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Constitutional Law Survey: Commercial Speech

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CONSTITUTIONAL LAW SURVEY: COMMERCIAL SPEECH

INTRODUCTION

The Tenth Circuit, for the second consecutive survey period,[1] handed down an important constitutional law decision regarding commercial speech. In *Lanphere & Urbaniak v. Colorado*,[2] three issues—commercial speech, the extent of private rights of access to public records, and attorney advertising—amassed to create an intriguing but questionable decision. *Lanphere & Urbaniak* addressed whether a state legislature could bar access to public records when those procuring the records were utilizing them solely for economic gain. Attorneys Lanphere and Urbaniak contested the statute as an impermissible restraint on their free speech rights, basing their challenge on the limited protection afforded commercial speech.

In addressing the issues posed by *Lanphere & Urbaniak*, this Survey discusses the evolution of the commercial speech doctrine, including recent Supreme Court pronouncements on the topic. The Survey also examines the existence and extent of private rights of access to public records and the hotly debated decisions regarding the permissibility and propriety of attorney advertising. The Survey criticizes the circuit's decision as inconsistent with recent Supreme Court decisions and concludes that the Colorado statute is an impermissible restraint on free speech.

I. *LANPHERE & URBANIAK V. STATE OF COLORADO*: COMMERCIAL SPEECH, PUBLIC RECORDS, AND DIRECT-MAIL SOLICITATION

A. *Evolution and Protection of Commercial Speech Under the First Amendment*

In 1942, the U.S. Supreme Court held in a brief three page decision that the Constitution imposes no restraints on government regulation of "purely commercial advertising."[3] Although this initial foray into the commercial

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1. During the 1993 survey period the Tenth Circuit decided Adolph Coors Co. v. Bentsen, 2 F.3d 355 (10th Cir. 1993), *aff'd*, 115 S. Ct. 1585 (1995). For a discussion of *Coors*, see J. Bartlett Johnson, *Constitutional Law Survey*, 71 DENV. U. L. REV. 887, 887-93 (1994).

2. 21 F.3d 1508 (1994).

3. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). For an interesting discourse regarding *Valentine* and the commercial speech doctrine in general, see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993). The authors discuss the pre-*Valentine* lack of distinction between commercial and noncommercial speech, and conclude that *Valentine* explicitly created, without explanation or reliance on prior precedent, the commercial speech doctrine. *Id.* at 754-57.

Note that the commercial advertising at issue in *Valentine* is equivalent to commercial speech. Although there are many proposed definitions of commercial speech, the Court itself has traditionally relied on one of two formulations. The first and narrower of the two states that commercial speech is speech that proposes a commercial transaction. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). A broader definition,

speech spectrum was clear and unambiguous, the last fifty-two years of commercial speech jurisprudence have lacked both simplicity and clarity. While the Court has since concluded that commercial speech deserves some protection,[4] there has been much disagreement over the scope and degree of shelter such speech should be accorded under the First Amendment.

The definitive break with *Valentine*'s absolutist approach came in 1976, when the Court expressly abandoned *Valentine* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[5] In striking down a Virginia statute that restricted licensed pharmacists from advertising prescription drug prices, the Court noted that "speech does not lose its First Amendment protection because money is spent to project it."[6] This protection, however, is not absolute. False or misleading commercial speech may be regulated,[7] and time, place and manner restrictions imposed.[8]

The Court further defined the *Virginia Citizens* formulation in 1980 when it handed down the seminal decision in the commercial speech arena: *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[9] The effects of *Central Hudson* were two-fold. First, the Court returned to government some of the regulatory power over commercial speech that presumably was lost after *Virginia Citizens*. Second, the Court adopted a four-part test to be applied when deciding commercial speech issues. Under this analysis, it is first necessary to determine whether the First Amendment protects the speech in question.[10] This first prong of the *Central Hudson* test is met if the expression

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found in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980), claims that commercial speech is "expression related solely to the economic interests of the speaker and its audience." In a recent decision, however, the Court redefined commercial speech in accordance with *Virginia State Board of Pharmacy*. This definition focuses on the distinguishing characteristics of commercial speech, such as whether money is spent to project it, whether the speech is carried in a publication sold for profit, whether the speech solicits money, and whether the speech is on a commercial subject. Peter J. Tarsney, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533, 551-52 (1994) (citing Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1512 (1993)).

4. *See, e.g.*, Bates v. State Bar, 433 U.S. 350 (1977).

5. 425 U.S. 748 (1976). Rumblings of the Court's changing stance on the issue, however, could be heard three years earlier in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). In *Lehman*, the majority concluded that a municipality's refusal to allow political advertising on city-owned rapid transit vehicles did not constitute a violation of the First Amendment. *Id.* at 304. The majority based its conclusion on a finding that legitimate state interests were at stake. *Id.* at 303-05. The dissenters (*Lehman* was a 5-4 decision) argued, however, that the city was banning message content, since only political advertising was restricted. *Id.* at 310.

6. *Virginia Citizens*, 425 U.S. at 761. Rather, the Court stated that restriction of entire categories of speech solely on the basis of inclusion in that category is forbidden. *Id.*

7. *Id.* at 771-72 ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

8. *Id.* at 771. These restrictions must "serve a significant governmental interest [and] . . . leave open ample alternative channels for communication of the information." *Id.* In short, commercial speech is entitled to protection only from "unwarranted governmental regulation." *Id.* at 761-62.

