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Professional Responsibility: The United States Supreme Court Gives Attorney Advertising Increased Protection

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PROFESSIONAL RESPONSIBILITY: THE UNITED STATES SUPREME COURT GIVES ATTORNEY ADVERTISING INCREASED PROTECTION—*Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985).

I. INTRODUCTION

On August 10, 1838, Abraham Lincoln placed the following advertisement in the *Sangomo Journal*: " 'STUART & LINCOLN, Attorneys and Counsellors at Law, will practice, conjointly in the Courts of this Judicial Circuit—Office No. 4 Hoffman's Row, upstairs. Springfield.' "[1] It is unlikely that Abraham Lincoln and his partner could have foreseen the controversy that attorney advertising would cause in later years. What appeared to be simply capitalism in action came to be looked upon by the states as highly unethical conduct. Eventually, the American Bar Association (ABA), echoing the views of most states at that time, prohibited attorney advertising in the First Canon of Ethics,[2] which was adopted by the ABA in 1908. This complete ban on attorney advertising remained unchanged for over sixty years. However, as the number of attorneys in the United States has grown dramatically in the past twenty-five years,[3] so has the competition for the client's dollar. This competition among attorneys has resulted in a "rebirth" of attorney advertising,[4] a rebirth much more extensive than Abraham Lincoln could have foreseen.

The ABA reacted to this increase in attorney advertising by reforming a code of ethics that was, unfortunately, both ineffective in

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1. L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (1980) (citation omitted in original).

2. The 1908 Canons of Ethics provided in part: "The most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust. . . . [S]olicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional." CODE OF PROFESSIONAL ETHICS Canon 27, *reprinted in* REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 582 (1908).

3. *See* Taylor, *Justice System Stifled by Its Costs And Its Complexity, Experts Warn*, N.Y. Times, June 1, 1983, at A1, col. 2, at A17, col. 1. ("The number of lawyers in the United States has more than doubled since 1960, to more than 612,000." The author also estimates there are more than 35,000 new law school graduates each year.).

4. An ABA survey indicates that only 13% of 521 attorneys polled in the United States advertised in 1983. *News Notes—Advertising*, [Current Reports] LAW. MAN. PROF. CONDUCT (ABA/BNA) No. 14, at 335 (July 25, 1984). However, in 1984, 414 lawyers and a number of legal clinics spent $28 million on television advertising alone. This amount was 58% higher than the amount spent in 1983, and much higher than the $18,344 spent in 1977 when Bates v. State Bar, 433 U.S. 350 (1977), was decided. Nat'l L.J., Mar. 25, 1985, at 3, col. 1. For a discussion of *Bates*, see *infra* notes 48–53 and accompanying text.

protecting the average citizen from unethical attorneys and unsuccessful in serving the best interests of society.[5] Furthermore, many attorneys have challenged these rules, arguing that the rules violate their first amendment right to free speech.[6] The first of these challenges to uphold an attorney's right to advertise was *Bates v. State Bar*.[7] Recently, a similar challenge was raised in the case of *Zauderer v. Office of Disciplinary Counsel*.[8] This note will examine the continuing controversy regarding attorney advertising, particularly the effect the *Zauderer* decision will have on the issues of indirect solicitation, television advertising, and direct mail solicitation.[9]

II. FACTS AND HOLDING

Late in 1981, Philip Zauderer, an attorney in Columbus, Ohio, sought to increase his practice by advertising in a local paper.[10] Accordingly, he placed a newspaper advertisement claiming that any of his clients would receive a refund of their legal fees if they were convicted of driving under the influence of alcohol.[11] The advertisement was noticed by an attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio (ODC)[12] who telephoned Zauderer and informed him that it appeared the advertisement violated Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.[13] Zauderer apologized for running the advertisement, promised to decline any employment offered as a result of the advertisement, and

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5. *See* L. ANDREWS, *supra* note 1, at 43.

6. *See, e.g., In re* R.M.J., 455 U.S. 191 (1982) (states may not apply prophylactic regulations to attorney advertising and direct mail solicitation); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state regulation of in-person solicitation by attorneys is constitutional); *In re* Primus, 436 U.S. 412 (1978) (state may not curtail mail solicitation of clients by attorneys); *Bates*, 433 U.S. 350 (1977) (state regulation of attorney advertising is unconstitutional except when the state is protecting against false, deceptive, or misleading advertising).

7. 433 U.S. 350 (1977).

8. 105 S. Ct. 2265 (1985).

9. This note deals with indirect solicitation, which is a form of solicitation where the attorney does not directly confront the consumer but instead has the advertising (solicitation) message transmitted through some type of media. *See* Whitman, *Direct Mail Advertising By Lawyers*, 45 U. PITT. L. REV. 381, 392 (1984).

10. Zauderer v. Office of Disciplinary Council, 105 S. Ct. 2265, 2271 (1985).

11. *Id.*

12. *Id.* The rules governing the disciplining of Ohio lawyers are administered by the Ohio Board of Commissioners on Grievances and Discipline. The Board makes disciplinary recommendations to the Ohio Supreme Court which has the ultimate authority to impose sanctions on attorneys. *See generally* OHIO REV. CODE ANN. Gov. Bar Rule V (Page Supp. 1984).

13. *Zauderer*, 105 S. Ct. at 2271. This rule provides: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (Page 1983). The Ohio Code of Professional Responsibility is codified at title 19 of the Ohio Revised Code.

withdrew the advertisement from circulation.[14] No further action was taken against Zauderer at that time.

Zauderer, however, continued his advertising efforts. In the spring of 1982, he placed an advertisement in thirty-six Ohio newspapers indicating his "willingness to represent women who had suffered from their use of the contraceptive device known as the Dalkon Shield Intrauterine Device."[15] The advertisement also contained a line drawing of the IUD, Zauderer's legal opinion that those women who had been injured still had a cause of action against the shield's manufacturer,[16] and the statement that "cases are handled on a contingent fee basis . . . . If there is no recovery, no legal fees are owed by our clients."[17] Zauderer received over two hundred inquiries as a result of his advertisement and ultimately initiated lawsuits on behalf of 106 women.[18]

Acting upon the IUD advertisement and the advertisement Zauderer placed concerning his drunk driving representation,[19] the ODC instigated an action against Zauderer for the following violations of the Ohio Code of Professional Responsibility:[20] the rules against line

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14. *Zauderer*, 105 S. Ct. at 2271.

15. *Id.* The full text of the advertisement read:

"The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infection resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

Id. at 2271–72 (citation omitted in original).

16. *Id.* at 2271.

17. *Id.* at 2272.

18. *Id.*

19. *Id.*

20. *Id.* The action by the ODC was instigated on July 29, 1982, and the hearing before the Ohio Board of Commissioners on Grievances and Discipline was held on May 24, 1983. Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 44–45, 461 N.E.2d 883, 884 (1984). Zauderer was disciplined for violating Ohio's rule on attorney advertising and publicity which provided in pertinent part:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast . . . 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 publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, . . . dramatizations, slogans, music, lyrics or the use of pictures . . . . Only the following information may be published or broadcast:

drawings in attorney advertising,[21] self-recommendation for unsolicited legal advice,[22] accepting employment from a non-lawyer to whom he had given unsolicited legal advice,[23] representing criminal defendants on a contingent fee basis,[24] and the rule requiring complete fee disclosure, if a contingent fee arrangement will be used, in legal advertising.[25]

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

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(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;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print size used in setting forth fee information;

(17) Fixed fees for specific legal services;

. . . .

(C) If the advertisement is communicated to the public over radio or television, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)–(C) (Page 1983).

21. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (Page 1983). *See also supra* note 20.

22. This rule states: "A lawyer shall not recommend employment as a private practitioner of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (Page 1983).

23. This rule states: "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (Page 1983).

24. *Id.* DR 2-106(C).

