Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification

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I. Introduction

A commentator on lawyer advertising recently posed the question whether the doctrine issued by the Supreme Court in *Bates v. State Bar of Arizona*[1] had produced progression or confusion.[2] *Bates* held that a total ban on lawyer advertising is unconstitutional and that the first amendment protects truthful newspaper advertising of routine legal services and their prices.[3] Characterizing the issue of attorney advertising as "an obvious problem to members of the legal community,"[4] the commentator noted that the Supreme Court has been "gradually filling in the interstices" created by the *Bates* decision.[5] While the questions surrounding lawyer advertising will probably "never be answered to everyone's total satisfaction,"[6] it has been suggested that the Supreme Court's recent decision in *Zauderer v. Office of Disciplinary Counsel*[7] "should finally define the boundaries within which a state may go in limiting lawyer advertisements' discussions of specific legal problems."[8]

In *Zauderer*, the Court held that a state violates the first amendment by prohibiting lawyer advertising that contains illustrations and advice about specific legal problems.[9] The Court, however, simultaneously held that failure to make full disclosure in the advertisement of all possible costs of a lawsuit can result in disciplinary action.[10] The *Zauderer* decision, though, comes as no surprise in view of the Supreme Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

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[1]433 U.S. 350 (1977).

[2]Comment, *Seven Years of the* Bates *Doctrine: Progression or Confusion?*, 7 Am. J. Trial Advocacy 611 (1984) [hereinafter cited as Comment, *Seven Years*].

[3]433 U.S. at 383.

[4]Comment, *Seven Years, supra* note 2, at 620.

[5]*Id.* (citing *In re* Felmeister, 95 N.J. 431, 437, 471 A.2d 775, 778 (1984)).

[6]*Id.* at 621.

[7]105 S. Ct. 2265 (1985).

[8]Comment, *Seven Years, supra* note 2, at 621 n.85 (citing Nat'l L.J., Oct. 15, 1984, at 5, col. 1).

[9]105 S. Ct. at 2280.

[10]*Id.* at 2283 n.15.

Council, Inc.,[11] decided nearly a decade earlier. The *Virginia Pharmacy Board* decision combined issues of commercial speech and regulation of professionals. In its opinion, the Court noted that permissible restrictions on commercial speech include regulation of the time, place, and manner of advertising,[12] prohibitions on advertising which might in any way be false or misleading,[13] and restrictions on advertisements promoting illegal transactions.[14] The *Virginia Pharmacy Board* decision also spawned a line of cases dealing with lawyer advertising. In those cases decided by the Supreme Court, lawyer advertising has consistently been allowed.[15] A sole

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[11]425 U.S. 748 (1976). *Virginia Pharmacy Board* capped a line of cases beginning with Valentine v. Christensen, 316 U.S. 52 (1942), in which the Supreme Court's position had evolved from finding no constitutional restraints on the states' power to regulate "purely commercial advertising" to requiring that first amendment interests be balanced against the public interest served by the regulation in question. *Id.* at 54. *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (state statute making the sale or circulation of any publication which encourages or prompts the processing of an abortion a misdemeanor violates first amendment freedom of speech rights of newspaper editor who published a commercial advertisement announcing availability of placement services of organization in another state where abortion was legal); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (municipal ordinance prohibiting discrimination in employment construed as forbidding newspapers to carry "help wanted" advertisements in sex-designated categories does not infringe first amendment rights of advertisers); Breard v. City of Alexandria, 341 U.S. 622 (1951) (municipal ordinance forbidding door-to-door soliciting for sale of goods without prior consent of owners or occupants does not violate freedom of speech and press); Martin v. City of Struthers, 319 U.S. 141 (1943) (municipal ordinance forbidding door-to-door distribution of handbills or circulars advertising a religious meeting invalid as abridging freedom of speech and religion). In another line of cases, first amendment theory has been expanded to encompass protection of an individual's right to know, in addition to his right of expression. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (state statute prohibiting specified business corporations from making contributions or expenditures to influence or affect the vote on any question submitted to the voters violates the first amendment); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (FCC's "fairness doctrine" requiring that public issues be presented to the public by broadcasters and that both sides of issues be given fair coverage does not violate first amendment rights of FCC licensees). *See generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Cox, *The Supreme Court, 1979 Term-Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

[12]425 U.S. at 771. For a general discussion of content regulation allowable under the first amendment, see Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

[13]425 U.S. at 771.

