72.

21. *Id.* at 773 n.25. "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.* (emphasis in original).

22. *Id.* at 774-75 (Burger, C.J., concurring).

23. *Id.* at 788-89 (Rehnquist, J., dissenting).

24. *Id.* at 785 (Rehnquist, J., dissenting).

The Supreme Court outlined its current approach to commercial speech most succinctly in *Central Hudson Gas v. Public Service Commission*.²⁵ There, the Court struck down a ban on promotional advertising by an electrical utility.²⁶ Justice Powell, writing for the Court, synthesized commercial speech cases into a four-part analysis.²⁷ The Court began the analysis by determining whether the first amendment protects the form of expression in question. In order to receive first amendment protection, the expression must not be misleading or concern unlawful activity.²⁸ Second, the government must assert a substantial interest in regulating the speech.²⁹ In the third and fourth parts of the analysis, the Court determined both whether the regulation directly advances the government interest asserted, and whether the regulation is more extensive than necessary to serve that interest.³⁰

Justice Blackmun, who authored the opinion in *Virginia Pharmacy*, concurred only in the result.³¹ He believed that the Court in *Central Hudson* provided only "intermediate scrutiny" of restraints on commercial speech,³² whereas *Virginia Pharmacy* had promised a higher level of review.³³

Justice Rehnquist again dissented, stating that the Court "unlocked a Pandora's box when it 'elevated' commercial speech to the level of traditional political speech"³⁴ He noted that the final part of the Court's four-part test left room for so many less restrictive ways of regulating that "any ingenious lawyer will surely seize on one of them to secure the invalidation of [the regulation]."³⁵

B. *The Lawyer Advertising Cases*

Soon after *Virginia Pharmacy*, the Supreme Court received its first opportunity to rule on the regulation of advertising by attorneys. In *Bates v.*

25. 447 U.S. 557 (1980). See Comment, *Advertising Restrictions on Health Care Professionals and Lawyers: The First Amendment Limitations*, 50 UMKC L. REV. 82 (1981) (anticipating *In re R.M.J.* in analyzing how *Central Hudson* would apply).

26. 447 U.S. at 558-59. The ban was based on the New York Public Service Commission's finding that the electric utility system in New York State did not have sufficient fuel stocks for the 1973-1974 winter.

27. *Id.* at 566.

28. *Id.* at 564.

29. *Id.*

30. *Id.* at 564-65.

31. *Id.* at 573 (Blackmun, J., concurring).

32. *Id.* (Blackmun, J., concurring).

33. *Id.* at 575-76 (Blackmun, J., concurring). Government regulation of speech that is fully protected by the first amendment is presumptively invalid and is thus subject to strict scrutiny. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 602-08 (1978). Exceptions, such as speech that forms a "clear and present danger," constitute expression regulable as long as minimal due process requirements are met. *Id.* Justice Blackmun views the four-part test of *Central Hudson* as providing a level of intermediate scrutiny appropriate only for false or misleading commercial speech, or time, place, and manner restrictions.

34. *Id.* at 598 (Rehnquist, J., dissenting). Justice Rehnquist's concern is borne out by the necessity for the Court to issue five decisions just in the narrow area of lawyer advertising or solicitation since 1977.

35. *Id.* at 599-600 (Rehnquist, J., dissenting).

State Bar of Arizona,³⁶ the Court considered the claims of two attorneys who placed a newspaper advertisement that violated a state ban on advertising legal fees.³⁷ Faced with disciplinary action, the attorneys appealed to the state supreme court, which rejected their claim that such a ban violated both the Sherman Act and the first amendment.³⁸

The United States Supreme Court also rejected the Sherman Act claim,³⁹ noting that to do otherwise would have the "undesired effect" of diminution of the authority of the state to regulate its professions.⁴⁰ In addressing the first amendment claim, Justice Blackmun's opinion for the Court relied primarily on *Virginia Pharmacy*.⁴¹ Just as he had failed to find adequate justification for a ban on advertisements by pharmacists,⁴² Justice Blackmun now found the reasons asserted by the State of Arizona inadequate to support its ban on price advertising by lawyers.⁴³ Justice Blackmun examined the adverse effects of such advertisements on the professionalism of attorneys,⁴⁴ the inherently misleading nature of lawyer advertising,⁴⁵ the charge that advertising would increase litigation,⁴⁶ the possible effects on the cost and quality of legal services,⁴⁷ and the difficulty of enforcing a less than total ban.⁴⁸

36. 433 U.S. 350 (1977). See generally Meyer & Smith, *Attorney Advertising: Bates and a Beginning*, 20 ARIZ. L. REV. 427 (1978) (in-depth analysis of *Bates* with survey of attorneys' attitudes toward advertising); Welch, Bates, Ohralik, Primus—*The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585 (1979) (surveying the states' response to *Bates*); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 198 (1977) (somewhat critical of the imprecision of *Bates*); Comment, *Bates and O'Steen v. State Bar of Arizona: From the Court to the Bar to the Consumer*, 9 LOY. U. CHI. L.J. 477 (1978) (discussing the ABA response to the question); Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898 (1977).

37. 433 U.S. at 354-55.

38. *Id.* at 356. The decision of the Supreme Court of Arizona is reported as *In Re Bates*, 113 ARIZ. 394, 555 P.2d 640 (1976).

39. 433 U.S. at 359. The Sherman Act basically prohibits restraint of trade. 15 U.S.C. §§ 1-7 (1982). In rejecting the restraint-of-trade claim, the Court adhered to its decision in *Parker v. Brown*, 317 U.S. 341 (1943), which held that the Sherman Act did not prohibit a state program restricting competition among raisin growers, thus creating a state-action exception to the Sherman Act. The *Bates* Court distinguished *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which had prohibited enforcement of a minimum-fee schedule by the state bar on the grounds that such enforcement constituted a classic example of price-fixing. The Court also distinguished *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (no state-action exception found where utility's distribution of light bulbs was only indirectly authorized by state regulations).

40. 433 U.S. at 360 n.11.

41. *Id.* at 363-65.

42. See *supra* notes 11-15 and accompanying text.

43. 433 U.S. at 379.

44. *Id.* at 368-72.

45. *Id.* at 372-75.

46. *Id.* at 375-77.

47. *Id.* at 377-79.

48. *Id.* at 379.