9. 447 U.S. 557 (1980).

10. *Id.* at 564-66. *Virginia Citizens* implied that commercial speech could only be restricted if the speech sought to be regulated is false or misleading. *Central Hudson*, however, permits states to regulate even truthful advertising. In order to do so, the state carries the burden of demonstrating that its regulation will further a substantial state interest. *Central Hudson*, 447 U.S. at

concerns lawful activity and is not misleading.[11] Next, the deciding court must determine whether the asserted governmental interest is substantial.[12] If these initial tests are met,[13] the court must then decide, third, whether the "regulation directly advances" the asserted governmental interest and, fourth, whether it "is not more extensive than is necessary to serve that interest."[14]

The Court has attempted, with mixed results, to recharacterize the final two prongs of the analysis. Under *Central Hudson*, the third prong inquiry is satisfied if the governmental body demonstrates that the restriction directly furthers the asserted state interest.[15] Hence, a regulation that "provides only ineffective or remote support for the government's purpose" does not directly advance the asserted interest and will not be upheld under the original framework.[16] However, in *Posadas de Puerto Rico Associates v. Tourism Co.*, the Court held that the legislature's "reasonable" belief that the restrictions advanced the asserted state interest satisfied the third prong.[17]

This decidedly deferential and "reasonableness" approach continued as the predominant interpretation of *Central Hudson*'s third prong until 1993, when the Supreme Court decided *Edenfield v. Fane*.[18] There, the Court struck down a Florida law prohibiting certified public accountants from engaging in direct, personal solicitation of clients.[19] In doing so, the Court emphasized that under *Central Hudson*'s third prong "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[20]

564.

11. *Id.*

12. *Id.*

13. A court will only proceed to the third and fourth prongs of the *Central Hudson* analysis if the speech survives scrutiny under these initial inquiries. *Id.*

14. *Id. Central Hudson* describes the final two prongs of the analysis as criteria for determining whether the state interest asserted in prong two is substantial and if the regulatory technique adopted is proportionate to that interest. *Id.* at 564.

15. *Id.* ("[T]he Court has declined to uphold regulations that only indirectly advance the state interest involved."). Under prong three, the court will "focus on the relationship between the State's interests and the advertising ban." *Id.* at 569.

16. *Id.*

17. 478 U.S. 328, 341-42 (1986). The *Posadas* reasonableness test thus appears to favor less scrutiny of governmental action and further judicial deference to government regulation. In fact, many commentators interpret *Posadas* as representing little more than rational basis review. *See, e.g.*, Albert P. Mauro, Jr., *Commercial Speech After* Posadas *and* Fox: *A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992). However, the Court itself has never formally adopted such a standard. Note also that *Posadas* characterizes steps three and four in the *Central Hudson* analysis as "involv[ing] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, 478 U.S. at 341.

Many commentators have suggested that the deferential approach adopted in *Posadas* is applicable only when a "vice" activity is being regulated. *See, e.g.*, Tarsney, *supra* note 3, at 546-47. Commonly regulated vice activities include gambling, alcoholic beverages, tobacco and prostitution. *Id.* at 547. In a recent decision, however, the Supreme Court refused to consider whether vice activities were subject to a lower level of scrutiny. United States v. Edge Broadcasting, 113 S. Ct. 2696, 2703 (1993).

18. 113 S. Ct. 1792 (1993).

19. *Id.* at 1796.

20. *Id.* at 1800. The two asserted state interests in *Edenfield* were protection of consumers from fraud (as well as protection of privacy) and furtherance of the accountant's independence, a necessary component of the attestation function. *Id.* at 1799. While the Court found these interests

This expansion demonstrates a significant departure from the "reasonableness" approach adopted in *Posadas*, and may indicate a return to the initial *Central Hudson* framework.[21] As it stands, however, *Central Hudson*'s third prong remains in flux, awaiting further clarification by the Court.

Central Hudson's fourth prong has also been the subject of much debate. Whereas the framework as set forth in *Central Hudson*, if read literally, imposes a least-restrictive-means test,[22] courts have not read the *Central Hudson* language to create such a requirement. The Supreme Court adopted this deviation in 1989 when it decided *Board of Trustees v. Fox*,[23] which served as the determinative break with the least-restrictive-means interpretation. *Fox* merely requires the means to be "narrowly-tailored to achieve the desired objective."[24] Under this requirement, the legislature's regulatory technique must merely be reasonable.[25] In contrast, a least-restrictive-means test would require the government to demonstrate that no other regulatory technique could further its asserted interest to the same degree. Hence, *Fox*'s narrowly tailored, or "reasonable fit," requirement undoubtedly gives governmental decisionmakers greater deference to determine which regulatory method best suits the asserted interest.[26]

In 1993, the Court confirmed its adherence to the narrowly tailored standard with its decisions in *United States v. Edge Broadcasting*[27] and *City of*

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substantial, it concluded that the regulatory technique adopted by the Florida Board of Accountancy did not advance "these interests in a direct and material way." *Id.* at 1798.

21. In addition to recharacterizing the third prong yet again, the Court in *Edenfield* alleviated any notions that the *Central Hudson* framework represents rational basis review. It thus stated that the Court will only examine those interests put forward by the state; under *Central Hudson*, the Court will not speculate as to other possible state interests, as would be allowed under rational basis review. *Id.* at 1798. Moreover, the Court will scrutinize the asserted state interest to ensure it is the actual interest "served by the restriction." *Id.* at 1798-99 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)). The Court also placed some emphasis on the Board's failure to demonstrate, through studies or other "anecdotal evidence," that the restrictions advanced the asserted state interests. *Id.* at 1800. Hence, a "reasonable belief," such as that in *Posadas*, on the part of the legislature may now be insufficient to satisfy step three of the analysis.