25. This rule is contained in the code section governing publicity. *Id.* DR 2-101(B)(15). *See supra* note 20.

In effect, these rules resulted in blanket prohibitions against attorney advertising when the advertisement contained self-recommendation. Zauderer, relying on previous court decisions,[26] contended that his actions were protected by the first amendment of the United States Constitution.[27] To support his contention that the advertisements were protected by the first amendment, Zauderer proffered testimony that his Dalkon Shield advertisement was socially valuable.[28]

This argument was rejected by ODC's Board of Commissioners,[29] who relied on a United States Supreme Court decision that had approved of a prohibition against in-person solicitation.[30] Although the Ohio Supreme Court noted prior cases that prohibited total bans on attorney advertising,[31] the court found that because the regulation served a substantial state interest, the Disciplinary Rules were constitutional and that Zauderer could be disciplined for violating them.[32] The Ohio Supreme Court publicly reprimanded Zauderer for placing the advertisements.[33] Zauderer appealed to the United States Supreme

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26. *See, e.g., In re* R.M.J., 455 U.S. 191 (1982); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *See also infra* notes 42–54 and accompanying text.

27. *Zauderer*, 105 S. Ct. at 2273.

28. *Id.* The proffered testimony consisted of expert testimony that unfettered attorney advertising in general was economically beneficial and that Zauderer's advertisement was particularly socially valuable because it informed the public of their legal rights and potential health hazards. Zauderer also offered the testimony of two women who said that they would not have learned of their legal claims had it not been for Zauderer's advertisement. *Id.*

29. *See* Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47, 461 N.E.2d 883, 886 (1984). The supreme court accepted a recommendation made by the Ohio Board of Commissioners on Grievances and Discipline of the Bar to impose discipline in the form of a public reprimand. *Id.* at 49, 461 N.E.2d at 887. It was during the initial hearings on May 24, 1983, that the Board initially rejected Zauderer's first amendment argument. *See id.* at 45–46, 461 N.E.2d at 884–85.

30. Brief for Appellee, Zauderer v. Office of Disciplinary Council, 105 S. Ct. 2265 (1985) (available on LEXIS, Genfed library, Briefs file). *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *See also infra* notes 56–58 and accompanying text.

31. *Disciplinary Counsel*, 10 Ohio St. 3d at 47, 461 N.E.2d at 886 (citing *Bates*, 433 U.S. 350 (1977); *R.M.J.*, 455 U.S. 191 (1982)).

32. *Id.* at 48, 461 N.E.2d at 886. In regard to false or misleading advertisements, the Ohio Supreme Court stated that "[a] potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both." *Id.* at 47–48, 461 N.E.2d at 886. In commenting on the state interests being served by the regulations, the court stated: "[I]t is reasonable for a state to impose restrictions upon lawyer advertising, prohibiting the lawyer from giving legal advice in a specific area, and then recommending employment of himself to those who have not sought his advice. Further, . . . the states may restrict the lawyer from accepting employment resulting from unsolicited advice . . . ." *Id.* at 48, 461 N.E.2d at 886–87.

33. *Id.* at 49, 461 N.E.2d at 887. The supreme court, noting Zauderer's cooperation with the ODC, reduced the discipline from an indefinite suspension to a public reprimand. *Id.*

Court which noted probable jurisdiction.[34]

In analyzing the first amendment issues presented, the Supreme Court stated that Ohio had not justified its blanket rules against the type of advertising used by Zauderer.[35] The Court did, however, hold that the Ohio Supreme Court was warranted in finding that Zauderer's failure to include information regarding fee arrangements could be considered false and misleading because the advertisement did not effectively inform prospective clients that they would still be liable for court costs if they did not win their cases.[36] By holding the flat prohibitions against Zauderer's advertisement unconstitutional,[37] the United States Supreme Court demonstrated its adherence to a more liberal attitude toward attorney advertising, an attitude that has undergone much transition since the issue first arose.

III. BACKGROUND

In 1908, the ABA adopted the first canons of professional ethics which banned attorney advertising outright.[38] This was also the position adopted by most of the states at that time.[39] The ABA and each state bar association which enforced attorney discipline based their restrictions on the United States Supreme Court's commercial speech doctrine which allowed the states to regulate purely commercial speech. This doctrine was formally announced in *Valentine v. Chrestensen*,[40] where the Court held that the United States Constitution imposed no burden on the power of a state to regulate purely commercial speech.[41]

In 1976, however, the Supreme Court, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*,[42] significantly changed

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34. *Zauderer*, 105 S. Ct. at 2276.

35. *Id.* at 2278–80.

36. *Id.* at 2283. The same conclusion was reached regarding Zauderer's drunk driving advertisement which failed to include information about the common practice of plea bargaining. *Id.* at 2284 n.17

37. The Court specifically held that the prophylactic regulation against this type of print advertising used by Zauderer was unconstitutional. *Id.* at 2278–81. However, the Court did hold the regulation requiring disclosure of fee information constitutional because it was reasonably related to Ohio's interest in preventing deception. *Id.* at 2282.

38. *See* CODE OF PROFESSIONAL ETHICS Canon 27, *reprinted in* REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 582 (1908).

39. *See generally Final Report of the Committee on Code of Professional Ethics*, in REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 567–73 (1908).

40. 316 U.S. 52 (1942). *Valentine* involved a New York City ordinance that prohibited the distribution of printed handbills bearing commercial advertising on the public streets. The Court stated: "We are equally clear that the Constitution imposes no such restraint on government [regulation of] . . . purely commercial speech." *Id.* at 54.

41. *Id.* at 54.

42. 425 U.S. 748 (1976).

its philosophy and held that the first amendment afforded commercial speech limited protection.[43] In *Virginia Pharmacy Board*, the United States Supreme Court reviewed the constitutionality of a Virginia statute that prohibited the advertising of prices of pharmaceutical drugs by a licensed pharmacist.[44] The statute declared any advertising of prices of pharmaceuticals to be unprofessional conduct; any pharmacist who advertised prices could be disciplined for such advertising.[45] The Supreme Court held the statute unconstitutional, finding that the first amendment protected even purely commercial speech from complete suppression by the state.[46] The Court's justification for this ruling relied primarily on the consumer's right to receive information.[47]

One year later, this "right to receive information" doctrine was extended in *Bates v. State Bar*[48] to include information advertised by attorneys. In *Bates*, the United States Supreme Court held that the consumer's right to receive information through a lawyer's truthful advertisement regarding routine legal services was superior to any state interest in restricting the free flow of information.[49] However, the Court also indicated a belief that attorney advertising could come under increased scrutiny because "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "[50] Nevertheless, the Court, as in *Virginia Pharmacy Board*, limited state regulation of attorney advertising to the prohibition of advertising that was false or misleading,[51] reasonable

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43. *Id.* at 761.

44. Section 54-524.35 of the Virginia Code provided:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by presciption.

VA. CODE § 54-524.35 (1974) (amended 1982).

45. *Virginia Pharmacy Bd.*, 425 U.S. at 749–50. Section 54-524.22:1 of the statute stated: "The Board of Pharmacy may revoke, suspend or refuse to issue or renew any license [of a pharmacist who] (c) . . . has been guilty of unprofessional conduct as prescribed in § 55-524.35 . . . ." VA. CODE § 54-524.22:1(c) (1974) (amended 1982).

46. *Virginia Pharmacy Bd.*, 425 U.S. at 773. While the Court rejected a complete state ban on commercial advertisements by pharmacists, the Court also recognized that the state could subject such speech to certain regulations. The parameters of a state's permissible regulations are: (1) reasonable time, manner, and place restrictions; (2) prohibition of advertising which is false or misleading; and (3) prohibition of the advertising of illegal transactions. *Id.* at 771–72.

47. *Id.* at 763–64.

48. 433 U.S. 350 (1977).

49. *Id.* at 384.

50. *See id.* at 361–62 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1974)).