[14]*Id.*

[15]*See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985); *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In spite of this line of cases upholding a lawyer's right to advertise, Chief Justice Burger was quoted in a speech to an American Bar Association commission on July 7, 1985, as stating that "some of the ads are 'sheer shysterism' and

exception occurred in *Ohralik v. Ohio State Bar Association*,[16] which involved instances of blatant "in-person solicitation" rather than a general public advertisement.[17]

Lawyer advertising continues to be litigated with regularity, primarily because of the manner in which the states have chosen to respond to the *Bates* doctrine. Professional responsibility rules regulating advertising have been revised by the states, but only grudgingly and often in the most restrictive manner possible. An American Bar Foundation research attorney pointed out in 1981 that "the very ad in *Bates* would not be permissible in 27 states or under the ABA Model Code."[18] The American Bar Association changed its Model Code of Professional Conduct in 1983 to allow lawyers to include any information in their ads as long as it is not false, fraudulent, or misleading.[19] However, to date, few states have adopted

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that, if he were a private lawyer again, he would 'dig ditches' before resorting to advertising." Kansas City Times, July 8, 1985, at B-8, col. 5. He also opined that "the actions of 'a tiny handful of lawyers advertising in flagrant ways' are 'pulling down' the image of the entire profession," and claimed "I will never — my advice to the public is never, never, never, under any circumstances, engage the services of a lawyer who advertises." *Id.*

[16]436 U.S. 447 (1978).

[17]*Id.* at 448-52.

[18]L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 43 (1980).

[19]The American Bar Association has changed its Model Code governing attorney advertising twice since 1977. The 1980 amendments permitted and regulated advertising of legal services in the public media. Disciplinary Rule 2-101 expressly prohibited "false, fraudulent, misleading, deceptive, self-laudatory, or unfair" advertising. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1979). Then it went on to create a list of 25 categories of information lawyer ads would be permitted to contain. Generally, the permissible content categories involved personal information about the lawyer and facts relating to the lawyer's qualifications, the areas of law in which the lawyer practiced or specialized, and information concerning the lawyer's fees and arrangements for payment. *Id.*

Given the problems inherent in the application of DR 2-101, the ABA continued its consideration of lawyer advertising issues. This resulted in the publication, in 1981, of a new proposed Model Rule 7.1. Model Rule 7.1 rejected the "laundry list" approach of DR 2-101 on the grounds that information the public might think relevant could not be adequately identified in such a manner. Instead, Model Rule 7.1 took the approach of simply forbidding a lawyer to "make any false or misleading communication about the lawyer or the lawyer's services" and then described what made a statement "false or misleading." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983). Specifically, the rule provides that a communication is false or misleading if it:

> (a) contains a material misrepresentation of 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
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

the ABA 1983 Model Rules.[20]

It is apparent that the *Bates* doctrine has produced both progress and confusion. Although Supreme Court decisions have steadily and gradually been filling in the interstices created by *Bates*, many issues remain unresolved. The states are split on the legality of direct mail advertising. States prohibiting such advertising perceive it as impermissible solicitation,[21] while states upholding attorney direct mailings view it as permissible advertising.[22] Another unresolved issue is the relationship between advertising

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Id. The Model Rules of Professional Conduct were adopted by the ABA in 1983 with Rule 7.1 intact. It is this version that is now under consideration by a number of the states.