22. *See Central Hudson*, 447 U.S. at 564 ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.").

23. 492 U.S. 469, 477 (1989) ("[W]e now . . . conclude that the reason of the matter requires something short of a least-restrictive-means standard.").

24. *Id.* While the Court alleged that its decisions could not be reconciled with a least-restrictive-means standard, *id.* at 479, the cases are clearly to the contrary. For example, in *Central Hudson* the Court not only stated a least-restrictive-means test, but also applied one. *See Central Hudson*, 447 U.S. at 569-71. The Court even went so far as to suggest alternative, but less restrictive, means that the Commission could have employed. *Id.* The Court continued its application of the least-restrictive-means standard in *Posadas*, where it stated that "the restrictions on commercial speech [were] no more extensive than necessary to serve the government's interest." *Posadas*, 478 U.S. at 343. In furtherance of this point, the Court noted that the Puerto Rico Superior Court had narrowed the statute considerably to ensure compliance with this requirement. *Id.* Thus, as the dissent in *Fox* points out, the majority reaches its holding "only by recasting a good bit of contrary language in our past cases." *Fox*, 492 U.S. at 486 (Blackmun, J., dissenting).

25. *Fox*, 492 U.S. at 480 (citing In re R.M.J., 455 U.S. 191, 203 (1982)). Hence, after *Fox* "a regulation . . . can . . . be more extensive than is necessary to serve the government's interest as long as it is not unreasonably so." City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1519 (1993) (Blackmun, J., concurring).

26. *See Fox*, 492 U.S. at 480-81.

27. 113 S. Ct. 2696, 2705 (1993) ("We made clear in [*Fox*] that our commercial speech

Cincinnati v. Discovery Network.[28] In doing so, however, the Court in *Discovery Network* maintained that the standard was greater than rational basis review.[29] As such, courts will not require the regulation to be the least severe method available, but will examine whether there are "numerous and obvious less-burdensome alternatives."[30] The existence or nonexistence of such alternatives serves as a factor in determining whether the fit is reasonable.[31]

In *Edge Broadcasting*, the Court further held that challenges to a statute as applied to the plaintiff, in an individual capacity, should be resolved under *Central Hudson*'s fourth prong.[32] Previously, and in the court of appeal's decision in *Edge Broadcasting*, challenges of this nature were based on the third prong of the analysis.[33] As a result, only when a statute's general application is contested will the more stringent third step be the focal point of the analysis.[34] Note that at least one commentator has concluded, however, that special circumstances may limit *Edge Broadcasting* to its facts.[35] Even so, the Court's intention, as demonstrated in *Fox*, *Edge Broadcasting*, and *Discovery Network*, to discard the least-restrictive-means standard in favor of the narrowly tailored approach cannot be questioned.

B. *Regulation of Direct-Mail Solicitation by Attorneys*

Armed with new-found commercial speech protection courtesy of *Virginia Citizens*, in 1977, two Arizona lawyers placed an ad in a local newspaper publicizing their fees for various routine legal services. This advertisement contradicted every bar regulation in the country, as well as two hundred years of traditional attorney restraint. Nonetheless, the Supreme Court held in *Bates*

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cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable."). The Court in *Edge Broadcasting* characterized the fourth-prong inquiry as a determination of "whether the regulation is more extensive than is necessary to serve the government[al] interest." *Id.* at 2704-05. Noticeably absent is the familiar "no" that traditionally preceded "more extensive." *See, e.g.*, *Central Hudson*, 447 U.S. at 566; *Posadas*, 478 U.S. at 343. Thus, *Edge Broadcasting* represents the Court's final recharacterization of *Central Hudson*'s fourth prong.

28. 113 S. Ct. 1505, 1510 n.13 (1993).

29. *Id.*

30. *Id.*

31. *Id.* The Court in *Discovery Network* also noted that the governmental body must assert an interest that seeks to protect a commercial harm. *Id.* at 1515. Moreover, unless there exists some demonstrable difference between the prohibited commercial speech and noncommercial speech, courts will refuse to accept the "low value" of commercial speech as a justification for a categorical ban. *Id.* at 1516. The Court also warned against "plac[ing] too much importance on the distinction between commercial and noncommercial speech." *Id.* at 1514. Rather, the distinction must bear some relationship to the interests asserted. *Id.*

32. *Edge Broadcasting*, 113 S. Ct. at 2703-05.

33. *See, e.g.*, *id.* at 2704.

34. *Id.* The statute must still directly advance the state interest as required by prong three of the analysis. Also, all four prongs of the *Central Hudson* framework still must be satisfied.