51. *Id.* at 383. *See also* FTC STAFF REPORT, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 149–55 (1984) (false and deceptive standard would not be more burdensome in attorney advertising than it is in

time, place, and manner restrictions,[52] and advertisements that propose illegal transactions.[53] In *In re R.M.J.*[54] the Court added the requirement that in order to regulate truthful, non-misleading commercial speech, "the State must assert a substantial interest . . . ."[55]

In 1978, the United States Supreme Court, in *Ohralik v. Ohio State Bar Association*,[56] examined the issue of state regulation of in-person solicitation by attorneys.[57] The Court held that a state could prohibit in-person solicitation because of its substantial interest in protecting the public from fraud, overreaching, and undue influence.[58]

In response to this new attitude of the United States Supreme Court favoring attorney advertising, the ABA promulgated the Model Code of Professional Responsibility (Model Code)[59] which contained new regulations on attorney advertising.[60] The Model Code offers two complementary provisions for regulating attorney advertising.[61] The first regulation prohibits advertising that contains a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."[62] The second regulation specifically delineates the permissible form and content of an attorney's ad.[63] Under this regulation, the advertisement must be presented in a "dignified manner" and cannot be accompanied by drawings or pictures.[64] In a separate provision, the Model Code also prohibits an attorney from accepting employment from a prospective client who has received unsolicited legal advice.[65] This provision has been interpreted to include any advice that may be communicated by an advertisement.[66]

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other types of advertising) [hereinafter cited as FTC STAFF REPORT].

52. *Bates*, 433 U.S. at 384.

53. *Id.*

54. 455 U.S. 191 (1982).

55. *Id.* at 203 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563–64 (1980)). *See also infra* note 77.

56. 436 U.S. 447 (1978).

57. *Id.* at 454.

58. *Id.* at 468.

59. *See* L. ANDREWS, *supra* note 1, at 91–96.

60. *See generally* AMERICAN BAR ASS'N COMM'N ON ADVERTISING, REGULATION OF ADVERTISING BY LAWYERS: COMPARISONS OF THE AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY, ABA PROPOSAL B, AND STATE CODES (1978) [hereinafter cited as REGULATION OF ADVERTISING BY LAWYERS].

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A), (B) (1980). *See supra* note 20.

62. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1980).

63. *Id.* DR 2-101(B).

64. *Id.*

65. *Id.* DR 2-103(A). *See also supra* note 22.

66. *See* Spencer v. Honorable Justices, 579 F. Supp. 880, 888 (E.D. Pa. 1984) ("[C]ounsel for defendants was unable to draw any line of demarcation between solicitation and advertising. Thus, plaintiff is justifiably bewildered as to whether and under what circumstances direct mailing

In spite of the Supreme Court's emphasis on the consumer's right to receive information, the changes made by the ABA seem more likely to restrict the ability of attorneys to advertise effectively rather than encourage or require "dignified" advertising.[67] By not focusing on the truth or falsity of the advertisement and by not advancing a substantial state interest, the ABA attempted to circumvent the Court's desire to encourage the free flow of information.[68]

In Ohio, as in most states, the Ohio Supreme Court has adopted the Model Code[69] provisions on attorney advertising as the legal standard to which attorneys are held.[70] The Model Code as adopted by a particular state, therefore, has the force of law.[71] These restrictions on attorney advertising, however, have been under attack by attorneys in many states.[72] After the *Zauderer* decision, state supreme courts

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would constitute permissible advertising as opposed to impermissible solicitation."), *aff'd sub nom.* Spencer v. Supreme Court of Pa., 760 F.2d 261 (3rd Cir. 1985). *See also* Grievance Comm. v. Trantolo, 192 Conn. 27, 33, 470 A.2d 235, 238 (1984) ("Whether the instant mailing is characterized as an advertisement or as solicitation, it is commercial speech, and entitled to some protection . . . ."); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980) ("all advertising . . . involves solicitation"), *cert. denied*, 450 U.S. 1026 (1981).

67. *See* J. LIEBERMAN, CRISIS AT THE BAR 101–02 (1978). It is noteworthy, however, that in 1983 the ABA House of Delegates adopted its new Model Rules of Professional Conduct. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1–8.5 (1983), *reprinted in* [Manual] LAW. MAN. PROF. CONDUCT (ABA/BNA) No. 27, at 1:101–:174 (Feb. 20, 1985). The Model Rules, which replace the ABA's Model Code, include provisions on attorney advertising that are seemingly more liberal than those previously contained in the Model Code. *See id.* Rules 7.1–.5 (1983). Notwithstanding the ABA's adoption of the Model Rules, the majority of states still pattern their ethics rules on advertising after the Model Code. Some states, such as Ohio, have effectively moved towards adopting the language of the ABA Model Rules on advertising and solicitation in their ethics statutes. *See infra* note 189.

68. J. LIEBERMAN, *supra* note 67, at 98–99.

69. Effective March 1, 1986, new rules regulating attorney advertising went into effect in Ohio. *See infra* note 189.

70. The Ohio Supreme Court Rules for Government of the Bar provide in relevant part:

> The Code of Professional Responsibility, as adopted by this Court on October 5, 1970, . . . shall be binding upon all persons admitted to practice law in the State of Ohio, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

OHIO REV. CODE ANN. Gov. Bar Rule IV(1) (Page Supp. 1984).

71. *See* Supreme Court v. Consumers Union of the United States, Inc., 446 U.S. 719, 731 (1980) (" 'Disciplinary rules are rules of general application and are statutory in character.' ") (citation omitted); Committee on Professional Ethics v. Humphrey (Humphrey I), 355 N.W.2d 565, 569 (Iowa 1984) ("[D]efendants chose to violate the rule and defend their violation by challenging its constitutionality [instead of petitioning for a change]."), *vacated*, 105 S. Ct. 2693 (1985). *See also* Brief of Appellee, Zauderer v. Disciplinary Council, 105 S. Ct. 2265 (1985) (available on LEXIS, Genfed library, Briefs file).

72. *See, e.g., Spencer*, 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd sub nom.* Spencer v. Supreme Court of Pa., 760 F.2d 261 (3rd Cir. 1985); Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981); Florida Bar v. Schreiber, 420 So. 2d 599 (Fla. 1982); State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982); Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978); Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489 (La. 1978);

should be better able to apply the spirit of *Bates* and the law of *Zauderer.*

IV. ANALYSIS

In *Zauderer v. Office of Disciplinary Counsel*,[73] the United States Supreme Court reiterated its previous stand of allowing attorney advertising, but it also tied together the problems of attorney advertising combined with solicitation by attorneys. The Court began by restating its position that " 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than afforded 'noncommercial speech.' "[74] The Court stated that the speech involved in *Zauderer* was, inarguably, purely commercial speech.[75] The Court asserted that the state of Ohio could have regulated the advertisement if it were false, deceptive, misleading, or if the advertisement proposed an illegal transaction.[76] However, if the advertisement were truthful and of a legal nature, then the state could have regulated the advertisement *only* to advance a "substantial governmental interest, and *only* through means that directly advance that interest."[77] In light

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Koffler, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981); *In re* Alessi, 88 A.D.2d 1089, 451 N.Y.S.2d 456 (1982), *vacated sub nom.*, Alessi v. Committee on Professional Standards, 460 U.S. 1077 (1983); *In re* Greene, 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), *aff'd*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982)). *See also* McGonigle, *3 Challenge Texas Bar's Rule on Ads*, Nat'l L.J., June 3, 1985, at 8, col. 3.

73. 105 S. Ct. 2265 (1985).

74. *Id.* at 2275 (citing cases). The Supreme Court has defined commercial speech based on the common-sense distinction between speech proposing a commercial transaction and other varieties of speech. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 760–65 (1976).

75. *Zauderer*, 105 S. Ct. at 2275.

76. *Id.* False or misleading speech has been defined by the ABA as communication that:

> (a) contains a material misrepresentation of a fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
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> (c) compares the lawyer's services with another lawyer's services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

77. *Zauderer*, 105 S. Ct. at 2275 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)) (emphasis added). The *Zauderer* Court affirmed the use of its four-part *Central Hudson* test in attorney advertising cases. That test provides:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

of the Supreme Court cases that had already rejected the state's ability to employ blanket prohibitions on lawyer advertising,[78] along with its previous approval of the state's ability to prohibit in-person solicitation,[79] the Court divided the first amendment question presented into three issues:

1. are prohibitions against attorney advertisements that contain legal advice and information concerning specific legal problems constitutional;

2. are prohibitions against the use of truthful, nondeceptive illustrations in advertising by attorneys constitutional; and

3. are requirements forcing the disclosure of all terms relating to a prospective client-attorney relationship that involves a contingent fee arrangement constitutional?[80]

In answering the first issue, the Supreme Court pointed out that a prohibition against accepting employment resulting from advertisements containing unsolicited legal advice might be applied as a complete ban on attorney advertising—a ban which the Court had previously been declared unconstitutional.[81] However, the Court indicated that this is not what the Ohio Supreme Court attempted to do.[82] According to the United States Supreme Court, the Ohio Supreme Court interpreted the rule as a means of prohibiting attorneys from accepting employment from unsolicited legal advice about a specific legal problem.[83] Nevertheless, the Court felt that if such a regulation were to be permitted, the consumer's right to know, as protected in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*[84] and *Bates v. State Bar*,[85] would be severely circumscribed.[86] The Court reasoned that advertising information geared to specific individuals who had specific legal problems "was undoubtedly *more valuable* than many other

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Central Hudson, 447 U.S at 566.