[20]The states have, for the most part, used the ABA's proposals only as a reference source for drafting their own response to *Bates*. *See* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 135-46 (1980); Braverman, *ISBA and CBA Joint Committee Reviews Illinois Code/ABA Model Rules*, 73 ILL. B.J. 544 (1985); Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest*, 46 BROOKLYN L. REV. 423 (1980); ‡ *ABA Rules Drubbed at N.Y. Bar Meeting*, Nat'l L.J., Feb. 11, 1985, at 3, col. 3. As of the end of 1985, only eight states had adopted the ABA Model Rules. *See Fight Intensifies on Ethics Rules*, Nat'l L.J., Dec. 9, 1985, at 3, 8; *Model Rules Jolted*, ABA Journal, Jan. 1986, at 18.

[21]*See, e.g.*, Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981) (advertisement mailed to addressees listing only initial consultation fee and broad areas of law without information on charges for those services not informative in nature but rather impermissible solicitation); Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1981) (letter mailed by attorney recommending own employment violates state interest in prohibiting direct mail solicitation motivated solely by personal pecuniary gain); State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982) (letters mailed by attorney to persons whose names were gathered from the Realtors Multiple Listing constituted recommendation of own employment and was impermissible direct solicitation); Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489 (La. 1978) (letters mailed by attorneys to certain employers which sought formation of contract for prepaid legal services were impermissible direct solicitation); *In re* Green, 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) (direct mail advertising by attorney to real estate brokers soliciting broker to refer clients to attorney was impermissible third-party mailing); Adler v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978) (attorneys who phoned and mailed form letters to clients of law firm which formerly employed them in efforts to procure business for own new law firm violated state disciplinary rule against self-recommendation where non-lawyer had not sought advice regarding employment), *cert. denied*, 442 U.S. 907 (1979). *See generally* Thurman, *Direct Mail: Advertising or Solicitation? A Distinction Without a Difference*, 11 STETSON L. REV. 403 (1982); Note, *Attorney Direct Mailings as Impermissible Solicitation or Permissible Advertising*, 9 J. OF THE LEGAL PROF. 211 (1984).

[22]*See, e.g.*, Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978) (letters mailed to real estate agencies stating only price charged for routine legal services in real estate transactions and no words of solicitation did not constitute prohibited in-person solicitation); *In re* Appert, 315 N.W.2d 204 (Minn. 1981) (disciplinary rule prohibiting distribution of brochure and mailing of informational circular which advertised attorneys' experience and availability in products liability suits against intrauterine device manufacturer are unconstitutional restrictions on first amendment right to free speech); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (direct mailing of letter to individual real property owners soliciting use of attorney's legal services for the sale of real property was neither misleading nor promoting unlawful activity). *See generally*

specific services and the state's power to regulate specialization within the profession.[23] Finally, the Court noted in *Bates* that "the special problems of advertising on the electronic broadcast media will warrant special con-

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Stoltenberg & Whitman, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381 (1984); Note, *Mail Advertising by Attorneys and the First Amendment*, 46 ALA. L. REV. 250 (1981); Comment, *Attorney Direct Mail Communication: The* Koffler *Commercial Speech Approach*, 4 W. NEW ENG. L. REV. 397 (1982).

> In general, states take one of three approaches to direct mail. One approach is patterned after Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct. It provides that a lawyer may distribute letters generally to persons not known to need legal services of the kind provided by the lawyer but who are so situated that they might find such services useful . . . . Another approach . . . permits mailings to people whom the lawyer has identified as needing specific legal services in a particular manner. . . . The third, most liberal, approach would permit lawyers to send letters to any potential client.

The Barriers to Lawyer Advertising, Nat'l L.J., Dec. 16, 1985, at 14, col. 3-4.