35. Tarsney, *supra* note 3, at 561. Tarsney states two facts that may limit *Edge Broadcasting*'s precedential value. First, a vice activity was being regulated. *Id.* Hence, the Court may have afforded the statute greater deference, as vice activities are afforded special treatment. *See supra* note 18 and accompanying text. Second, the Court may have been more willing to manipulate the *Central Hudson* framework because Congress had few or no other methods to regulate state run lottery systems. Tarsney, *supra* note 3, at 561-62.

v. State Bar of Arizona[36] that states could not impose blanket bans on attorney advertising. Nearly twenty years after this historic decision; however, the propriety of attorney advertising continues to be intensely debated. Although *Bates* purported to bestow upon attorneys the right to engage in so-called "traditional" advertising in newspapers, periodicals and the like, the opinion expressed specific reservations about the permissibility of in-person solicitation.[37]

Just one year later, these reservations were addressed in *Ohralik v. Ohio State Bar Ass'n.*[38] Citing the overriding state interests in "protecting consumers, regulating commercial transactions, and maintaining standards among members of the licensed professions," the Court upheld a regulation restricting in-person solicitation.[39] In contrast to public advertising, in-person solicitation exerts pressure upon and demands an immediate response from a specific individual.[40] Hence, bar association restrictions prohibiting such action serve the "legitimate and important state interest" of protecting the public from the unwanted effects of solicitation.[41]

In 1985, the Court in *Zauderer v. Office of Disciplinary Counsel*[42] again expanded the sphere of protection accorded attorney advertising. The Court held that a state may not impose a blanket ban on written, public advertisements directed toward specific potential clients facing particular legal dilemmas.[43] *Zauderer*, in conjunction with *Bates* and *Ohralik*, thus set the stage for the debate over direct-mail solicitation, a novel and recent phenomenon having characteristics of both public and in-person advertising.[44]

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36. 433 U.S. 350 (1977). *Bates* held that states could not place blanket bans on reasonable legal advertising which was not false or misleading. The Court based its decision on the limited protection afforded commercial speech in *Virginia Citizens*. The Arizona State Bar, which imposed the ban, contended lawyer advertising either would or potentially could adversely effect professionals, mislead the public, impede the administration of justice, produce undesirable economic effects, and reduce the quality of legal services. *Id.* at 364, 368-79. The Court, however, determined that the consumer's interest in the free flow of commercial information outweighed all of the Bar's proffered interests. *Id.* at 364.

37. *Id.* at 356.

38. 436 U.S. 447 (1978).

39. *Id.* at 460, 468.

40. *Id.* at 457. This pressure could result in confronted individuals making hasty and uninformed decisions regarding an important and personal matter. *Id.* Moreover, there is no opportunity to police the propriety of the communication between the attorney and the potential client. *Id.*

41. *Id.* at 462. These potential effects include "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." *Id.* at 461. Despite the Court's conclusion in *Ohralik*, attorneys occasionally still attempt to solicit clients directly. For an example, see In re Anis, 599 A.2d 1265 (N.J. 1992).

42. 471 U.S. 626 (1985). The attorney in *Zauderer* placed a newspaper advertisement seeking potential plaintiffs in suit against Dalkon Shield, the manufacturer of a birth control device previously proven to be dangerously defective. *Id.* at 629-31.

43. *Id.* at 644-47.

44. Like in-person solicitation, direct-mail solicitation is personal (a direct contact addressed and written to a specific individual), presumably for a specific purpose (representation of the solicited client in a specific legal matter). However, a written contact is less personal and intrusive than an in-person confrontation, and does not subject the solicited client to the pressures of making an immediate or hasty decision. The solicited client also has the opportunity to explore and compare other representation opportunities.

The Supreme Court ended all speculation regarding the permissibility of direct-mail solicitation in 1988 when it handed down the still controversial decision of *Shapero v. Kentucky Bar Ass'n.*[45] Relying on the crucial distinction between in-person and written advertisements, the Court held that states could not categorically ban attorneys from soliciting clients through the mail.[46] The Court noted that written communications may be reflected upon or even discarded, and involve significantly less privacy invasion than an in-person confrontation.[47] Moreover, states have several available options in policing such advertising. For example, states could require lawyers to file copies of the proposed communication with a state agency so as to allow for review and supervision, and, if appropriate, punishment.[48] The communication could bear advertisement identification clauses and provide details of the process by which concerned recipients could report suspected inaccuracies or abuses.[49] Also, state agencies could require the attorney to authenticate the accuracy of the information prior to mailing.[50]

In short, the Court in *Shapero* held that the First Amendment prohibits states from imposing plenary bans on direct-mail solicitation by attorneys.[51] Although opportunities for attorney abuse may increase without such a ban, these "isolated abuses or mistakes [do] not justify a total ban" on protected commercial speech—especially when viewed in light of the many possible restrictive arrows states hold in their commercial speech quivers.[52]

C. *Public Records and Criminal Proceedings*

Although the common law historically provided a minimal, if not absolute, right of access to some government records, statutory schemes across the country have supplanted this common law framework.[53] Moreover, the Supreme Court has held that the First Amendment bestows upon the general

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45. 486 U.S. 466 (1988).

46. *Id.* at 471, 473-74. In 1985, Shapero contacted the Kentucky Attorneys Advertising Commission, seeking their approval of a form letter he intended to send to potential clients. *Id.* at 469. The letter invited and encouraged those persons facing foreclosure on their homes to contact his office regarding legal representation. *Id.* Despite the Commission's conclusion that the letter was not false or misleading, it was denied approval because of a Kentucky Supreme Court rule prohibiting written advertisements to those facing specific legal problems. *Id.* The rule permitted attorneys to mail written solicitations to the general public. *Id.* at 469-70. The Commission did, however, express its opinion that the Kentucky rule violated the First Amendment, and suggested the rules be amended. *Id.* at 470. Shapero then took his claim to the Kentucky Bar Association's Ethics Committee, which upheld the rule. *Id.* The Kentucky Supreme Court struck down the rule but oddly replaced it with an American Bar Association rule that also prohibited targeted direct-mail solicitation. *Id.* at 470-71.