78. *See In re* R.M.J., 455 U.S. 191, 207 (1982); *In re* Primus, 436 U.S. 412, 438–39 (1978); Bates v. State Bar, 433 U.S. 350, 383–84 (1977).

79. *See Ohralik*, 436 U.S. 447, 468 (1978).

80. *Zauderer*, 105 S. Ct. at 2275.

81. *Id.* at 2276.

82. *See id.*

83. *Id.*

84. 425 U.S. 748 (1976).

85. 433 U.S. 350 (1977).

86. *See Zauderer*, 105 S. Ct. at 2279–80. *See also Bates*, 433 U.S. at 364; *Virginia Pharmacy Bd.*, 425 U.S. at 766. The Court also rejected the state's contention that it was difficult to determine the truth or falsity of attorney advertising, citing the experience of the Federal Trade Commission and the advice of the ABA. *Zauderer*, 105 S. Ct. at 2279 n.13. *See generally* FTC STAFF REPORT, *supra* note 51. Further, the Court noted that the state could not prejudge an individual's legal claims and, therefore, the argument that attorney advertising might stir up meritless litigation was invalid. *Zauderer*, 105 S. Ct. at 2279 n.12.

forms of advertising."[87]

The United States Supreme Court termed the Ohio court's reliance on *Ohralik v. Ohio State Bar Association*[88] as inappropriate.[89] The Supreme Court held that while *Ohralik* involved in-person solicitation,[90] a practice rife with tactics that the state had a substantial interest in preventing—the risks of overreaching, invasion of privacy, undue influence, and fraud—*Zauderer* involved a much different type of advertising. Print advertising as a whole does not have the same risks according to the Supreme Court because it is "indirect" rather than "direct."[91] As the Court observed, "[A] printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney."[92] Accordingly, the Court found that prohibitions against attorney advertising that contain legal advice and information about a specific legal problem are unconstitutional.[93]

The Supreme Court used the same analysis when it examined the second issue, concluding that Ohio's blanket ban on illustrations was also invalid.[94] The Supreme Court determined that illustrations used in commercial speech are to be afforded the same level of protection as are other components of commercial speech.[95] Because the state did not argue that the drawing of the IUD was false, misleading, or deceptive,[96] the Court placed the burden on the state to prove that a substantial governmental interest would be served by banning illustrations outright.[97] The state's failure, and probable inability, to meet this burden convinced the Supreme Court to invalidate the regulation.[98] Accord-

87. *Zauderer*, 105 S. Ct. at 2280 (emphasis added).
88. 436 U.S. 447 (1978).
89. *Zauderer*, 105 S. Ct. at 2277.
90. *Ohralik*, 436 U.S. at 454.
91. *See Zauderer*, 105 S. Ct. at 2277.
92. *Id.*
93. *Id.* at 2280.
94. *Id.*
95. *Id.*
96. *See id.* Moreover, while observing that the state has an interest in ensuring that attorneys behave in a dignified manner, the Court pointed out that "the mere possibility that some members of the population might find [the] advertising embarrassing or offensive cannot justify suppressing it." *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1978)). *But see Spencer*, 579 F. Supp. at 892 (state has a substantial interest in maintaining the image and stature of the legal profession and can advance this interest by requiring legal advertisements to be "dignified").
97. *Zauderer*, 105 S. Ct. at 2280.
98. *Id.* at 2280–81. The Court hypothesized that the ban was intended to ensure that advertisements would be dignified. The Court recognized that Ohio has a substantial interest in maintaining dignity and decorum in the courtroom, but was "unsure that the State's desire that attor-

ingly, Zauderer could not be disciplined for utilizing an accurate and nondeceptive illustration in his advertisement.[99]

The third issue facing the Court was whether a provision requiring attorneys to include certain information regarding fee disclosure in their ads was constitutional.[100] The Supreme Court agreed with the Ohio Supreme Court that a substantial state interest was advanced by requiring disclosure of contingent fee information.[101] Recognizing the complexity of fee schedules and the difference between legal fees and court costs, and the fact that the ordinary layperson could be misled if certain information was not included, the Court affirmed the state's position that an attorney could be disciplined for failing to comply with a regulation that requires full disclosure of contingent fee arrangements.[102]

The Court found that disclosure requirements would be valid if they were reasonably related to the state's interest in protecting its citizens,[103] a standard unlike the strict limits placed upon the state's power to regulate truthful, non-deceptive advertisements.[104] If such statements were not required, attorneys could entice consumers into their office and subject them to many of the risks of in-person solicitation.[105] In justifying this "reasonably related" test, a less protective standard, the Court noted that the educational value of the ad would not be hindered by reasonable disclosure requirements.[106] In fact, the educational

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neys maintain their dignity in communications with the public . . . [was] an interest substantial enough to justify the abridgement of their First Amendment rights." *Id.* at 2280. *But see Spencer*, 579 F.Supp. at 892.

99. *Zauderer*, 105 S. Ct. at 2281.

100. *Id.*

101. *Id.* at 2282.

102. *Id.* at 2283.

103. *Id.* at 2282. The Court further stated:

> We reject appellant's contention that we should subject disclosure requirements to a strict "least restrictive means" analysis under which they must be struck down if there are other means by which the State's purposes may be served. Although we have subjected outright prohibitions on speech to such analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech. . . . Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes might be hypothesized.

Id. at 2282 n.14.

104. *See supra* note 103.

105. *See generally Ohralik*, 436 U.S. at 466–67 (potential for overreaching during in-person solicitation exists because it is harder to police); Committee on Professional Ethics v. Humphrey, 355 N.W.2d 565, 570 (Iowa 1984) ("The committee asserts defendants, like the defendant in *Ohralik*, . . . used the contingency fee as a lure . . . .").

106. The Court realized that extensive disclosure requirements could interfere with first

value of the advertisement would be enhanced by including such information.[107] Therefore, the Ohio Supreme Court acted within constitutional limits when disciplining Zauderer for failing to meet the disclosure requirements of Ohio law.[108]

The predictable result of *Zauderer* is an increase in attorney advertising. *Zauderer* applied old, established law to a familiar fact pattern. In so doing, *Zauderer* further defined the spirit of *Bates*—freedom is the rule, regulation the exception. Therefore, blanket prohibitions or prophylactic rules on attorney advertising are clearly unconstitutional. This result can best be seen by examining two types of advertising that are attracting increased use by attorneys: electronic media advertising and direct mail solicitation.

V. THE IMPACT OF ZAUDERER

A. *Impact on Electronic Media Advertising*

Prior to *Zauderer v. Office of Disciplinary Council*,[109] the Supreme Court had not dealt with a case involving an attorney who advertised on either the radio or television.[110] However, considering the increasing number of attorneys using electronic media advertising, a conflict between the ABA's rules and such attorneys was inevitable.[111] Initially, the changes in the Model Code of Professional Responsibility allowing advertisements in the print media made no provision for advertisements in the electronic media. Provisions were, however, added to allow for radio and television advertisements in 1978.[112] Although neither *Bates*[113] nor *Zauderer*[114] dealt with such advertising, the principles the United States Supreme Court announced in those cases, the false or misleading standard[115] and the substantial interest test,[116]

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amendment rights by chilling protected speech, but held that the advertiser's rights would be protected if the regulations on disclosure were reasonable. *Zauderer*, 105 S. Ct. at 2282.