[23]The issue of a state's power to regulate specialization was addressed in *Zauderer*, where the Supreme Court discussed Ohio's prohibition of Zauderer's advertisement containing advice about a specfic legal problem. The Court stated that the "advertisement did not promise readers that lawsuits alleging injuries caused by [the defendant's product] would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation." 105 S. Ct. at 2276. Commenting more generally, the Court noted that

> [a]lthough our decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services, they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Id. at 2276 n.9 (citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977)); *In re* R.M.J., 455 U.S. 191, 203-05 (1982)). The Supreme Court appeared to enhance the deference due state specialization certification procedures when, in January, 1986, it dismissed a challenge to a Texas bar rule that forbids lawyers from advertising for any specific type of case unless they have been certified as specialists in that area. *Advertising Challenge Is Dismissed*, Nat'l L.J., Jan. 27, 1986, at 11, col. 1-2. *See also In re* Mountain Bell Directory Advertising, 185 Mont. 68, 604 P.2d 760 (1979) (state supreme court would not approve telephone company plans to permit lawyers to advertise under 33 different sub-headings of practice). *See also* ABA Model Rule 7.4, which states:

> A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
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> (a) a lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation "patent attorney" or a substantially similar designation;
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> (b) a lawyer engaged in admiralty practice may use the designation 'admiralty,' 'proctor in admiralty' or a substantially similar designation; and
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> (c) (provisions on designation of specialization of the particular state).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1983). *See generally* Dickason, *Advertising, Yes! Specialization, When?*, 72 ILL. B.J. 332 (1984); Note, *Seven Years of the* Bates *Doctrine: Progression or Confusion?*, 7 AM. J. TRIAL ADVOC. 611, 614-15 (1984); *Three Challenge Texas Bar's Rule on Ads*, Nat'l L.J., June 3, 1985, at 8, col. 3; *Iowa Justices Delay Decision on Specialization*, Nat'l L.J., Apr. 8, 1985, at 9, col. 1, 38; *Tennessee Lawyers Sue to Overturn Required Ad Disclaimer*, Nat'l L.J., Feb. 11, 1985, at 6, col. 1.

sideration."[24] The state courts' subsequent decisions in broadcast media cases, however, have not been uniform.[25]

This Article analyzes the Supreme Court's opinions on lawyer advertising through *In re R.M.J.*,[26] examines the trends that have been evolving in the states since *In re R.M.J.*,[27] and concludes with a discussion and analysis of *Zauderer*. The authors' goal is to derive from the vast and growing volume of cases spawned by *Bates* those basic principles which serve as the foundation for the resolution of future cases in this area of continuing ferment.

II. From *Bates* to *R.M.J.*

The Supreme Court has issued several decisions regarding lawyer advertising between *Bates v. State Bar of Arizona*,[28] where it invalidated a blanket suppression of lawyer advertising as violative of the first amendment, and *In re R.M.J.*,[29] where the Court considered the rules regarding lawyer advertising Missouri adopted in the wake of *Bates*. In *Bates*, two Arizona attorneys decided to advertise to attract the volume of business necessary to sustain their "legal clinic."[30] They placed an advertisement in a Phoenix newspaper which stated that the clinic provided "legal services at very reasonable fees"[31] and which identified exact prices for several routine legal services.[32] The advertisement also stated that information regarding other types of cases would be furnished on request.[33] Arizona's Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme

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[24]*Bates*, 433 U.S. at 384.

[25]In Committee on Professional Ethics and Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded,* 105 S. Ct. 2693 (1985), an Iowa court enjoined a law firm from airing three television commercials which featured an actor or actress discussing an injury caused by negligence. The court determined that the advertisements violated various disciplinary rules because they were misleading. *Id.* at 570. The case was remanded to the Supreme Court of Iowa for further consideration in light of Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). *See infra* notes 158-65 and accompanying text for a discussion of the *Humphrey* case.

[26]455 U.S. 191 (1982).

[27]*Id.*

[28]433 U.S. 350 (1977).

[29]455 U.S. 191 (1982).

[30]433 U.S. at 354.

[31]*Id.* An illustration of the advertisement is shown at 433 U.S. at 385.

[32]The legal services and prices advertised were:

> Divorce or legal separation — uncontested (both spouses sign papers): $175 plus $20 court filing fee. Preparation of all court papers and instructions on how to do your own simple uncontested divorce: $100. Adoption — uncontested severance proceeding: $225 plus approximately $10 publication cost. Bankruptcy —non-business, no contested proceedings — individual: $250 plus $55 court filing fee; wife and husband: $300 plus $110 court filing fee. Change of Name — $95 plus $20 court filing fee.