To the charge of increased litigation, Justice Blackmun replied that much of the population under-utilized legal services, and that fear of costs was at least part of the reason for this under-utilization.⁴⁹ The Court could not accept "the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."⁵⁰ The possibility of increased costs and decreased quality of services seemed remotely linked to the use of advertisements.⁵¹ As for enforcing less complete bans on solicitation through advertisements, Justice Blackmun relied on the honesty of the vast majority of the legal profession, saying that "[i]t is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal

49. *Id.* at 376. In a footnote, Justice Blackmun indicated that 35.8% of the adult population has never visited an attorney, and another 27.9% has visited an attorney only once. *Id.* at 376 n.33. The use of these figures suggests that the Court was relying on two assumptions: that all adults have legal problems sometime during their lives, and that people with legal problems should take them to a lawyer. These figures come from preliminary data released by the ABA Special Committee to Survey Legal Needs. ABA, *Legal Services and the Public*, 3 ALTERNATIVES 1 (Jan. 1976). This survey, conducted in 1973-1974, was limited to gathering information about personal (as opposed to business) legal needs and was the first comprehensive market research regarding the incidence of personal legal problems and the use of lawyers. The committee itself recognized that it could not draw any hard and fast lines as to which problems ought to be handled by a lawyer. It also recognized that this often might depend on whether the person experiencing the problem perceived it as "serious." *Id.* at 2.

Other figures from the study are revealing. For instance, of thirty-two different legal problems about which the survey group was questioned, only six had been encountered by more than 10% of the respondents. *Id.* at 4. Fully 95% of those asked were able to give some source for finding a lawyer. Usually they named a friend, relative, or the telephone book. *Id.* at 10.

A great majority (78.9%) felt that a lot of people do not go to lawyers because they have no way of finding out who is competent to handle their problems. On the other hand, a majority (58%) also believed that lawyers will only take cases if they believe they know enough to handle the problem.

To some extent, the actual behavior of the respondents contradicts these attitudes. Only 19.2% of the respondents had ever considered using a lawyer, but then had not. They gave multiple reasons for this, with the majority (56.3%) being related to the use of an alternate means for resolving the problem, or feelings that the use of a lawyer was inappropriate or undesirable. Cost was a reason for only 18.3% of those answering. A mere 3.1% cited unavailability of a competent lawyer, while 1.2% gave lack of knowledge on their own part as a reason. *Id.* at 14.

The survey also tested the attitudes of the population toward lawyers generally. For example, 42.6% of the respondents either agreed or strongly agreed that other possibilities should be exhausted before a lawyer is consulted, while 29.3% believed that lawyers work harder at getting clients than serving them. *Id.* When asked what qualities they sought in a lawyer, 16.2% were concerned about the lawyer's ethical standards, while only 8.5% were worried about fees. *Id.* at 15. See generally ABA, FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS (1978).

50. 433 U.S. at 376. This statement assumes, of course, that "suffering silently" is the only alternative to legal action. What choice an individual makes when faced with a legal problem is not germane to the issue of whether an attorney has the right to advertise his services.

51. *Id.* at 377.

profession at one point, and at another, to assert that its members will seize the opportunity to mislead and distort."⁵²

Inasmuch as the traditional ban on advertising had originated "as a rule of etiquette and not as a rule of ethics,"⁵³ Justice Blackmun concluded that the "historical foundation" for the ban had "crumbled."⁵⁴ As for the inherently misleading nature of such advertisements, he stressed that only routine legal services would lend themselves to the advertisement of fees; attorneys would not be likely to advertise their many unique services at fixed prices.⁵⁵

Although the Court in *Bates* concluded that blanket suppression of lawyer advertising was insupportable, it reiterated that false, deceptive, or misleading advertising could be regulated.⁵⁶ The Court affirmed the permissibility of the time, place, and manner restrictions asserted in *Virginia Pharmacy*.⁵⁷ Finally, Justice Blackmun noted possible problem areas, including claims made as to the quality of legal services, in-person solicitation, and advertising on the electronic broadcast media.⁵⁸ The *Bates* decision, however, decided only whether lawyers could advertise their fees for routine legal services.⁵⁹

In the following term, the Supreme Court issued two decisions on the same day regarding solicitation by attorneys. In *In re Primus*,⁶⁰ an ACLU attorney had written a letter offering the ACLU's assistance to a woman who had been sterilized, possibly in violation of her civil rights.⁶¹ The State

52. *Id.* at 379.

53. 433 U.S. at 371.

54. *Id.* at 372. Justice Blackmun's primary reason for this conclusion was that the belief that lawyers are "above" trade is an anachronism. This, of course, does not answer the question of whether modern concerns have replaced the historical foundation for the advertising ban.

55. *Id.* Justice Blackmun listed uncontested divorce, simple adoption, uncontested personal bankruptcy, and change of name as examples of routine legal services.

56. *Id.* at 383 (citing *Virginia Pharmacy*, 425 U.S. at 771-72 & n.24). See *supra* note 2.

57. 433 U.S. at 384. See *supra* note 16 and accompanying text.

58. *Id.* The Iowa Supreme Court seized upon these very reservations as justification for Iowa's rules regarding lawyer advertising on the electronic media. *Committee on Prof. Ethics v. Humphrey*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 106 S. Ct. 1626 (1986). See *infra* notes 150-53 and accompanying text.

59. On the first amendment issue, *Bates* was a 5-4 decision. Chief Justice Burger dissented on the grounds that *Virginia Pharmacy* had dealt with advertisements of products and not services. *Id.* at 386-88 (Burger, C.J., concurring in part and dissenting in part). Justice Powell, joined by Justice Stewart, also dissented, stressing the differences between advertising by pharmacists and by lawyers. *Id.* at 390-95 (Powell, J., concurring in part and dissenting in part). He concluded that few legal services would fall into the "routine" category outlined by Justice Blackmun. See *supra* note 55. Thus, he saw little similarity between legal services and the standardized products dispensed by pharmacists. Finally, Justice Rehnquist reiterated his views of the *Virginia Pharmacy* decision, noting that the "case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence." *Id.* at 404-05 (Rehnquist, J., dissenting in part).

60. 436 U.S. 412 (1978). For commentary on *Primus*, see *infra* note 68.

61. *Id.* at 415-16.

of South Carolina attempted to discipline attorney Primus pursuant to its ethical canons barring solicitation of clients.⁶² The Supreme Court reversed,⁶³ noting that restrictions on solicitation were designed to prevent undue influence or overreaching. The Court found no proof that such undesirable consequences had occurred.⁶⁴ It voiced its solicitude for the first amendment protection accorded to organizations that engage in litigation only as a form of political expression and association.⁶⁵ The state's concerns about "stirring up" vexatious litigation and minimizing commercialism in the legal profession did not outweigh the Court's concern for maintaining first amendment protections.⁶⁶ Again, the Court declared that a state may impose time, place, and manner restrictions on solicitation by members of its bar.⁶⁷

The Court, however, reached the opposite result in the companion case, *Ohralik v. Ohio State Bar Association*.⁶⁸ In *Ohralik*, the Court held that first amendment concerns were considerably diminished where in-person solicitation was involved. *Ohralik* involved an attorney who obtained agreements to represent two young auto-accident victims after having met in person with each.⁶⁹ The Court reaffirmed the state's responsibility for maintaining standards among the licensed professions.⁷⁰ Because of the strength

62. *Id.* at 417-21. The order by which the Supreme Court of South Carolina issued a public reprimand of attorney Primus is reported at 268 S.C. 259, 233 S.E.2d 301 (1977).