47. *Id.* at 475-76.

48. *Id.* at 476.

49. *Id.* at 477-78.

50. *Id.* at 477.

51. *Id.* at 471.

52. *Id.* at 476.

53. *See, e.g., Lanphere & Urbaniak*, 21 F.3d at 1511. The underlying, and most important, issue for commercial speech purposes, is whether the Constitution can be read to confer such a right upon the general public. All appearances indicate, as does the current Court, that no such right exists.

public no constitutional right of access to government records.[54]

It may be possible, however, to circumvent this holding when the records at issue involve criminal proceedings. For example, the Sixth Amendment right to a fair and public trial may sometimes implicate First Amendment protection of a right of access.[55] All indications are, however, that this right only attaches where the public records sought actually relate to and involve an initiated, ongoing, or completed criminal proceeding.[56] Moreover, this right is triggered only when a tradition of accessibility to the desired records or proceedings is demonstrated and when public access to the records plays a valuable role in "the actual functioning of the process."[57] "Experience and logic" will therefore dictate whether a constitutional right of access attaches.[58]

D. *Curtailment of Commercial Speech:* Lanphere & Urbaniak v. Colorado[59]

1. Majority Opinion

The controversy in *Lanphere & Urbaniak* arose out of a Colorado statute prohibiting access to public criminal-justice records where the information contained in the records is to be used to "solicit business for pecuniary gain."[60] The three plaintiffs were Lanphere and Urbaniak, partners in a Colorado Springs law firm, and Frank Mutchler, director of a substance abuse center, also located in Colorado Springs.[61] Prior to enactment of the challenged statute, plaintiffs obtained the names and addresses of individuals involved in alcohol-related traffic incidents.[62] Mutchler used the information to solicit clients for his treatment center, and Lanphere and Urbaniak solicited those individuals facing prosecution for DUIs and various misdemeanor traffic violations.[63] Both solicitations came in the form of targeted, direct-mail advertisements.[64]

Once denied access to the records, plaintiffs sought declaratory and in-

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54. *See* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) ("this Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control").

55. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). Note that even this right, should it inhere, is not absolute. *Id.* at 9.

56. *See id.* at 6-10. For example, the public records sought in *Press-Enterprise* involved attempts by the media to obtain transcripts of a preliminary hearing in a criminal prosecution. *Id.* at 4-5.

57. *Id.* at 8-10, 12.

58. *Id.* at 9.

59. 21 F.3d 1508 (10th Cir. 1994).

60. *Id.* at 1510. The Colorado statute in relevant part provides:

> Records of official actions and criminal justice records and the names, addresses, telephone numbers, and other information in such records shall not be used by any person for the purpose of soliciting business for pecuniary gain. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain.

COLO. REV. STAT. § 24-72-305.5 (1994).

61. *Lanphere & Urbaniak*, 21 F.3d at 1510.

62. *Id.*

63. *Id.*

64. *Id.*

junctive relief under 42 U.S.C. § 1983, alleging a violation of their First and Fourteenth Amendment free speech rights.[65] The state of Colorado contended that the issue was merely one of public records access, not free speech.[66] Apparently in agreement, the District Court granted summary judgment for Colorado and plaintiffs appealed to the Tenth Circuit.[67]

The Tenth Circuit initially focused on the scope and degree of the traditional common-law right of access to government records.[68] Although the common law historically recognized such a right, Colorado statutes effectively preempted the field and were thus controlling.[69] Accordingly, any right of access to the records not granted by statute required a constitutional source. The court concluded, based on a strong line of Supreme Court precedent, that the First Amendment bestowed no such right.[70]

Although Colorado argued that determination of the access question was dispositive, the court disagreed, noting that the First Amendment was implicated by the Colorado legislature's "content-based restriction on protected speech."[71] Because the legislation disfavored commercial speech, the court applied the four-part test formulated in *Central Hudson*.[72] First, the court found that the First Amendment protected the speech in question because the proposed advertising was neither false nor misleading, and the statute denied all commercial access to the records.[73] Second, the court concluded that Colorado had a substantial governmental interest in preventing privacy invasions.[74] Further, the court held that Colorado's interest in protecting privacy was directly furthered by denying access to the names and addresses of those charged with alcohol related traffic violations and preventing solicitors from