Id. at 385.

[33]*Id.*

Court of Arizona, prohibited any lawyer advertising.[34] The attorneys conceded that the advertisement violated the disciplinary rule, but argued that the rule violated their first amendment rights.[35]

The Arizona Bar Association urged six separate grounds for sustaining the regulation: (1) the adverse effect on professionalism, (2) the inherently misleading nature of attorney advertising, (3) the adverse effect on the administration of justice, (4) the undesirable economic effects of advertising, (5) the adverse effect of advertising on the quality of service, and (6) the difficulties of enforcement.[36] The Supreme Court concluded that the public's need for information about the availability and terms of legal services outweighed all of these concerns.[37] Indeed, the Court felt that the advertising prohibition was inconsistent with some of the particular purposes advanced.[38]

The Court, however, exercised great care to limit its holding to the facts of the case. It stated that the constitutional issue was "only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal ser-

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[34]Disciplinary Rule 2-101(B) stated in part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

433 U.S. at 355 (citing Arizona statute) (footnote omitted).

[35]433 U.S. at 356. The attorneys also argued that the disciplinary rule violated sections 1 and 2 of the Sherman Act because it limited competition. *Id.*

[36]*Id.* at 368-79.

[37]*Id.* at 379.

[38]In addressing the argument that lawyer advertising is inherently misleading in nature, the Court stated that

> it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative — the prohibition of advertising — serves only to restrict the information that flows to consumers. . . . Although, of course, the bar retains the power to *correct omissions* that have the effect of presenting an *inaccurate* picture, the preferred remedy is more disclosure, rather than less.

Id. at 374-75 (emphasis added). Regarding the adverse effect on the administration of justice, the Court commented that "[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376. The argument that lawyer advertising produces undesirable economic effects was defeated by the Court's statement that "[t]he ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced." *Id.* at 377. Briefly addressing the adverse effect of lawyer advertising on the quality of legal services, the Court stated that "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work." *Id.* at 378. Finally, on the difficulties of enforcement, the Court noted with irony that "[i]t is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Id.* at 379.

vices."[39] The Court expressly stated that it was not considering two issues: the peculiar problems associated with advertising claims relating to the quality of legal services and the problems associated with in-person solicitation of clients.[40] Finally, the Court mentioned "some of the clearly permissible limitations on advertising not foreclosed by our holding."[41] These include reasonable time, place, and manner restrictions, suppression of advertising concerning transactions that are themselves illegal, and restraints on false, deceptive, or misleading advertising.[42] Some considerations for applying the false, deceptive, or misleading standard to lawyers' advertising in particular were suggested,[43] but they were so vague as almost to insure that the Court would have to speak to the issues involved with greater particularity in future cases.

After *Bates*, the Court did not take another case involving lawyer advertising until it decided *In re R.M.J.*[44] In the interim, however, the Court decided three cases which have since had a strong impact on the issues involved in lawyer advertising: *In re Primus*,[45] *Ohralik v. Ohio State Bar Association*,[46] and *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*.[47] In the companion cases of *Primus* and *Ohralik*, the Court dealt with commercial speech issues arising from in-person solicitation by lawyers, a topic the Court had expressly avoided in *Bates*. In *Central Hudson*, the Court formulated a four-pronged test to be applied in all challenges to a state's attempt to regulate commercial speech.

In *In re Primus*, the Court held that where the American Civil Liberties Union ("ACLU") engages in litigation as a means for effective political expression and association, the first amendment protects efforts in pur-

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[39]*Id.* at 384. The limited scope of the opinion may lend additional force to the criticism that in its approach to the first amendment in recent years, the Court has "paid little attention to building a systematic body of law, but [has] instead engaged in particularistic and pragmatic balancing." Cox, *supra* note 11, at 26.

[40]433 U.S. at 366 (emphasis added). The Court did give some hint of its attitude toward these issues, however: "[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation." *Id.* at 383-84.