63. 436 U.S. at 421.

64. *Id.* at 421-22.

65. *Id.* at 422-25. The Court relied primarily on its decision in *NAACP v. Button*, 371 U.S. 415 (1963). In *Button*, the Supreme Court of Appeals of Virginia had held that members and staff attorneys of the NAACP were subject to a state law prohibiting solicitation by attorneys. *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960). The United States Supreme Court reversed, holding that the solicitation of prospective litigants came within the right "to engage in association for the advancement of beliefs and ideas." 371 U.S. at 430 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). Thus, the activities of the NAACP were "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit . . . as improper solicitation of legal business . . ." 371 U.S. at 428-29.

66. 436 U.S. at 436-37.

67. *Id.* at 438 (citing *Bates* and *Virginia Pharmacy*). See *supra* notes 2 & 56.

68. 436 U.S. 447 (1978). For commentary on both *Primus* and *Ohralik*, see Ely, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 197 (1978) (*Ohralik* too neatly divided solicitation into the giving of legal advice and the proposal of a business relationship); Pulaski, *In-Person Solicitation and First Amendment: Was Ohralik Wrongly Decided?*, 1979 ARIZ. ST. L.J. 23 (nonpecuniary solicitation should be protected regardless of subjective motive); Note, *Constitutional Law—Attorney Advertising and Solicitation—In the Wake of Bates*, 10 TEX. TECH L. REV. 166 (1978) (only false or misleading solicitation should be banned); Note, *Constitutional Law—Attorney Solicitation Under the First and Fourteenth Amendments*, 53 TUL. L. REV. 617 (1979) (narrowly drawn rules to proscribe solicitation could be uniformly applied without discriminating on basis of motivation); Comment, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik*, 12 U. MICH. J.L. REF. 144 (1978) (commercial/noncommercial distinction should not be basis for solicitation laws).

69. 436 U.S. at 449-51.

70. *Id.* at 460. "[T]he State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.*

of the state's concerns and the difficulty in regulating members of the bar the Court held that a prophylactic rule against in-person solicitation was not violative of Constitution.⁷¹ Two years later, the Court again struck down a state rule regulating attorney advertising. In *In re R.M.J.*,⁷² an attorney placed an advertisement that did not adhere to the rules of the Missouri Supreme Court.⁷³ Although Missouri's rules had been amended in the aftermath of the *Bates* decision,⁷⁴ they still restricted the areas of practice lawyers' advertisements could specify⁷⁵ and did not permit an attorney to list the jurisdictions in which he had been admitted to practice.⁷⁶ In addition, the attorney had sent announcement cards to persons other than to those permitted under the rules.⁷⁷

In re R.M.J. presented the Court with its first opportunity to apply the four-part test of *Central Hudson* to a state regulation of lawyer advertising. In so doing, the Court found that the type of information actually included

71. *Id.* at 467.

72. 455 U.S. 191 (1982). See generally Whitman & Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of In Re R.M.J.*, 57 ST. JOHN'S L. REV. 445, 475 n.165 (1983) (noting that only 10% of lawyers in one poll actually advertised); Comment, *The First Amendment, In Re R.M.J. and State Regulation of Direct Mail Lawyer Advertising*, 34 BAYLOR L. REV. 411 (1982) (extensive review of state decisions regarding mail advertisements); Note, *In Re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U.L. REV. 229 (1983) (flow of needed legal information will be constrained by allowing states greater freedom to regulate lawyer advertising).

73. 455 U.S. at 196-98.

74. *Id.* at 193. The Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri sought to "strike a midpoint between prohibition and unlimited advertising." Report of Committee to Chief Justice of Supreme Court of Missouri (Sept. 9, 1977).

75. The relevant part of an addendum to Rule 4 of the Supreme Court of Missouri provided:

[A] lawyer or law firm can use one or more of the following:

1. "Administrative Law"

2. "Anti-Trust Law"

...

18. "Property Law"

...

21. "Tort Law"

...

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated

Mo. Sup. Ct. R. 4, Addendum II (Adv. Comm. Nov. 13, 1977).

76. The Rule permitted only ten categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified routine legal services. Mo. Sup. Ct. R. 4, DR 2-101(B) (Index Vol.) (1978). Missouri's current rule on lawyer advertising appears as Supreme Court R.4, RULES OF PROFESSIONAL CONDUCT Rules 7.1 & 7.2 (effective Jan. 1, 1986).

77. 455 U.S. at 198.

in the advertisements was not in itself misleading. For instance, the attorney had used the word "real estate" instead of the required word "property."⁷⁸ Nor did the Court find the identification of jurisdictions in which the advertiser was licensed to practice misleading.⁷⁹ The Court then turned to the question of whether the state regulations were broader than reasonably necessary to prevent deception. It found that the state had established no interest compelling the restrictions on the types of information that could be included in the advertisements, the way in which areas of practice could be described, or the groups of people to whom announcements could be sent.⁸⁰ Justice Powell's opinion did note, however, that the states "retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice."⁸¹

The Note will now examine the breadth of authority to regulate attorney advertising that remains after *Zauderer*.

II. THE ZAUDERER DECISION

Late in 1981, attorney Philip Q. Zauderer advertised in a newspaper that he would represent defendants in drunken driving cases, and that he would refund their attorney's fees if they were convicted of drunk driving.⁸² The Office of Disciplinary Counsel of the Supreme Court of Ohio contacted Zauderer and warned him that his advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis in violation of the Ohio Code of Professional Responsibility. Zauderer immediately withdrew the advertisement and promised not to accept employment by anyone responding to it.⁸³

In 1982, Zauderer placed an advertisement in thirty-six Ohio newspapers in which he offered to represent women who had suffered injuries as a result of using the Dalkon Shield Intrauterine Device (IUD). The advertisement included a drawing of a Dalkon Shield and advised readers not to assume that it was too late to take action against the manufacturer of the device.⁸⁴

78. *Id.* at 205.

79. *Id.*

80. *Id.* at 205-06.