107. *Id.*

108. *Id.* at 2283.

109. 105 S. Ct. 2265 (1985).

110. *See* Bates v. State Bar, 433 U.S. 350, 384 (1977) (advertising in a newspaper of general circulation).

111. *See supra* note 4.

112. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980). Television and radio advertising was allowed by amendments passed in 1978. REGULATION OF ADVERTISING BY LAWYERS, *supra* note 60, at introduction. *See also* AMERICAN BAR ASS'N COMM'N ON ADVERTISING, LEGAL ADVERTISING—THE ILLINOIS EXPERIENCE 4 (1985).

113. *See Bates*, 433 U.S. at 384.

114. *See Zauderer*, 105 S. Ct. at 2271–72 (advertising in newspaper of general circulation).

115. *See id.* at 2275. *See also supra* notes 48–54 and accompanying text.

116. *See Zauderer*, 105 S. Ct. at 2275. *See also In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978). In commenting on the need for first amendment protection for commercial speech in different forms of media, the Tennessee Supreme Court

should be applicable to *all* advertising, including electronic advertising.[117] In fact, subsequent to its decision in *Zauderer*, the Court remanded *Committee on Professional Ethics v. Humphrey*[118] to the Iowa Supreme Court for reconsideration in light of the decision in *Zauderer*.[119] *Humphrey* was a case that directly dealt with television advertising by attorneys.[120] By remanding *Humphrey*, the Court indicated its position that the holdings of *Zauderer* and *Bates* should be extended to include electronic advertising.

In *Humphrey*, three Iowa attorneys sought to increase their clientele through the use of television advertising.[121] The television ads were in violation of the Iowa Code of Professional Responsibility, specifically DR 2-101 and DR 2-105.[122] The attorneys defended their action on the ground that the rules unconstitutionally violated their first amendment right to free speech, as made applicable to the states by the fourteenth amendment.[123] The Iowa Supreme Court rejected their argument and

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stated: "Advertising is advertising irrespective of the device or instrumentality employed. Restricting lawyer advertising to the print media would frustrate the only legitimate benefit flowing from the advertising, i.e., the provision of legal services to the public based upon the knowledgeable selection of a lawyer." *Id.* at 643. *See also supra* notes 54–55 and accompanying text.

117. *But cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.").

118. 105 S. Ct. 2693 (1985).

119. *Id.*

120. Committee on Professional Ethics v. Humphrey (Humphrey I), 355 N.W.2d 565, 566 (Iowa 1984), *vacated*, 105 S. Ct. 2693 (1985).

121. The advertisements in *Humphrey* were of three types. For example, the first advertisement featured an actor and an actress portraying a physician and nurse in an examination room. While the two examine the x-ray, the "physician" says: "We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of a lawyer could be important. That's something to think about." *Id.* at 566. The advertisements then listed the name, address, phone number, and areas of practice of the defendant's law firm, superimposed over a picture of a receptionist in a law office. A voice continued: "If you're injured through the negligence of others, call the law firm of . . . . Cases involving auto accidents, work comp, [sic] serious personal injury and wrongful death handled on a percentage basis. No charge for initial consultation." *Id.*

122. *Id.* The Iowa rule provides in pertinent part:

> The same information, in words and numbers only, articulated only by a single nondramatic voice, not that of the lawyers, and with no other background sound, may be communicated by radio . . . [and] on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which the attorney maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

IOWA CODE OF PROFESSIONAL RESPONSIBILTY FOR LAWYERS DR 2-101(B) (West 1985). Iowa's DR 2-105 limits the ability of an Iowa attorney to engage in "specialty advertising." *See id.* DR 2-105.

123. *Humphrey I*, 355 N.W.2d at 566–67.

enjoined the attorneys from continuing to employ the advertisements.[124] In so doing, the Iowa Supreme Court relied on earlier United States Supreme Court decisions,[125] wherein the Court indicated that "the special problems of advertising in the electronic broadcast media will warrant special consideration."[126] The Iowa court sustained the disciplinary rules by looking at the "uniquely pervasive or intrusive" effect of television on the public.[127] The court concluded that the unique power of television magnified the danger that the advertisement could mislead the public.[128] Therefore, the state demonstrated a substantial interest that justified the regulations.[129] The Iowa Supreme Court cited prior United States Supreme Court cases in support of its stricter test for television advertising.[130] Those cases indicated that electronic advertising presented unique problems that merited state regulation. However, the Iowa Supreme Court's holding failed to fully analyze the underlying message of those decisions—the presumption in favor of allowing the flow of information to be unrestricted.[131] By remanding *Humphrey* in light of *Zauderer*, the United States Supreme Court apparently indicated that the protections of print media advertising apply to electronic media advertising.[132]

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124. *Id.* at 571.

125. *See, e.g., Bates*, 433 U.S. 350 (1977); Capital Broadcasting Co. v. Acting Att'y Gen., 405 U.S. 1000 (1972).

126. *See Bates*, 433 U.S. at 384.

127. *Humphrey I*, 355 N.W.2d at 569.

128. *Id.* at 570.

129. *Id.* First, the committee responsible for attorney discipline believed that the advertisement used the promise of free representation as a lure to get clients into the office. *Id.* Second, the advertisement's self-laudatory statements regarding the attorneys' experience would tend to mislead the public because the defendants, in actuality, had little trial experience. *Id.*

130. *Id.* at 569–70 (citing *Metromedia*, 453 U.S. 490 (1981); FCC v. Pacifica Found., 438 U.S. 726 (1978); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

131. *See Bates*, 433 U.S. at 384. *See also* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 590 (D.C. 1971) (Wright, J., dissenting) ("Any statute which suppresses speech . . . begins with a presumption against its validity.").

132. On November 13, 1985, however, the Iowa Supreme Court determined that *Zauderer* had no effect on television advertising regulations for attorneys. Committee on Professional Ethics v. Humphrey (Humphrey II), 377 N.W.2d 643 (Iowa 1985) (opinion after remand). Justice Harris, writing for a four to three majority, again relied on the Supreme Court's statement in *Bates* that "special problems of electronic advertising would warrant special consideration." *Id.* at 645 (quoting *Bates*, 433 U.S. at 384). Justice Harris also pointed out that because the *Zauderer* majority referred to the advertisements at issue as "print" advertising, the majority intended to exclude electronic advertising from its sweep. *Id.* at 645–46. Accordingly, the Iowa court found the regulations constitutional. *Id.* at 647. For the text of the Iowa advertising regulations, see *supra* note 122.

Justice Harris further stated that "electronic advertising lies closer to face-to-face solicitation . . . than to printed advertising." *Id.* at 646. The majority focused upon the fact that electronic advertising "tolerates much less deliberation" because advertisements are quick; "in a flash they are gone without a trace." *Id.* The court also recognized a potential for abuse in electronic adver-

The interests involved in allowing information to flow freely to the consumer is at stake in all advertising, regardless of the medium used. Information that is broadcast rather than printed is not automatically false or misleading *simply because it is broadcast* rather than printed.[133] The primary inquiry should be directed at the truthfulness of the advertisement,[134] not the form in which it is presented.[135] If the

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tising because the advertisements might tend to be more "image enhancing" rather than a transmission of information to the consumer; accordingly, the majority asserted that "[t]he field cries out for careful regulation." *Id.* at 647. Finally, the court denied the allegation that the regulation was meant to be a blanket ban, as the United States Supreme Court characterized the regulations at issue in *Zauderer*, stating instead that "the rule provides only for the regulation of a form of advertising which is recognized as ripe for abuse." *Id.*

In a dissenting opinion, Judge Uhlenhopp stated boldly: "While *Zauderer* did not involve electronic media, the Supreme Court must have believed it has relevancy to the present case . . . . I have the impression that the Court takes quite a broad view of constitutionally protected lawyer advertising." *Id.* at 654 (Uhlenhopp, J., dissenting).