[41]*Id.* at 383. This statement implies the existence of other permissible limitations, but no hint is given of what they might be.

[42]*Id.* at 383-84 (citing *Virginia Pharmacy Board*, 425 U.S. at 771).

[43]The Court stated that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 383. The Court noted that whether an advertisement is misleading will require consideration of the legal sophistication of its audience and that different degrees of regulation may thus be necessary in different areas. *Id.* at 383 n.37.

[44]455 U.S. 191 (1982).

[45]436 U.S. 412 (1978).

[46]436 U.S. 447 (1978).

[47]447 U.S. 557 (1980).

suit of such litigation.[48] *Primus* dealt with an attorney, Edna Smith Primus, who was associated with the Carolina Community Law Firm and was an officer and cooperating lawyer with a branch of the ACLU. Primus went to a meeting attended by persons who had been sterilized as a condition for continued receipt of medical assistance. In August of 1973, the ACLU decided it would file suit on behalf of any persons sterilized pursuant to this program. Primus, having been informed that Mary Williams was willing to institute suit, wrote Williams on August 30, advising her of the ACLU's offer of free legal representation. Williams subsequently met with the doctor who performed the operation and at that time, having shown the doctor and his attorney Primus' letter, called Primus and announced her intention not to sue. There was no further communication between Williams and Primus.

A complaint was filed against Primus with the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina ("Board"). A panel appointed by the Board found the lawyer guilty of soliciting a client on behalf of the ACLU.[49] Subsequently, the

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[48]436 U.S. at 436-39.

[49]Specifically, Primus was found guilty of violating South Carolina's Disciplinary Rules (DR) 2-103(D)(5)(a) and (c) and 2-104(A)(5). South Carolina's Rule (DR) 2-103(D) provided:

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person: (l) A legal aid office or public defender office:
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> (1) A legal aid office or public defender office:
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> (a) Operated or sponsored by a duly accredited law school.
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> (b) Operated or sponsored by a bona fide non-profit community organization.
>
> (c) Operated or sponsored by a governmental agency.
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> (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
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> (2) A military legal assistance office.
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> (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
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> (4) A bar association representative of the general bar of the geographical area in which the association exists.
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
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> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> (b) The recommending, furnishing, or paying for legal services to its members

Board approved this finding, and its findings were adopted verbatim by the Supreme Court of South Carolina.[50]

Primus argued, based on *NAACP v. Button*[51] and its progeny, that her activities involved constitutionally protected expression and association. In *Button*, the Court had stated that the NAACP's activities which encourage litigation do not constitute solicitation the state can prohibit, but instead are forms of political association and expression fully protected by the first and fourteenth amendments.[52] Without referring to any of its earlier commercial speech cases, the Court found that because the

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is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

436 U.S. 418-19 n.10 (citing DR 2-103(D) incorporated into South Carolina Supreme Court Rule 32 (1976)). South Carolina's DR 2-104(A) provided:

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, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1), (2), or (5) may represent a member or beneficiary thereof to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Id. at 418-19 n.11 (citing DR 2-104(A) incorporated into South Carolina Supreme Court Rule 32 (1976)).

[50]*Id.* at 418-21.

[51]371 U.S. 415 (1963). Subsequent decisions interpreting *Button* have established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964).

[52]371 U.S. at 428-30.

ACLU was similar in relevant respects to the NAACP,[53] any statute prohibiting activity like the ACLU's had to withstand exacting scrutiny in order to be found constitutional.[54] It concluded that Primus had not engaged in in-person solicitation, and that because the case was on a par with *Button*, her activity was protected by the first amendment.[55] Her "speech — as part of associational activity — was expression intended to advance 'beliefs and ideas,' "[56] and, as such, was subject to the full protection of the first amendment rather than the partial protection of the commercial speech doctrine.