81. *Id.* at 207.

82. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2271 (1985).

83. *Id.*

84. *Id.* The question, "DID YOU USE THIS IUD?" accompanied the drawing. The advertisement then read as follows:

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

Zauderer received over 200 inquiries and initiated lawsuits on behalf of 106 of the women that contacted him as a result of the advertisement.⁸⁵ The Office of Disciplinary Counsel responded to the advertisement with charges that Zauderer had violated the following Disciplinary Rules: DR 2-101(B), which prohibited the use of most illustrations⁸⁶ and limited the types of information that may be included in an advertisement; DR 2-103(A), which prohibited attorneys from recommending employment of themselves to lay persons who had not sought their advice;⁸⁷ and DR 2-104(A), which prohibited attorneys from accepting employment from anyone to whom they had given unsolicited advice.⁸⁸ The complaint against Zauderer also alleged that his earlier drunken driving advertisement was deceptive because it offered representation on a contingent-fee basis in a criminal case.⁸⁹

of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

Id. at 2271-72.

85. *Id.* at 2272.

86. Disciplinary Rule 2-101(B) provided in pertinent part:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such a publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except for the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of . . . professional associates, addresses and telephone numbers;

. . .

(13) Fee for an initial consultation;

(14) Availability upon request of a written . . . schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses; . . .

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1981). Ohio's Code has since been amended and reads simply:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-102 through 2-105, information in print media, in written or printed material distributed to consumers through the mail or otherwise; or over radio or television. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A).

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1985) (effective March 1, 1986).

87. *Id.* DR 2-103(A) (1981).

88. *Id.* DR 2-104(A) (1981).

89. 105 S. Ct. at 2272.

A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that Zauderer had violated the Disciplinary Rules, but for slightly different reasons than those advanced by the Office of Disciplinary Counsel.⁹⁰ For example, the panel found the drunken driving advertisement deceptive because it failed to mention the practice of plea bargaining. Thus, despite the promise in the advertisement, defendants who pleaded guilty to a lesser offense would still be liable for attorney's fees even though they had not been convicted of drunken driving per se.⁹¹ The panel also found that the Dalkon Shield advertisement failed to disclose the client's potential liability for the costs of an unsuccessful suit.⁹²

The panel noted that neither *Bates* nor *In re R.M.J.* had forbidden all regulation of advertising by attorneys.⁹³ It also relied heavily on *Ohralik* for the proposition that the interests served in regulating advertisements that contained legal advice and solicited clients were as substantial as the interests served by a ban on in-person solicitation.⁹⁴ The Supreme Court of Ohio adopted the panel's findings and concluded that Zauderer's conduct warranted a public reprimand.⁹⁵

Zauderer appealed to the United States Supreme Court. In an opinion written by Justice White, the Court affirmed in part and reversed in part.⁹⁶ Justice White first reiterated the tenets of the Court's earlier decisions regarding commercial speech and lawyer advertising.⁹⁷ He then divided the Ohio regulations into three types: those prohibiting the use of specific legal advice in advertisements; those restricting the use of illustrations; and those stating disclosure requirements relating to the terms of contingent fees.⁹⁸ After concluding that Zauderer's statements regarding the Dalkon Shield were not false or deceptive,⁹⁹ the Court considered the possible state interests that might justify a total ban on advertisements containing legal advice.

First, the Court compared print advertising with in-person solicitation, and concluded that the substantial interests that justified the ban on in-person solicitation in *Ohralik* could not justify the discipline imposed on Zauderer for his advertisement.¹⁰⁰ Although in-person solicitation is a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue

90. *Id.* at 2273-74.

91. *Id.* at 2273.

92. *Id.*

93. *Id.* at 2274.

94. *Id.*

95. *Id.* This decision is reported as Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984).

96. 105 S. Ct. at 2274.

97. *Id.* at 2274-75.

98. *Id.* at 2275.

99. *Id.* at 2277.

100. *Id.*

influence, and outright fraud,"¹⁰¹ the same is not true of print advertising. The latter, he noted, lacks the "coercive force of the personal presence of a trained advocate."¹⁰²

Second, Justice White addressed the fear that solicitation, even in the printed media, would "stir up litigation." He reiterated the observation in *Bates* that the Supreme Court could not accept the notion that it is better "to suffer a wrong silently than to redress it by legal means."¹⁰³ In a footnote, he suggested that "if the State's concern is with abuse of process, it can best achieve its aim by enforcing sanctions against vexatious litigation."¹⁰⁴ Finally, Justice White failed to find justification for a prophylactic ban on the use of legal advice in advertisements simply because of the difficulties posed by attempts to enforce a less restrictive rule. Inasmuch as "assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity," the state had failed to show a need for such prophylactic measures.¹⁰⁵

Similarly, the state's restrictions on the use of illustrations failed to withstand the Court's scrutiny. Just as the legal advice was not false or deceptive, the Court found that the drawing of the Dalkon Shield was not inaccurate.¹⁰⁶ The asserted state interests in maintaining "dignity" in attorneys' advertisements and in avoiding enforcement problems were found insufficient to justify the limitations imposed by DR 2-101(B).¹⁰⁷ Although recognizing the difficulties of policing the visual content of advertisements, White noted that the Federal Trade Commission, in other areas, had not found the task impossible.¹⁰⁸

Finally, the Court, in addressing the issue of disclosure requirements, recognized the significant differences between disclosure requirements and blanket prohibitions on speech.¹⁰⁹ Recalling that the Court's decision in *Virginia Pharmacy* had rested in large part on the value to the reader of the information contained in an advertisement,¹¹⁰ the Court found that the state could reasonably require warnings or disclaimers to prevent confusion or deception.¹¹¹ Zauderer's advertisements had failed to distinguish between

101. *Id.* See also *Ohralik*, 436 U.S. at 466 (in-person solicitation, unlike printed advertising, is not open to public scrutiny).

102. 105 S. Ct. at 2277.

103. *Id.* at 2278 (quoting *Bates*, 433 U.S. at 376). See *supra* note 50.

104. 105 S. Ct. 2265, 2279 n.12.

105. *Id.* at 2279.

106. *Id.* at 2280.

107. *Id.* at 2280-81.

108. *Id.* at 2281.

109. *Id.* "The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right." *Id.* at 2282 n.14.

110. *Id.* at 2282. See also *Virginia Pharmacy*, 425 U.S. at 764 (noting "society's strong interest in the free flow of commercial information").