Judge Larson, in a stinging dissent, pointed out that the informational value of advertisements indicated that they are constitutionally protected. On Iowa's "laundry-list" approach contained in DR 2-101(B), he stated: "To television viewers lacking information about the [legal] system, basic knowledge of their legal rights remains classified." *Id.* at 655 (Larson, J., dissenting). He also believed that the *Central Hudson* test, see *supra* note 77, applied to electronic advertising, and noted that although the majority *allegedly* applied the test in the first hearing, see *Humphrey I*, 355 N.W.2d at 568, the second opinion did not even acknowledge the *Central Hudson* test. *Humphrey II*, 377 N.W.2d at 655–56.

Furthermore, because the committee's witnesses agreed that the advertisements were not false or misleading, and that there was nothing inherently misleading in dramatizations, illustrations, or background sound, Judge Larson argued that the committee had to prove that the governmental interest in the restriction was substantial, that the restrictions directly advanced that interest, and that the restrictions were no more extensive than necessary. *Id.* at 656. Judge Larson concluded that the restrictions failed the test. *Id.* 656–57.

Judge Larson also rejected the majority's overall approach, stating that it was a "highly paternalistic" approach which had been rejected by the *Bates'* Court. *Id.* at 657. Finally, Judge Larson returned to the overwhelming reason for allowing attorney advertising—maintaining the free flow of information. Treating electronic advertising differently than print advertising distinguishes between socio-economic classes, Judge Larson asserted. *Id.* at 659. See *infra* notes 137–43 and accompanying text. The largest potential for informing the public of their legal needs, Judge Larson noted, is the use of television advertising. *Humphrey II*, 377 N.W.2d at 659 (Larson, J., dissenting).

While it might be true that some attorneys use electronic advertising unethically, Judge Larson agreed with the following statement of the *Bates* Court:

> "We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightfoward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few that abuse their trust."

Id. at 658 (Larson, J., dissenting) (quoting *Bates*, 433 U.S. at 379).

133. L. ANDREWS, *supra* note 1, at 49–50 (citing Iowa attorney Stephen Rapp in his challenge to that state's print-only rules).

134. *See Bates*, 433 U.S. at 384. *See also* Police Dept. v. Mosley, 408 U.S. 92, 95 (1971).

135. *See Zauderer*, 105 S. Ct. at 2280 ("Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to

information is true, then the state must show a substantial interest in justifying its prohibition.[136]

Additionally, with the Supreme Court's emphasis in *Zauderer* on the consumer's right to receive information, any regulation that restricts this flow of information would be difficult for the state to justify. Not only are individuals with income and education levels below those of the average reading public dependent, to a certain extent, upon radio and television for such information,[137] but also the television media's influence upon society is undeniable.[138] Therefore, prohibiting an attorney from advertising through the broadcast media as freely as the print media circumvents the Supreme Court's emphasis on the right of the consumer to receive information, as well as the duty of an attorney to educate the public of their legal needs[139] in the most effective manner.[140]

Futhermore, if broadcast advertising is deemed more misleading due to its wide impact on the public, then, logically, the same restrictions and inspections should be imposed upon other advertisers who use electronic advertising. All advertising is to some degree misleading,[141] and as a result, some consumers have been injured. However, nobody has advocated an outright ban on all advertising. Some commentators have asserted that the ABA, and those states that have adopted its Model Code, take the position that television advertising by attorneys is *inherently* misleading and, therefore, can be regulated without looking

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appellant's advertising.").

136. *See* Linmark Assocs. v. Willingboro, 431 U.S. 85, 92 (1977) (restrictions on the use of specific media could have the effect of prohibiting communication of specific messages to specific audiences, thus denying equal access to information about legal services). *See also* Spencer v. Honorable Justices, 579 F. Supp. 880, 887 (E.D. Pa. 1984).

137. *See* [Manual] LAW. MAN. PROF. CONDUCT (ABA/BNA) No. 28, at 81:501–:503 (Dec. 25, 1985). *See also* Grievance Comm. v. Trantolo, 192 Conn. 15, 25, 470 A.2d 228, 233 (1984) ("A total ban on advertising through the electronic media would not only exceed the state's legitimate interest in protecting potential consumers, but its overinclusiveness would also keep a great deal of information from consumers, thereby hindering their ability to make an informed choice.").

138. *See Humphrey I*, 355 N.W.2d at 569–70.

139. This duty, albeit aspirational in nature, is contained in Ethical Consideration 2-1, which provides:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1982) (footnotes omitted).

140. *See* Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A.J. 1116, 1117–18 (1981). *See also* L. ANDREWS, *supra* note 1, at 50.

141. J. LIEBERMAN, *supra* note 67, at 86, 101.

at the benefits derived from such advertisements.[142] As one commentator has asserted: "[By attempting] to create an antiseptic environment, [the rules] foreclose to lawyers and potential clients a large realm of freedom to do much good."[143]

The standards for broadcast advertising should be the same as the standards for print advertising. A state should be required to prove that a particular advertisement is false or misleading,[144] or that a substantial governmental interest would be served by placing restrictions on broadcast advertising.[145] In light of *Zauderer* and the other previous decisions, the consuming public can anticipate an ever-increasing number and variety of attorney advertisements through electronic means.

B. Impact on Direct Mail Solicitation

Direct mail solicitation by attorneys—advertisements mailed to a large group of consumers who have similar needs and interests—has been as closely regulated as has electronic advertising. The same justifications[146] offered for the restriction of electronic media advertising have been applied to restrict direct mail solicitation by attorneys despite slightly different policy goals. In regulating direct mail solicitation, the state is trying to protect the citizen from, among other things, an unwarranted invasion of privacy.[147] In regulating electronic advertising, on the other hand, the state is attempting to protect the citizen from the persuasive effectiveness of television, which the state has deemed "inherently misleading."[148] However, none of the arguments advanced to support these restrictions on direct mail solicitation is

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142. L. ANDREWS, *supra* note 1, at 49–50. *But see Trantolo*, 192 Conn. at 25, 470 A.2d at 233 ("But a blanket restriction on television advertising is not the sort of narrow regulation that the Supreme Court [has approved]."); *Humphrey II*, 377 N.W.2d at 659 (Larson, J., dissenting) ("[I]t is especially important to foster the use of television because of its great potential for informing the public."); *Petition for Rule of Court*, 564 S.W.2d at 643 ("[T]his protection would be fragile indeed if it were only applied to certain media and not to others.").

143. J. LIEBERMAN, *supra* note 67, at 96.

144. For the false and misleading standard now used under the ABA's Model Rules, see *supra* note 76. *See also supra* notes 48–54 and accompanying text.

145. Note that the consumer can always change the channel or turn the television off as easily as a letter can be thrown out; moreover, the consumer can always "avert his eyes." *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980).

146. *See Bates*, 433 U.S. at 368–79. In *Bates*, the Court rejected the Arizona Bar Association's arguments that attorney advertising would: (1) have an adverse effect on professionalism; (2) be inherently misleading because of the nature of attorney services; (3) have an adverse effect on the administration of justice; (4) have undesirable economic effects on consumers by increasing the costs of legal services; (5) adversly affect the quality of legal services; and (6) be difficult to enforce. *See id.*

147. *See* [Manual] LAW. MAN. PROF. CONDUCT (ABA/BNA) No. 28, at 81:601 (1984). *See also Spencer*, 579 F. Supp. at 889–90. For a case not involving attorneys, see *Consolidated Edison*, 447 U.S. at 541–43.

148. *See Humphrey I*, 355 N.W.2d at 569–70.

greatly different from those that were advanced in a vain attempt to keep the attorneys in *Bates* from advertising in the first place.[149] The state perceives a greater harm in direct mail solicitation because it is more apt to be specifically targeted to an audience with specific legal problems. Therefore, the state perceives similar problems that occur with in-person solicitation—the risks of fraud, overreaching, and undue influence. However, it is apparent that after *Zauderer* the regulations designed to safeguard against these fears are unjustified.