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65. *Id.*
66. *Id.* at 1511.
67. *Id.*
68. *Id.*
69. *Id*; *see* COLO. REV. STAT. §§ 24-72-301 to 24-72-308 (1988 & Supp. 1994).
70. *Lanphere & Urbaniak*, 21 F.3d at 1512. The plaintiffs, however, argued that a separate line of cases granted the necessary First Amendment right. Plaintiffs maintained that the Sixth Amendment right to a fair and public trial implicated a First Amendment right of access to the records in question. *Id.* The Court, however, disagreed, stating no tradition for this type of access existed, and that such access would not positively further any particular process. *Id.* The dissent relied heavily upon this reasoning. *See infra* notes 83-94 and accompanying text.
71. *Lanphere & Urbaniak*, 21 F.3d at 1512-13. The regulation was content based because the Colorado legislature permitted and denied access to the records based on whether the records were to be used for commercial purposes, i.e., soliciting pecuniary gain. While the records themselves were not "speech," access to the records was determined "based on the speech use" of the records (if the speech was commercial then access was denied, and vice versa).
72. *See supra* notes 9-35 and accompanying text.
73. *Lanphere & Urbaniak*, 21 F.3d at 1514. The Colorado legislature made no attempt to deny commercial access only to those solicitations found to be misleading, but rather imposed a plenary commercial access ban. *Id.* Nor did Colorado claim that any of the plaintiff's particular advertisements were misleading. *Id.*
74. *Id.* The court noted that discovery of a person's legal affairs constitutes a greater privacy invasion when the information is used to elicit pecuniary gain than when the same information is used for a non-economic purpose. *Id.* Plaintiffs, however, alleged Colorado's stated purpose was illusory, because the information could be obtained through other sources, including the local newspapers. *Id.* The court found, however, that the state had a legitimate, substantial interest in "not aiding in the dissemination of the information for commercial speech purposes," as well as reducing the potential for solicitor abuse and "maintaining public confidence in our system of justice." *Id.*

overreaching towards vulnerable solicitation recipients.[75]

Central Hudson's fourth prong, which requires the regulation to be no more extensive than necessary to further the state's interest, caused the most debate. The court interpreted this prong to require no more than a reasonable fit between the regulation and the state's asserted interest.[76] Both Colorado and the court's primary task was overcoming and distinguishing *Shapero*.[77] The court offered several reasons why *Shapero* was not controlling. First, the statute was designed to protect privacy, not to prevent solicitation.[78] Moreover, Colorado did not ban direct mail solicitation by attorneys; it merely established an indirect barrier by not making certain records available for that purpose.[79] Finally, the court considered it relevant that Colorado possessed the greater power to deny all access to criminal justice records.[80] With the case distinguished from *Shapero*, the court held that the Colorado statute constituted a reasonable fit in furtherance of the state's asserted interest, and affirmed the district court's grant of summary judgment for Colorado.[81]

2. Dissent

Judge Aldisert dissented, claiming that the First Amendment right of access to criminal proceedings rendered the Colorado statute unconstitutional.[82] In particular, Judge Aldisert believed that the *Press-Enterprise* three-part inquiry controlled and determined the issue.[83] Applying *Press-Enterprise*, Judge Aldisert concluded that the Colorado statute denied access to records that were clearly a part of criminal proceedings.[84] Moreover, a historical right of access to such records existed—a right which added significantly to the judicial process in question.[85] Accordingly, Judge Aldisert insisted that Colorado have a compelling state interest to justify denial of the records.[86]

Judge Aldisert found none of Colorado's asserted interests sufficiently compelling.[87] These interests included protecting privacy, restricting use of the records to their intended purpose, and preventing state assistance in un-

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75. *Id.* at 1515.

76. *Id.* (citing Board of Trustees v. Fox, 492 U.S. 469, 476-81 (1989)). In determining whether such a fit existed, the court balanced the state's interests against the effect of the statute on commercial speech. *Id.*

77. *See supra* notes 46-53 and accompanying text.

78. *Lanphere & Urbaniak*, 21 F.3d at 1515.

79. *Id.* Rather, Colorado erected an indirect "barrier to commercial speech." *Id.*

80. *Id.* at 1516.

81. *Id.*

82. *Id.* (Aldisert, J., dissenting) (Judge Aldisert, a Senior Circuit Judge of the U.S. Court of Appeals for the Third Circuit, was sitting by designation).

83. *Id*; *see* Press Enterprise v. Superior Court, 478 U.S. 1, 8-9 (1986).

84. *Lanphere & Urbaniak*, 21 F.3d at 1517.

85. *Id.* at 1517-18. Solicitation adds value to the judicial process by informing individuals of their legal rights in judicial proceedings. *Id.* at 1518. Such information is particularly important where, as here, potential liberty and property interests may be at stake. *Id.* Finally, allowing substance abuse centers access to the records for solicitation purposes served the judicial process by "attempting to limit the number of repeat offenders." *Id.*

86. *Id.*

87. *Id.*

wanted solicitation by those seeking economic gain.[88] The state's arguments furthering these interests overlooked that a right of access to such records has always played a role in preserving the credibility of the criminal justice system.[89] Moreover, Supreme Court precedent establishes that restriction of speech connected to allegedly offensive conduct is an insufficient basis upon which to deny access to public records.[90] In addition, the dissent believed that the statute was underinclusive, and failed to effectively accomplish its stated objective of protecting privacy.[91] Judge Aldisert concluded by noting that the activity in question, access to criminal proceeding records, enjoyed constitutional protection without regard to the lawful use of that information.[92] As such, the state lacked the power to deny access to the records based solely on an intent to utilize them to procure pecuniary gain.[93]

3. Analysis

The court's opinion in *Lanphere & Urbaniak* is an unfortunate defeat for commercial speech protection—a defeat based on an unconvincing attempt to distinguish precedent, as well as the acceptance of an asserted state interest that was likely illusory. Moreover, recent Supreme Court decisions should have altered the court's analysis. As a result, the Tenth Circuit appears to be retreating from the strong commercial speech protection it provided last year in *Adolph Coors Co. v. Bentsen.*[94]

The Colorado statute at issue fails to satisfy the commercial speech framework as delineated in *Central Hudson* and its progeny. As the Supreme Court has made clear, speech that is not false or misleading may be regulated only when a substantial interest is asserted and directly advanced by the regulatory technique employed, and when a reasonable fit exists between the asserted interest and the regulation.[95]