111. *Id.* at 2282 (citing *In re R.M.J.*, 455 U.S. 191 (1982)). See also *Central Hudson*, 447

“legal fees” and “costs” and, because such terms are interchangeable in the mind of a nonlawyer, the possibility of deception was substantial.¹¹² The Court concluded that the reprimands of Zauderer for the use of an illustration and legal advice in his advertisements could not stand. The Court affirmed the judgment of the Ohio Supreme Court, however, to the extent that it was based on omission of information regarding contingent-fee arrangements.¹¹³

III. ANALYSIS

The *Zauderer* case demonstrates the Supreme Court's failure to provide guidance to the states for regulating solicitation by lawyers without suppressing protected speech. Because the Court in *Bates* commanded state bar associations to relax restrictions on attorney advertising, most states complied by rewriting their rules regarding advertising.¹¹⁴ But as the decisions in *In re R.M.J.* and *Zauderer* demonstrate, relaxation of the rules was not enough. Despite repeated pronouncements regarding reasonable restrictions and substantial state interests,¹¹⁵ *Zauderer* indicates that only the Supreme Court can determine what is “reasonable” and “substantial.” The *Bates* decision permitted only advertising of fees for “routine legal services.”¹¹⁶ In *In re R.M.J.*, the Court affirmed that *Bates* was a narrow ruling that did not

U.S. at 565 (requiring disclosures in advertisements less restrictive than outright ban); *Bates*, 433 U.S. at 384 (anticipating that warnings or disclaimers might be required in lawyer advertising); *Virginia Pharmacy*, 425 U.S. 748, 772 n.24 (lesser toleration of inaccurate statements in commercial speech may require warnings or disclaimers to prevent deception).

112. 105 S. Ct. at 2283. “The assumption that substantial numbers of potential clients could be . . . misled is hardly a speculative one When the possibility of deception is as *self-evident* as it is in this case, we need not require the State to ‘conduct a survey of the . . . public’” *Id.* (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)) (emphasis added).

113. 105 S. Ct. at 2284.

114. The ABA, for instance, amended its Model Code DR 2-101 in 1977 to allow publication of information in print media or broadcast over television or radio, but continued to limit the types of information to twenty-five specified categories. By 1980, a majority of states had followed suit. A few permitted advertising in the print media while continuing to ban advertisements in the electronic media. Perhaps the most elegant of the new rules was that of Massachusetts: “A lawyer shall not, on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, knowingly use or participate in the use of any form of public communication containing a deceptive statement or claim.” MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 2-101 (1986).

115. “[T]here may be reasonable restrictions on the time, place, and manner of advertising.” *Bates*, 433 U.S. at 384 (cited in *In re R.M.J.*, 455 U.S. 191, 201 n.13). “We have often approved [time, place, and manner restrictions] provided that they are justified without reference to the content of the regulated speech” *Virginia Pharmacy*, 425 U.S. at 771. See *supra* notes 27-30 and accompanying text.

116. 433 U.S. at 372. “The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like” *Id.*

abolish all state regulation of advertisements.¹¹⁷ A product liability suit against a major corporation, such as Zauderer's advertisement proposed, is hardly a "routine legal service." Nor is it a service for which a prospective plaintiff is likely to go comparison shopping. Nevertheless, concern over middle class consumers' access to affordable legal services formed the basis of the *Bates* decision to relax the strictures against lawyer advertisements. Furthermore, the *Bates* Court noted that the bar associations retain the power to define the services included in an advertised package.¹¹⁸ The Court could hardly have been suggesting that such a service as Mr. Zauderer offered was either routine or easily defined.

The Supreme Court has repeatedly recognized that the potential for deception in advertisements of professional services is great.¹¹⁹ To illustrate, suppose a physician were to place the following advertisement in the print media:

Automobile accidents have reportedly caused serious injuries such as comminuted fractures, splenic ruptures, and intracranial injuries. They have also reportedly led to complications such as fat emboli, internal hemorrhage, and neurovascular deficits. If you or a friend have had a similar experience do not assume that your injuries are irreversible. My office is currently treating patients with such problems. The cases are handled for fees that are commensurate with those charged by other physicians.¹²⁰

While none of the statements made are false on their face, such an advertisement says nothing about the doctor's qualifications, the results he has achieved in his treatments, or the amount of his fee. It does not, therefore, benefit the consumer. Nevertheless, the Supreme Court would give full first amendment protection to such an advertisement unless some substantial state interest intervened.¹²¹ This is apparently so even if the advertiser, making use of a similar list of medical terms and offering no promises, is a lawyer with no medical training. The potential for misleading the public, which the Supreme Court admits is inherent in professional advertising, is

117. 455 U.S. at 200.

118. 433 U.S. 350, 373 n.28.

119. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates*, 433 U.S. at 383. The opinion then points out in a footnote that, after consideration of the legal sophistication of an advertisement's audience, "different degrees of regulation may be appropriate in different areas." *Id.* at 383 n.37.

"[T]he potential for deception and confusion is particularly strong in the context of advertising professional services." *In re R.M.J.*, 455 U.S. at 203. See also *supra* note 21.

120. This hypothetical ad tracks Zauderer's own advertisement in word-for-word fashion. Cf. *supra* note 84.

121. Where an advertisement is not false or deceptive, the Court's decisions "impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial government interest." *Zauderer*, 105 S. Ct. at 2277.

multiplied when information from two specialized areas is combined in one advertisement.

In *Zauderer*, the Court noted that the parties had stipulated that Zauderer's Dalkon Shield advertisement was not false, misleading or deceptive.¹²² It then uncritically accepted that stipulation. The *Bates* Court had cautioned that to determine whether an advertisement is misleading requires consideration of the legal sophistication of its audience.¹²³ It follows that whether a lawyer's advertisement containing a list of medical terms is misleading might depend on the medical sophistication of the audience as well. The *Zauderer* Court glossed over the fact that a reader of Mr. Zauderer's advertisement might well be confused as to the difference between an abortion, a septic abortion, and a miscarriage. The Court also ignored the suggestion in the advertisement that the device can "cause" a pregnancy. It might not be clear to the average reader whether the advertisement used the word "cause" in a legal or physiological sense. The incidence of ill effects due to the use of IUD's has obviously been of great interest to the public.¹²⁴ But the Court did not consider whether discussion of a matter of public concern as a vehicle for the sale of legal services imparted any greater importance to the representations, or lack thereof, made as to the legal services themselves.¹²⁵ Instead, the Court blandly noted that Zauderer's advertisement merely reported the "indisputable fact" that the Dalkon Shield had spawned an impressive number of lawsuits and advised readers that Mr. Zauderer was currently handling such lawsuits.