Zauderer offers new insight into the degree of protection the United States Supreme Court is willing to afford direct mail solicitation. Earlier cases concerned the advertising of general information, services performed, and fees charged.[150] Zauderer's advertisements, however, were similar to the type of advertisement used in direct mail solicitation although it was not technically direct mail solicitation. It was geared to specific individuals, women who used the Dalkon Shield, with a specific legal problem, those who sustained injury as a result.[151] *Zauderer* clearly demonstrates that the Supreme Court believes targeted ads are within the protection of the first amendment to the Constitution.[152] The holding of *Zauderer*, when viewed in conjunction with cases where the Supreme Court invalidated state attempts to discipline attorneys for using the mail to advertise, indicates that such advertising passes constitutional muster.

In re R.M.J.,[153] decided in 1982, involved an attorney who was disciplined for mailing announcement cards concerning the opening of his law firm to individuals other than "lawyers, clients, relatives, friends, and former clients" in apparent violation of DR 2-101(A)(2) of the Missouri Code of Professional Responsibility.[154] The Court determined that this type of direct mail advertising was to be afforded constitutional protection.[155] In reversing the Missouri Supreme Court, the United States Supreme Court found that Missouri had not justified its prophylactic rule against such mailings.[156] The Court also found that

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149. *See supra* note 146.

150. *See In re* R.M.J., 455 U.S. 191, 197 (1982); *Bates*, 433 U.S. at 353–54, 367–68.

151. *See Zauderer*, 105 S. Ct. at 2271–72.

152. *Id.* at 2279 ("Print advertising may convey information and ideas more or less effectively [then in-person solicitation], but in most cases, it will lack the coercive force of the personal presence of a trained advocate.").

153. 455 U.S. 191 (1982).

154. *Id.* at 198. *See* MISSOURI CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (West 1985) (repealed 1985). The attorney was also charged with publishing advertisements that listed non-approved areas of the law. *R.M.J.*, 455 U.S. at 198.

155. *R.M.J.*, 455 U.S. at 206–07.

156. *Id.* The Court emphasized that the "states retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice." *Id.* at 207.

there were less restrictive means available to prevent the harms perceived by the state.[157] Although *In re R.M.J.* did not deal with targeted individuals, those with specific, known legal problems, the case is useful because it does demonstrate the Supreme Court's affirmance of the ability of attorneys to use the mail to increase their clientele.[158] Using the rationale of *In re R.M.J.* and *Zauderer*, a strong argument can be made that targeted direct mail advertising that is truthful and not misleading should be free from excessive state regulation.[159]

This conclusion is not inconsistent with the Supreme Court's stand in favor of state regulation of in-person solicitation.[160] Because they are targeted to individuals, direct mail letters are more akin to personal solicitation than mass media advertising. However, direct mail solicitation does not present the same opportunity for undue influence or overreaching as does in-person solicitation.[161] Since the Court in *Zauderer* did not reject Zauderer's newspaper advertisement even though it was targeted to specific individuals, and even seemed to give this aspect of the case special consideration,[162] the Court appears to have approved advertising targeted to specific individuals with specific legal problems, an implicit approval of direct mail solicitation.[163] There are, however, additional conceptual issues that have been raised concerning direct mail solicitation. First, there is a question of whether the state must use the least restrictive means available when regulating attorneys who choose to solicit via the mail—means which could advance the same substantial state interests as would an outright ban on direct solicitation.[164] However, this issue has effectively been resolved by most lower

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157. *Id.* at 206. The Court was again echoing the fourth prong of the *Central Hudson* test. *See supra* note 77.

158. *See R.M.J.*, 455 U.S. at 206 (case involved attorney who was disciplined for mailing professional announcements—state restrictions on mailing of such announcements were found unconstitutional).

159. *See* Hazard, *Court Activity Abounded on the Legal Profession*, Nat'l L.J., Sept. 2, 1985, at S-14, col. 2.

160. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

161. *See id.* at 464–65 ("[I]t hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed person.").

162. *See Zauderer*, 105 S. Ct. at 2280 (advertisement at issue "undoubtedly more valuable than many other forms of advertising" because it acquainted consumers with legal rights they might not otherwise have known about).

163. *See id.* (attorney may not be disciplined for soliciting business through printed advertisements that contained truthful information about consumer's legal rights). *See also supra* notes 152–59 and accompanying text.

164. In an analysis done under the Court's *Central Hudson* test, see *supra* note 77, a state regulation that prohibits or severely restricts advertisements, either in form or content, will be constitutional only if it is the least restrictive way the state can advance its substantial interest. *See Zauderer*, 105 S. Ct. at 2278.

courts, which have found that there are lesser means of accomplishing the same ends as the state's prophylactic regulations.[165]

The second controversy is the question of privacy. There are two common invasion of privacy arguments raised in opposition to attorneys who undertake direct mail solicitation efforts.[166] The first concerns the manner in which the attorney identifies the persons to be targeted.[167] Before an attorney can send a targeted letter, the attorney must determine which individuals will be the targets. Undoubtedly, such an investigation could result in attorneys violating an individual's privacy to get this information. In *Zauderer*, the state argued that allowing attorneys to comb court dockets and police records in search of prospective clients was a harm the state had a substantial interest in protecting against. The state argued that it was protecting its citizens' right of privacy.[168]

However, these arguments failed. The records the state mentioned, court dockets and police records, were already statutorily open to the public.[169] Also, the potential harms that accompany this method of collecting information should be weighed against the possible benefits of allowing attorneys to advertise and inform the public of their legal needs. Consumers already involved in the judicial process, either criminally or civilly, have a right to receive information.[170] These individuals

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165. *See Spencer*, 579 F. Supp. at 889; Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978) (rule requiring attorney to mail copy of letter to local bar associations is less restrictive alternative that satisfies *Central Hudson* test); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 150, 412 N.E.2d 927, 933, 432 N.Y.S.2d 872, 878 (1980) (filing of solicitation letter is sufficient protection against deceiving letters). It has been asserted that this least restrictive means test should also apply to electronic advertising. *See Trantolo*, 192 Conn. at 24–25, 470 A.2d at 233 (state has to use least restrictive means to accomplish its ends); *Humphrey II*, 377 N.W.2d at 657 (Larson, J., dissenting) (review for false and misleading advertisements on a case-by-case basis is less restrictive).

166. *See* [Manual] LAW. MAN. PROF. CONDUCT (ABA/BNA) No. 28, at 81:601–:602 (1984).

167. *See* Brief for Appellant, *Zauderer*, 105 S. Ct. 2265 (1985)(available on LEXIS, Genfed library, Briefs file) (Ohio has ongoing disciplinary proceedings against attorneys who have searched court documents looking for clients).

168. *Id.* ("Attorneys can . . . look at court documents to determine who is being sued, has financial difficulties, is threatened with license suspension, or might otherwise be particularly susceptible to a suggestion of a need for legal services.").

169. *See* OHIO REV. CODE ANN. § 149.43 (Page Supp. 1984).

170. The Court does not accept the proposition that a lawsuit is an evil per se:

> Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

may have legal rights that, if they knew about them, would be very beneficial to their position. Therefore, the proper inquiry is into the content of the advertisement, not into the form of the advertisement or method of collecting the material for the ad.

The second argument against direct mail solicitation is that the attorney invades the sanctity of the individual's home the moment the mail is delivered.[171] Unlike regular print or broadcast advertising, where the consumer assumes the risk that the type of media he has chosen will contain a certain percentage of advertising, the recipient of direct mail solicitation takes no affirmative action to bring the advertisement into his home. Thus, the situation is slightly analogous to *Ohralik*, where the attorney went into the prospective clients' home and hospital room without an invitation.[172] Therefore, the state argues that its regulation of direct mail solicitation serves its substantial interest of protecting its citizens from the harms of in-person solicitation—the risks of undue influence and overreaching.[173]

This argument, however, ignores a fundamental difference between in-person solicitation and direct mail solicitation. The dangers which concerned the *Ohralik* Court could occur only because the prospective client was subjected to a face-to-face meeting with a trained, experienced advocate.[174] In direct mail solicitation, however, there is no face-to-face meeting between attorney and prospective client, with the accompanying potential for the attorney to pressure the uninformed consumer into making an immediate decision.[175] Moreover, under *Zauderer*, the proper inquiry is directed to the content of the advertising, rather than to the method by which the advertisement is communicated.[176] Therefore, because the *Zauderer* decision encourages attorneys to employ such methods to educate the public, an invasion of privacy argument is likely to be ineffective and does not permit the states to prohibit either the form or content of this type of advertising.