Colorado enacted the legislation[96] in question to inhibit privacy invasions.[97] Undoubtedly, protecting privacy constitutes a substantial state interest.[98] However, courts should be loathe to accept a governmental body's asserted interest without further inquiry. Indeed, the Supreme Court has mandated that courts not "turn away if it appears that the stated interests are not the actual interests served by the restriction."[99] Moreover, the Court has, in practice, examined the circumstances to determine what purpose the challenged

88. *Id.*
89. *Id.* at 1519.
90. *Id.*
91. *Id.* at 1518-19.
92. *Id.* at 1519.
93. *Id.* at 1519-20.
94. *See supra* note 1.
95. *See supra* notes 9-35 and accompanying text.
96. *See supra* note 75 and accompanying text.
97. *Lanphere & Urbaniak*, 21 F.3d at 1514. Specifically, the interest was protecting "the privacy of those charged with misdemeanor traffic offenses and DUI." *Id.*
98. The Supreme Court has held that protection of potential clients' privacy constitutes a substantial interest. *Edenfield*, 113 S. Ct. at 1799.
99. *Id.* at 1798 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)).

statute actually serves in a given case.[100]

Ignoring the Supreme Court's directive, and despite evidence to the contrary, the court in *Lanphere & Urbaniak* accepted Colorado's asserted privacy interest. Evidence offered by the plaintiffs indicated that the legislation actually was passed to prevent the information provided in the records to be used for direct-mail solicitation purposes. While little legislative history is available, remarks by one state senator denote no indication of privacy concerns.[101] Confronted by this reality, the court noted the presence of additional state interests. These interests were "lessening the danger of solicitor abuse and maintaining public confidence in our system of justice."[102] To support this assertion, the court cited several solicitation cases, including *Shapero*.[103] However, none of the cases cited suggests that a state has the power to prohibit direct-mail solicitation when the proposed communication is not false or misleading and no substantial state interest exists.[104] Yet Colorado never contended that plaintiffs solicitations were in any manner deceptive or untruthful, and "merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech."[105] In light of this pronouncement, "lessening the danger for solicitor abuse" should not constitute a substantial state interest unless the state can bring forward empirical evidence establishing that such abuses exist. Similarly, the court never explained how denying access to these records to persons seeking to utilize them for pecuniary gain maintains public confidence in the justice system.

The Colorado statute also fails to survive a proper application of step three of the analysis. Even assuming arguendo, that Colorado's legitimate state interest *was* protecting privacy, permitting and denying access to the records based on further use for commercial purposes does not materially alleviate any purported harm as required by *Edenfield*. In *Lanphere & Urbaniak*, the court interpreted step three as merely requiring the statute to "advance the State's interests in a reasonably direct way."[106] As stated above, however, *Edenfield* altered this prong of the *Central Hudson* framework by requiring the state to demonstrate that "the harms it recites are real and that its restriction will in

100. *See, e.g.*, Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1510 (1993).

101. When introducing the amendment, Senator Wells made these remarks: "We were not [providing access to records] to . . . provide a client base . . . for people to go out and solicit new business and . . . so what this does is it . . . says that those records are still open but are not to be used in direct solicitation for pecuniary gain. . . . " *Lanphere & Urbaniak*, 21 F.3d at 1514. The court concluded that this statement merely summarized what the amendment does, but that it was "not a definitive statement on the state's interest . . . and is not inconsistent with the state's asserted interest in protecting privacy." *Id.* However, the statement itself is conclusive—the state acted to prevent those in similar positions as plaintiffs from obtaining and using the information to engage in direct-mail solicitation. While the remarks may not be inconsistent with the state's asserted privacy interest, no mention is even made of such an interest, as would be expected if, as Colorado claimed at trial, privacy was the *overriding* interest involved.

102. *Id.*

103. *Id.*

104. *See, e.g., Edenfield*, 113 S. Ct. at 1799.

105. *Shapero*, 486 U.S. at 476.

106. *Lanphere & Urbaniak*, 21 F.3d at 1515.

fact alleviate them to a material degree."[107] The statute, however, fails miserably to accomplish its stated objective. Nowhere in the court's opinion does it justify its conclusion that privacy invasions are greater and more offensive when the obtained information is gathered for an economic purpose.[108] Certainly, line-drawing based on the intended use of the information in no way alleviates the fact that such invasions will continue to occur. The only distinction is that those responsible for the privacy invasion will not be utilizing the information for pecuniary gain. The statute is thus far too underinclusive to accomplish effectively its stated purpose.[109] As such, privacy invasions are not a significant concern.[110] Considering the distinct possibility that there are no real harms in *Lanphere & Urbaniak*, and the Colorado statute's inability to alleviate to a material degree the occurrence of privacy invasions, the third step in the *Central Hudson* analysis, as delineated under *Edenfield*, is not satisfied.

The reasonable fit, or narrowly tailored, requirement of step four also presents difficulties. In determining whether such a fit existed, the court in *Lanphere & Urbaniak* turned to *Shapero*, and made what it deemed three important distinctions.[111] The first of these distinctions was "the added interest in protecting privacy."[112] While there was no assertion of a privacy invasion in *Shapero*, the court in *Lanphere & Urbaniak* never explained the significance of this distinction. In failing to do so it overlooked that the invasions are identical, regardless of the source from which the information is derived. The second and third putative distinctions, respectively, were Colorado's refusal to grant access to all groups seeking to utilize the records for pecuniary gain, and Colorado's ability to ban all access to the records, regardless of

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107. *Edenfield*, 113 S. Ct. at 1800. *See supra* notes 18-21 and accompanying text.