Although the decision in *In re R.M.J.* overturned certain state rules, the Court was careful to point out that the states retained the authority to regulate advertising "that has proved to be misleading in practice."¹²⁶ In

122. *Id.* at 2276.

123. *See supra* note 119.

124. As the *Zauderer* Court itself noted, by the end of 1984 over 9800 claims had been brought against A.H. Robins, the manufacturer of the Dalkon Shield. 105 S. Ct. at 2276 n.10.

125. The Ninth Circuit, for example, while recognizing that the first amendment protection of commercial speech prohibits the stifling of comment on a subject of public interest even when presented in an advertising format, nevertheless concluded that "when discussion of a matter of public concern becomes a vehicle for sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public, and it is appropriate for the [Federal Trade] Commission to consider this factor in determining whether the advertising is misleading or deceptive." *Standard Oil of Cal. v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978). *See also* *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 297 (D.D.C. 1983) (fear of cancer as a vehicle for sale of product).

126. 455 U.S. at 207. The Court, however, offered no examples. Note that in advertising that is subject to regulation by the FTC, "the Commission may determine for itself [the deceptive nature of the representations] through visual inspection and analysis." *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212, 217 (4th Cir. 1962). In making this determination the Commission is entitled to "draw upon its own experience in order to determine [even] in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." *Carter Prod., Inc. v. FTC*, 268 F.2d 461, 495 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959) (parenthetical in original).

Zauderer, however, the Court failed to address the question of whether the advertisement was "misleading in practice." Mr. Zauderer produced two women to testify at his hearing that they would never have learned of their legal claims had it not been for his advertisement.¹²⁷ A survey of all the women who responded to the advertisement would have been more to the point. The fact that Zauderer accepted only 106 clients from "well over" 200 women who made inquiries¹²⁸ might well suggest that the others had not simply called Mr. Zauderer by mistake. But the Court dismissed the idea that anything about Mr. Zauderer's advertisement led those women to the mistaken belief that they might have a claim against the manufacturer. After *Zauderer*, it is questionable whether the states will ever be able to meet the burden of proving deception.

Not having examined Zauderer's advertisement for either inherently misleading qualities or for a misleading effect upon the public, the Supreme Court easily dismissed as unnecessary Ohio's prophylactic rule against advertisements containing legal advice. The Court reasoned that it was possible to present such information in a truthful, nondeceptive manner. The Court's primary reason for dismissing Ohio's ban on legal advice was that printed advertisements do not possess the same potential for overreaching and invasion of privacy as does in-person solicitation.¹²⁹ Thus, it was the "unique features" of in-person solicitation that in *Ohralik* had justified Ohio's similarly prophylactic rule against such activity. The Court's new rule is that state regulations of commercial speech are permissible only if the proscribed activity has some uniquely compelling characteristic that renders unenforceable any less restrictive regulation than an across-the-board ban on such activity. In support of its conclusion, the Court relied on dictum from *In re R.M.J.*: "[T]he 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."¹³⁰ Because the Court failed to find anything misleading about Zauderer's advertisement, it simply concluded that statements about law can be presented in a nondeceptive manner. A state should have no more difficulty in distinguishing deceptive and nondeceptive legal advertising than does, for example, the Federal Trade Commission in its regulation of other types of advertisements.¹³¹ The Court thus left open the question of whether prophylactic rules

127. 105 S. Ct. at 2273.

128. *Id.* at 2272.

129. *Id.* at 2277.

130. 455 U.S. at 203.

131. 105 S. Ct. at 2279. The Court cited *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), and *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), for the proposition that distinguishing deceptive from nondeceptive advertising may well require resolution of exceedingly complex and technical factual issues. Therefore, the Court argues, since the FTC manages to do it in other areas, the states will be able to distinguish valid legal advice from deceptive information. The *Warner-Lambert* court, however, noted the limited role

are ever permissible in this area. Since it is hard to imagine an advertising activity that possesses all the undesirable characteristics of in-person solicitation, the clear implication is that the Court believes that prophylactic bans are unacceptable except for the specific activity that *Ohralik* decried.

The Court also failed to address the question of what time, place, or manner restrictions are permissible. Although it has affirmed and reaffirmed the permissibility of such restrictions,¹³² *Zauderer* teaches that such restrictions, or at least restrictions on the use of illustrations, must pass the four-part test of *Central Hudson*. Since the Court equated the pictorial content of an advertisement with its verbal content, for first amendment purposes, the result is the same—the state may not ban all illustrations in lawyers' advertisements since such illustrations can be accurate representations. Significantly, the Court examined only whether *Zauderer's* drawing was an accurate depiction of a Dalkon Shield. Once again, the Court failed to consider whether such a drawing, accurate though it might have been on its face, could have been misleading in practice. There are probably few IUD users who would know for certain whether such a drawing represents the particular device they use. Nevertheless, the *Zauderer* Court extended the protections of *Central Hudson* to such illustrations. The Court simply relied on the state's ability to police the visual content of advertisements, notwithstanding the admitted complexity of the task.¹³³

In discussing the constitutionality of disclosure requirements, the *Zauderer* Court suddenly back-pedaled on the subject of what constitutes a misleading

of the courts in reviewing decisions of the FTC:

The Supreme Court has set forth the standard:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no *reasonable* relation to the unlawful practices found to exist.

562 F.2d at 762 (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)) (emphasis added). The Court has thus created different levels of review for advertising that falls within the jurisdiction of the FTC as opposed to lawyer advertising reviewable only by the state courts. Perhaps the Court is suggesting that the states establish independent agencies to review lawyer advertising and simply advert to the judgment of such agencies. See also *infra* note 133.

132. See *supra* note 119.

133. 105 S. Ct. at 2281. "Although the [FTC] has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one." *Id.* (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)). Note, however, that in *Colgate-Palmolive*, the Court discussed the broad powers of the FTC to enforce the mandate of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45(a)(1) (1982)). The 1938 amendments gave the Commission jurisdiction over "unfair or deceptive acts or practices in commerce." *Id.* The *Colgate-Palmolive* Court noted the importance of the generality of these standards of illegality and pointed out that it had "frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a . . . violation in this field rests so heavily on inference and pragmatic judgment." 380 U.S. at 384-85 (citations omitted).

advertisement. Because Zauderer's advertisement failed to disclose that a client might be liable for "costs" in an unsuccessful suit, it did not meet the requirements of Ohio DR 2-101(B)(15).¹³⁴ Here the Court found that there are technical meanings to the terms "fees" and "costs," such that the possibility of deception becomes "self-evident."¹³⁵ Thus, a state may mandate disclosure requirements regarding such technical terms at its own behest, with no need to make a prior determination of whether such terms are actually misleading to the public.¹³⁶ Why the possibility of deception is self-evident in an advertisement for fees or costs, but not in advertising with fairly specialized medical language, is not clear from the Court's opinion. The Court permits a state to impose a disclosure requirement for fees or costs without any inquiry into the actual potential for deception. At the same time, it denies the states the power to impose a prophylactic ban on information such as pictorial devices, for which the potential for deception is known and is regularly encountered in other forms of advertising.