Accordingly, direct mail solicitation must be weighed on the same

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Zauderer, 105 S. Ct. at 2278. *See also Spencer*, 579 F. Supp. at 891.

171. *See Consolidated Edison*, 447 U.S. at 541–43; *Spencer*, 579 F. Supp. at 889–90; Bishop v. COPE, 521 F. Supp. 1219, 1230–31 (S.D. Iowa 1981). *See generally* Comment, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik*, 12 U. MICH. J.L. REF. 144 (1978).

172. *See Ohralik*, 436 U.S. at 447.

173. *See supra* notes 56–58 and accompanying text.

174. *See Ohralik*, 436 U.S. at 465.

175. *Koffler*, 51 N.Y.2d at 149, 412 N.E.2d at 933, 432 N.Y.S.2d at 877 ("Invasion of privacy and the possibility of overbearing persuasion, both of which were condemned in *Ohralik* . . ., are not sufficiently possible in mail solicitation to justify banning it.").

176. *Zauderer*, 105 S. Ct. at 2281. *See also Mosley*, 408 U.S. at 95 ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

scales as all types of advertising.[177] The first inquiry must be whether the content of the advertisement is false or misleading. The next inquiry is whether there is an alternative method for protecting the state's interests rather than an outright ban on such advertising. If such a test is applied, the consumer would be benefited by receiving truthful information about his legal rights. The present state codes do not judge advertisements on such grounds, but instead use other unconstitutional and unreasonable methods to restrict the ability of attorneys to advertise.

C. *Impact on White List/Black List Standards*

The ABA disciplinary rule on publicity[178] is probably unconstitutional on its face in light of *Zauderer*. At present, DR 2-101 of the Model Code of Professional Responsibility limits both the form and content of attorney advertising under a white list/black list standard,[179] which contains criteria for evaluating attorney advertising. No inquiry is made into the truth or falsehood of the advertisement's content. Advertising that does not conform to the standards outlined in the rules is automatically considered unethical. Attorneys can be, and have been, disciplined for employing forms of advertising that differ from the required form.[180] Absent from the list enumerated by the ABA of permissible information is the type of information that made up Zauderer's advertisement. Zauderer's advertisement contained information directed to specific individuals with specific legal problems. After the Supreme Court decided *Zauderer*, it should be clear that such white list/black list standards are unconstitutional. The ABA's Model Code rule DR 2-101(B), the version adopted by many states,[181] essentially takes the approach that all attorney advertising is inherently false or misleading unless it follows the prescribed form.[182] Apparently the use of such white list/black list standards is necessary because of the complexity of the legal profession and the inability of the average

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177. As an example, the *Zauderer* Court approved the use of the *Central Hudson* test. *Zauderer*, 105 S. Ct. at 2280. *See supra* note 77. *See also* Leoni v. State Bar, 39 Cal. 3d 609, 627, 704 P.2d 183, 193, 217 Cal. Rptr. 423, 434 (1985).

178. For the relevant language of the Ohio version of the Model Code rule on publicity, see *supra* note 20.

179. *See id.*

180. *See* L. ANDREWS, *supra* note 1, at 44 ("Yet state advertising rules often prevent lawyers from using ad content that addresses the identification of legal problems and the nature and cost of legal services."); *id.* at 49 ("In addition to regulating content, current state ad rules regulate the media lawyers can use to get their messages across.").

181. The majority of states still utilize some version of the ABA's Model Code of Professional Responsibility rather than the ABA's now-official Model Rules of Professional Conduct. *See supra* notes 69–71 and accompanying text.

182. This was an approach previously rejected by the Court. *See Bates*, 433 U.S. at 372–75.

layperson to avoid deception by attorney advertisements. This is an extremely paternalistic approach that has no reasonable justification.[183] States that attempt to discipline attorneys who do not follow the accepted form of the white list, without inquiring into the actual content of the allegedly unacceptable advertising, are not following the Supreme Court's mandate.

Per se restrictions on attorney advertising are clearly improper under *Zauderer*. In *Zauderer*, the Court emphasized that the consumer's right to receive information was more important than any state interest that would interfere with the free flow of information.[184] Forcing attorneys to use certain phrases and words containing a limited amount of information is an impermissible restriction on this flow of information.[185] This conclusion is especially true when viewed in light of recent studies that have shown the benefits derived by consumers from "permissible" information. The information allowed by the Model Codes, while not false or misleading, is not helpful in educating the public of their legal needs or in making an informed decision about which attorney to choose.[186]

Another factor to be considered in judging the validity of these white lists is that the "allowable" words are not generally within the normal vocabulary of the average layperson.[187] This also impedes the free flow of information to the consumer, especially those consumers who might be in dire need of information concerning their legal problems.[188]

The Supreme Court promulgated a rule in *Bates* and reaffirmed it in *Zauderer* that allows states to regulate false and misleading advertising, or even truthful and non-deceptive advertising, if the regulations advance substantial state interests. The inquiry is, therefore, whether the advertisement is true or false, not whether the advertisement follows some prescribed standard. The white list/black list distinctions presently employed by some states are no longer acceptable under *Zauderer*.

VI. CONCLUSION

It is now undeniable that the American Bar Association's initial response to attorney advertising was unreasonable, unconstitutional,

183. *See* J. LIEBERMAN, *supra* note 67, at 98.
184. *Zauderer*, 105 S. Ct. at 2275.
185. J. LIEBERMAN, *supra* note 67, at 101.
186. L. ANDREWS, *supra* note 1, at 46.
187. *See id.* at 45.
188. *See R.M.J.*, 455 U.S. at 205 (attorney's listing of areas of practice more informative than listing allowed by regulation). *See also* L. ANDREWS, *supra* note 1, at 46.

and inconsistent with a lawyer's duty to educate the public about their legal needs. While it is true that some attorneys may use the increased availability of attorney advertising for admittedly unethical reasons, this is not sufficient justification for denying all attorneys the right to advertise. Advertising does serve the ethical duty of informing the public of their legal rights and needs. A state can still regulate advertising that is false or misleading, but the interests of the state must succumb to the higher interests of the public to receive truthful information.

The states must adopt new attitudes that permit truthful, non-deceptive advertisements so that more of the public can be educated as to their legal rights.[189] For the same reasons, the prohibitions against direct mail solicitation must be eliminated. While in the short run, there may be an increase in attorney advertising in Ohio and elsewhere, there is no proof that this result is harmful. The state bar associations must take positive steps toward educating the public. Effective, efficient attorney advertising serves this purpose, and serves it well. Therefore, all states must eliminate any restrictions that impede the process of attorney advertising. After *Zauderer*, no other result will be acceptable.

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189. This new attitude can best be seen by the new rules for attorney advertising recently adopted by the Ohio Supreme Court. *See Amendments to the Code of Professional Responsibility*, 59 OHIO ST. B.A. REP. 62 (1986). The changes effectively conform with the ABA's new Model Rules of Professional Conduct concerning attorney advertising which were adopted by the ABA in 1983.

The changes include elimination of the "laundry-list" of DR 2-101(B), see *supra* note 20, and implement the false and misleading standard advocated by the ABA, see *supra* note 76, as the only limitation on attorney advertising. *See Amendments to the Code of Professional Responsibility*, *supra*, at 62–63. The amendments also change DR 2-103, see *supra* note 22, to allow self-recommendation in an attorney's advertisement. *See Amendments to the Code of Professional Responsibility*, *supra*, at 64. The amendments add a new DR 2-104(B) which states: "Nothing in this rule prohibits a lawyer from accepting employment received in response to his own advertising, providing such advertising is in compliance with DR 2-101 [the false and misleading standard]." *Id.* at 65. Ethical Considerations 2-9 and 2-10 were combined and now read: "Methods of advertising that are false, misleading or deceptive should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through advertising." *Id.* at 66. The adoption of these amendments are a step in the right direction for freeing the ability of attorneys to communicate truthful and nondeceptive advertising to consumers in order to assist attorneys in fulfilling their ultimate duty to make legal counsel available.