In the companion case of *Ohralik v. Ohio State Bar Association*, the Court held that the state bar can constitutionally discipline an attorney for soliciting individuals for pecuniary gain under circumstances likely to pose dangers that the state has an interest in preventing.[57] In *Ohralik*, an experienced lawyer personally solicited the representation of two young auto accident victims in a suit to recover insurance money and was found guilty of in-person solicitation by the Ohio State Bar Association. The Supreme Court first noted that *Bates*[58] did not automatically control the decision because the in-person solicitation involved in the *Ohralik* case differed from the type of communication approved in *Bates*, and because the state's countervailing interest in prohibition was much greater in *Ohralik* than in *Bates*. Specifically, the Court reasoned:

> In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity

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[53]The Court noted that the ACLU engaged in litigation for the purpose of communicating useful information to the public and expressing their political beliefs. 436 U.S. at 431. The Court rejected the argument that because the ACLU has a policy of requesting an award of counsel fees that this case was outside the protection of the *Button* case. *Id.* at 429.

[54]The Court indicated that South Carolina must demonstrate some compelling reason for its actions. *Id.* at 432 (citing Bates v. Little Rock, 361 U.S. 516, 524 (1960)). The Court found that South Carolina's Disciplinary Rules were so broad as to prevent any lawyer employed by or cooperating with the ACLU from giving unsolicited advice to any lay person who later retained the organization. *Id.* at 433. The Court also noted that an attorney could be punished under these solicitation rules without any proof of some evil flowing from the attorney's actions. *Id.* at 433.

[55]In holding that Primus' letter was clearly protected by the first amendment, the Court seemed to look favorably on such written communications because it stated, "[T]he fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct. . . . The manner of solicitation in this case certainly was no more likely to cause harmful consequences than the activity considered in *Button* . . . ." *Id.* at 435-36.

[56]*Id.* at 438, n.32 (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

[57]436 U.S. 447, 464-68 (1978).

[58]433 U.S. 350 (1977).

> for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.[59]

The Court further argued that the state has the responsibility for maintaining the professional standards of lawyers, particularly because lawyers are essential to the administration of justice.[60] The advertising in *Bates* did not erode this important interest of the state, but the type of blatant solicitation involved in *Ohralik* — a kind of "ambulance chasing" — did severely affect the state's interest in preserving professionalism among lawyers.[61] Given the longstanding regulation by the bar of the professional ethics of lawyers, and given the longstanding, judicially recognized rationales for that regulation, the case fits neatly into the Court's belief that commercial speech does not deserve full first amendment protection.[62] Some regulation of commercial speech is constitutionally permissible, and the Court in *Ohralik* found it easy to justify such regulation in light of the state's important interests in protecting consumers and preventing fraud, undue influence, and overreaching.

In a case of major significance to commercial advertising as well as attorney advertising, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*[63] set forth a test for determining when the state can regulate commercial speech. The New York Public Service Commission had ordered all electric utilities in New York to stop any advertising that promoted the use of electricity. However, the Commission permitted "informational" advertising designed to encourage shifts of consumption from real demand times to periods of low demand. The regulation was first promulgated during an energy shortage, but the Commission decided to make the regulation permanent in order to promote

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[59]*Ohralik*, 436 U.S. at 457 (footnote omitted).

[60]*Id.* at 460.

[61]The Court summarized the case against the lawyer:

> He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released . . . . He employed a concealed tape recorder . . . . He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw . . . .

Id. at 467.

[62]*See, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where the Court noted that permissible restrictions on commercial speech include regulation of the time, place, and manner of advertising. *Id.* at 771.

[63]447 U.S. 557 (1980).

energy conservation. The New York Court of Appeals found the regulation to be constitutional,[64] but the Supreme Court reversed in a comprehensive opinion concerning the doctrine of commercial speech. The Court noted that the Commission's order restricted only commercial speech, which was defined as "expression related solely to the economic interests of the speaker and its audience."[65] The Court determined that the regulation violated the first and fourteenth amendments because it completely banned promotional advertising.[66] Furthermore, commercial speech, the majority argued, should be treated differently from other forms of speech.[67] The Court announced a test to be applied in commercial speech cases:

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[64]Consolidated Edison Co. v. Public Serv., 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *rev'd*, 447 U.S. 557 (1980). The New York court thought that promotional advertising would only exacerbate the energy crisis, and therefore the governmental interest in prohibiting this speech outweighed the constitutional value of the commercial speech. *Id.* at 110, 390 N.E.2d at 758, 417 N.Y.S.2d at 39.