IV. IMPACT

Zauderer blurs the distinctions between commercial speech and more fully protected noncommercial speech. The Court has implicitly adopted Justice Marshall's view, in his concurrences in *Primus* and *Ohralik*, that advertising by lawyers is simply "benign" commercial solicitation.¹³⁷ By limiting regulation to commercial speech that is actually false, misleading or deceptive, the Court has virtually extended full first amendment protection to advertising. This is odd because the Court has declined to give such protection even to political speech. In the area of political speech, time, place, and manner restrictions may be applied in the service of a variety of state interests.¹³⁸ The Court has even countenanced outright bans on certain types

134. See *supra* note 86.

135. 105 S. Ct. at 2283. See also *supra* note 112.

136. See *supra* note 112 and accompanying text.

137. "By 'benign' commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a non-coercive, non-deceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous." *Ohralik*, 436 U.S. at 472 n.3 (Marshall, J., concurring in part and concurring in the judgment).

138. The Court has countenanced such governmental interests as preserving the appearance of political neutrality in the military, *Greer v. Spock*, 424 U.S. 828, 839 (1976); avoiding the appearance of political favoritism in a city's allotment of advertising space on its buses, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); preserving the appearance that government employees are politically impartial in the execution of their duties, *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); the operation of schools, *Grayned v. City of Rockford*, 408 U.S. 104, 119-20 (1972); the functioning of the military draft, *United States v. O'Brien*, 391 U.S. 367, 378-80 (1968); and preserving the appearance of judicial independence, *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

of inherently false political speech.¹³⁹ In other areas, the Court has recognized various state interests permitting regulation of speech. But in the area of lawyer advertising, the Court has rejected one asserted state interest after another as too insubstantial to justify controls. To this extent, lawyer advertising receives greater protection than some types of political speech.

Zauderer also "constitutionalizes" ethical rules of the legal profession.¹⁴⁰ The Court has transformed the first amendment into an all-encompassing rule that safeguards not only our political freedom, but also consumers' access to prescription drug prices, public utilities' ability to promote the use of their services, and "benign" commercial solicitation by attorneys. This has been a neat historical trick. The first amendment on its face addressed only congressional actions.¹⁴¹ The United States Supreme Court did not even begin to seriously consider the full extent of constitutional protection for political speech until after World War I.¹⁴² Thereafter, it made the protections of the first amendment applicable to the states in piecemeal fashion.¹⁴³ State regulation of pure commercial speech did not fall under the purview of the first amendment until the Court's decision in *Virginia Pharmacy* in 1976. Now, because the practice of law is at bottom a commercial activity,¹⁴⁴ even those rules formulated to govern the ethical conduct of the profession must

139. The most notable example is *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which sustained an Illinois prohibition against group libel, even though the law was content-specific. Although *Beauharnais* has been questioned by the lower federal courts as no longer controlling, see, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), it has never been overruled. *Smith v. Collin*, 436 U.S. 953 (1978) (Blackmun, J., dissenting from a denial of a stay of the court of appeals order).

140. Cf. Boden, *Five Years after Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547 (1982). Boden suggests that the ABA Code of Professional Responsibility merely embodied rules of professional conduct and not ethical principles. Thus, the ethical principle "Thou shalt bear no false witness" survived the constitutionalization of the rules regarding lawyer advertising. *Id.* For a more pragmatic view of what constitutes ethical principles, compare Justice Holmes: "What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1941).

141. The first amendment, in pertinent part, reads: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

142. See *Schenck v. United States*, 249 U.S. 47, 51-52 (1919). See generally L. TRIBE, *supra* note 33, § 12-9, at 608-17 (discussing the "clear and present danger" exception to first amendment protection of political speech).

143. See, e.g., *Everson v. Board of Education*, 330 U.S. 1 (1947) (nonestablishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Hague v. C.I.O.*, 307 U.S. 496 (1939) (petition); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (incorporating freedom of speech into the fourteenth amendment).

144. Cf. *Bates*, 433 U.S. at 368-72. "Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." *Id.* at 371-72. This statement of course begs the question whether modern-day concerns, such as the increased litigiousness of our society and the clogging of our court systems, have not replaced that "historical foundation."

pass constitutional muster. The Court nowhere considers how many steps removed this modern application of the first amendment is from that amendment's original purposes.¹⁴⁵ Instead, the Court has been all too willing to set itself up as the final arbiter of all regulations of commercial advertising, including those rules directed solely at a professional group, simply because some form of expression is involved.

The Court demonstrated in *Zauderer* that the deference that it has expressed toward the ability of the states to regulate commercial speech has been a false one, borne of the secret knowledge that in the end only the Supreme Court knows what regulation is permissible in this area. Gone is any appreciation for Justice Powell's dissent in *Bates*, that one of the virtues of federalism is that it permits the states to experiment in defining what the permissible limits on lawyer advertising should be.¹⁴⁶ Apparently the constraints of *stare decisis* limited the Court in *Bates* and *In re R.M.J.* to strike only the specific rules that banned certain forms of advertising. Now *Zauderer* expansively implies that no such rules are permissible except those banning in-person solicitation. Rather, the states must assess all activities involving solicitation of clients in terms of whether the activity is inherently false or misleading, or has proven to be so in practice. But *Zauderer* also demonstrates that the Court has its own opinion of what is inherently misleading. The final result is a rule that the Court could just as easily have announced in *Bates*, but which is no more easily applied by the states despite the attempts of the Court in *Zauderer* to give it more definition. A state, for example, can no longer be certain whether a ban on claims of specialization in a given field of the law is permissible on grounds that such claims are inherently misleading. May an attorney permitted to advertise himself in one state as a patent attorney, similarly advertise himself in another state that has not recognized that specialty? Is a statement in an advertisement that a lawyer is a member of the Bar of the Supreme Court of the United States misleading or merely in bad taste? The Court left open this question in *In re R.M.J.* because the Missouri Supreme Court had made no finding that a similar statement was in fact misleading to the general public.¹⁴⁷ While the Supreme Court obviously believed that such a statement could be mis-

145. See, e.g., Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979), in which the authors assert that the first amendment protects only certain identifiable values, chiefly effective self-government and individual self-fulfillment through free expression. They argue that protection of commercial speech is not essential for the furtherance of either of these values. Cf. L. TRIBE, *supra* note 33, § 12-1, at 576-79 (rejecting such narrow bases for the scope of first amendment protections).