108. Rather, the court allows Colorado to engage in "mere speculation or conjecture" as to the effect of the statute on privacy invasions, a practice specifically forbidden by the Supreme Court. *Edenfield*, 113 S. Ct. at 1800.

109. If privacy interests truly constituted a substantial state interest, Colorado would have banned all access to the records. Under the current statute, however, a pro-bono attorney or non-profit substance abuse center legitimately could obtain the information and solicit in precisely the same manner as plaintiffs. Hence, the absence or presence of a pecuniary objective in no way effects any privacy invasion.

Also, while the Court in *Posadas* suggested underinclusiveness was no bar to satisfying the third prong, *Posadas*, 478 U.S. at 342-43, two distinctions separate *Lanphere & Urbaniak*. First, *Posadas* was a vice case, and hence arguably receives special treatment by the Court. Second, as support for its conclusion that "[a]ppellant's [underinclusive] argument is misplaced," the Court in *Posadas* noted that the history of legalized gambling in Puerto Rico supported its conclusion. *Id.* at 342-43. Here, however, Colorado historically had provided access to the records. *Lanphere & Urbaniak*, 21 F.3d at 1517 (Aldisert, J., dissenting).

110. The present situation is analogous to that in *Edenfield*. There the Court noted that if the solicited individual was "unreceptive to his initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern." *Edenfield*, 113 S. Ct. at 1803. Here, unresponsive individuals need only dispose of or ignore the solicitation.

111. *See supra* notes 78-82 and accompanying text. Note also that an argument can be made that the entire line of cases regarding attorney solicitation should be ignored. In each case involving attorney solicitation, a regulatory board or legislature had enacted an ordinance or law specifically addressing solicitation only. Here, however, the Colorado statute restricts all commercial speech, without regard to whether the soliciting individual is an attorney, by denying access to the records.

112. *Lanphere & Urbaniak*, 21 F.3d at 1515.

use.[113] Again, however, the court bases its conclusion on these distinguishing factors with no meaningful discussion of *why* these differences render the fit in *Lanphere & Urbaniak* reasonable.

In contrast, a strong argument can be made that the fit is unreasonable. The prohibited privacy invasions, those undertaken with a pecuniary goal, are no more harmful than the permitted privacy invasions, those undertaken without a pecuniary goal.[114] Hence, the distinction between commercial and noncommercial speech "bears no relationship whatsoever to the particular interests" asserted.[115] Therefore, Colorado may not restrict access to the records based on whether the information will serve a commercial purpose, even assuming its privacy interest is legitimate.[116]

As demonstrated, the Colorado statute fails to withstand scrutiny under the *Central Hudson* analysis. Specifically, the state's asserted interest is likely illusory and, even if legitimate, fails to alleviate privacy invasions to a material degree. Moreover, Colorado has failed to establish a reasonable fit between its statute and privacy invasions. Rather than demonstrating genuine concern for protecting privacy interests, the Colorado legislature appears to be making normative judgments regarding the relative worth of solicitation as a form of speech. Such a resolution directly contradicts the "general rule that the speaker and the audience, not the government, [should] assess the value of the information presented."[117] Properly scrutinized, the statute is an impermissible restriction on commercial speech.

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113. *Id.* at 1515-16. Furthermore, the court's assumption that Colorado's ability to prohibit any access to the records grants it the power to regulate use of the records is suspect. While the Supreme Court historically has accepted this "greater power includes the lesser power" argument in the commercial speech context, *see, e.g., Posadas*, 478 U.S. at 345-346, the Court in *Edge Broadcasting* refused to address this assertion. *Edge Broadcasting*, 113 S. Ct. at 2703 ("The Government argues . . . that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement. . . . The Court of Appeals did not address this issue and neither do we. . . . ").

114. This situation is analogous to *Discovery Network*, where the Court stated the city's proposition—that every decrease in commercial newsracks increased safety—was "an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks." *Discovery Network*, 113 S. Ct. at 1511.

115. *Id.* at 1514.

116. *See id.* The situation is again analogous to *Discovery Network*, where the Court stated:

> [n]ot only does Cincinnati's categorical ban . . . place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests."

Id.

Discovery Network also cited another relevant decision, Carey v. Brown, 447 U.S. 455 (1980). *Carey* struck down a statute concerning picketing because "nothing in the content-based labor/nonlabor distinction has any bearing whatsoever on privacy." *Discovery Network*, 113 S. Ct. at 1514 (citing *Carey*, 447 U.S. at 465). Similarly, nothing in Colorado's pecuniary/nonpecuniary purpose distinction has any bearing on privacy.

117. *Edenfield*, 113 S. Ct. at 1798.

CONCLUSION

Since 1976 and *Virginia Citizens*, courts have struggled with the proper scope and degree of First Amendment protection to afford commercial speech. As a result, the commercial speech doctrine developed into a puzzling array of contradictory decisions in which deference to legislative judgments was the only norm. However, in recent years, the Supreme Court has provided much guidance in the commercial speech arena and generally afforded commercial speech greater constitutional protection. As such, the Tenth Circuit's decision in *Lanphere & Urbaniak* is an unfortunate and poorly justified defeat for commercial speech.

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