146. 433 U.S. at 403 (Powell, J., dissenting). "The constitutionalizing—indeed the affirmative encouraging—of competitive price advertising of specified legal services will substantially inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States." *Id.*

147. 455 U.S. at 205.

leading,¹⁴⁸ the *Zauderer* Court now suggests that the statement, if true on its face, is not inherently misleading and is protected unless a state demonstrates that it is actually misleading in practice.

It is apparent that the state courts may not reach results of which the Supreme Court would approve, given the vagueness of *Zauderer's* guidelines for separating that which is inherently misleading from that which is only potentially misleading but accurate on its face, and the problems inherent in defining the reasonableness of a state regulation. One court has already balked at applying the rules of *Zauderer* and *Central Hudson* in the area of television advertising by attorneys. Relying on dictum from *Bates* that acknowledged special problems in the area of electronic broadcasting, the Iowa Supreme Court in *Committee on Professional Ethics v. Humphrey*¹⁴⁹ has interpreted *Zauderer* narrowly. The Iowa court noted that *Zauderer* dealt solely with a printed advertisement.¹⁵⁰ The court then decided that television advertising was closer to in-person solicitation than it was to print advertising.¹⁵¹ It avoided applying all four parts of the test of *Central Hudson* because the state's interest in regulating lawyer advertising in the electronic media was so substantial as to justify close regulation of such advertisements.¹⁵² Despite the fact that the controversy in *Zauderer* centered on a printed advertisement, the Supreme Court's commercial speech doctrine has wider application than the printed media alone. The Iowa court's virtual rejection of *Zauderer* was probably not what the Supreme Court expected when it remanded *Humphrey* for further consideration in light of *Zauderer*.

148. "Somewhat more troubling is appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court." *Id.* (citation omitted).

149. 377 N.W.2d 643 (Iowa 1985), *appeal dismissed for want of a substantial federal question*, 106 S. Ct. 1626 (1986). The Iowa Supreme Court's original decision appeared as *Committee on Professional Ethics v. Humphrey*, 355 N.W.2d 565 (Iowa 1984). The defendants appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of *Zauderer*. 105 S. Ct. 2693 (1985).

150. 377 N.W.2d at 646.

151. *Id.* "Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider." *Id.* (footnote omitted).

152. *Id.* at 647. Iowa's rule permits use of nineteen items of information in advertisements. With regard to television advertising the rule provides:

The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer.

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Humphrey demonstrates continued resistance to the Supreme Court's stringent protection of commercial speech.

The *Zauderer* decision does, however, permit disclosure requirements.¹⁵³ States are presumably free to reformulate their rules on advertising in terms of what additional information must be included to dissipate the possibility of confusion or deception. Such rules could conceivably be quite detailed as to what they might require. *Zauderer* does place a limit on such disclosures. The limit, however, is stated in terms no more certain than the rule allowing regulation only if "reasonably" necessary to advance "substantial" state interests. Disclosure requirements that are "unjustified or unduly burdensome . . . might offend the First Amendment by chilling protected commercial speech."¹⁵⁴ This is a new degree of solicitousness for the concerns of commercial advertisers. In a world rife with advertising, the Supreme Court of the United States is concerned that the ethical rules of officers of the court who are sworn to uphold the Constitution, and who formulated such rules only to govern themselves, may unduly "chill" commercial speech. This is symptomatic of the cavalier attitude the Court has towards the problems faced by state bar associations in the enforcement of their rules.¹⁵⁵ Despite the misgivings on the part of at least some members of the Court as to the general level of competence among attorneys,¹⁵⁶ and despite widespread suspicion on the part of the public as to the level of professionalism

153. See *supra* notes 109-13 and accompanying text.

154. 105 S. Ct. at 2282.

155. See, e.g., *Bates*: "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." 433 U.S. at 379. See also *supra* notes 105 & 108 and accompanying text.

On the other hand, the Court has recognized "the difficulties and complexities—and the inadequacy—of disciplinary enforcement." *Ohralik*, 436 U.S. at 466 n.28. See generally ABA SPECIAL COMMITTEE OF EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Preliminary Draft 1970).

Cf. *Humphrey*: "[The] courts . . . have not been supplied with sufficient resources to expand their regulatory responsibility in order to police even the ingenious activity of the minority of lawyers who have utilized print advertisements to promote dishonest scams." 377 N.W.2d at 649 (Reynoldson, J., concurring).

156. See, e.g., the views of Chief Justice Burger in Burger, *Conference on Supreme Court Advocacy*, 33 CATH. U.L. REV. 525 (1984) (calling for greater preparation by attorneys for arguments before the Supreme Court); Burger, *The Role of Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377 (1980) (noting client complaints regarding attorneys' competency); and Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980). See also Justice O'Connor's views in O'Connor, *Legal Education and Social Responsibility*, 53 FORDHAM L. REV. 659, 661 (1985) ("Too many lawyers are insensitive to their greater ethical and social responsibilities . . ."); and O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*, 36 VAND. L. REV. 1 (1983) (noting the increase in disciplinary actions against attorneys). See also Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015 (1984) (also calling for better preparation in oral arguments).

among lawyers,¹⁵⁷ *Zauderer* weakens the hand of state regulators. Statements by the Court that lawyers are not above trade more than justify advertising by lawyers. They suggest that lawyers are likewise not above using the tricks of trade, including deceptive advertising. To paraphrase the Court, it is at least somewhat incongruous¹⁵⁸ for the Court both to suggest that most lawyers will abide by their solemn oaths to uphold the integrity of their profession and yet remove from their hands the tools which they have long used to police themselves.

CONCLUSION

The Supreme Court has never extended the full protection of the first amendment to commercial speech. It has repeatedly announced that the states are free to regulate such speech in the advancement of substantial state interests. Although most states and the majority of members of the bar have in the past been opposed to unfettered advertising by lawyers, the Court's decision in *Zauderer* demonstrates that any imagined interests in maintaining the professionalism of lawyers or in enforcing rules of ethics fail to qualify as substantial state interests. The states continue to attempt to identify such interests, only to find that the Court recognizes fewer and fewer such interests as justifying regulation of commercial speech.

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157. See *supra* note 49. "The horde of lawyers that descended on the disaster at Bhopal, India, brought the American judicial system into worldwide disrepute." *Humphrey*, 377 N.W.2d at 649.

158. Cf. *supra* note 155 (quoting from the opinion in *Bates*).