[65]447 U.S. at 561. The Court summarized the commercial speech doctrine and the important cases:

> The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Id. at 561-62 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976)).

[66]*Id.* at 570.

[67]*Id.* at 561-62. The Court noted that commercial speech receives *less* protection than traditionally protected non-commercial speech. The Court then attempted to summarize *what regulation* of commercial speech was *permissible*:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity . . . .
>
> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

> 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.[68]

This four-part test has since served as the benchmark for determining when the states can regulate commercial speech.[69]

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447 U.S. at 563-64 (cinting Friedman v. Rogers, 440 U.S. 1, 13 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465-66 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)) (footnote omitted). *See generally* Jackson & Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38-39 (1979).

[68]447 U.S. at 566. The Court's application of its newly articulated four-part test may be summarized as follows. The Commission had not argued that the expression in question was inaccurate or related to an unlawful activity. The New York Court of Appeals, however, had suggested that in light of the noncompetitive market in the utility field, the Commission's order did not restrict commercial speech of any worth. 47 N.Y.2d at 110, 390 N.E.2d at 757, 417 N.Y.S.2d at 39. The Supreme Court rejected this argument. It noted that utilities compete for energy with other users of energy. Furthermore, consumers need to decide how much energy they need to use, and such a regulation decreased the total amount of information available to the public.

The Court observed that "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." 447 U.S. at 567. The Court conceded, however, that the asserted interest of the state in encouraging energy conservation was substantial. Likewise, it conceded that the state's interest in fair rates was also a substantial goal. The ban was deemed to advance those interests. *Id.* at 568-69. The critical question, then, was whether the Commission's order was no more extensive than necessary to advance the state's asserted interests. The Commission completely suppressed speech ordinarily protected by the first amendment. The Court stated that the energy conservation rationale could not justify "suppressing information about electric devices or services that would cause no net increase in total energy use." *Id.* at 570. To the extent the order suppressed speech that in no way impaired the goal of energy conservation, the ban violated the first and fourteenth amendments. Furthermore, the state failed to demonstrate that a more limited restriction on the content of ads would not adequately serve the state's interests. *Id.*

[69]Some commentators, while agreeing with the result in *Central Hudson*, took issue with the four-part test adopted in the case, preferring instead a rule fully protecting both commercial and non-commercial speech:

> The four-part analysis enunciated by the Court in *Central Hudson* and the implicit holding that narrowly drawn content-based regulation of accurate commercial speech would be constitutional are, however, inconsistent with the principles underlying the first amendment. Because commercial expression furthers the same values and interests that require protection of other forms of speech, regulation based on the content of the former should receive full constitutional protection.

The Supreme Court, 1979 Term, 94 HARV. L. REV. 75, 164 (1980). The authors also note, in light of the failure of the Court to define commercial speech, "[T]he application

The decision in *Central Hudson* set the stage for the next Supreme Court decision dealing with attorney advertising. In *In re R.M.J.*,[70] the Court addressed whether Missouri's rules regarding lawyer advertising adopted in the wake of *Bates*[71] violated the first amendment commercial speech doctrine set forth in *Central Hudson*.[72] The court concluded that truthful advertising related to lawful activities is protected by the first amendment, but where the advertising is false, deceptive, or misleading, the state can property regulate it.[73] Even where the communication is not misleading, the state retains some authority to regulate if it can assert a substantial interest and that the interference with speech is in proportion to the interest served.[74]

The Advisory Committee had charged a lawyer (R.M.J.) with four violations of the revised Disciplinary Rule on publicity, DR 2-101.[75] First,

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of a lower level of protection to speech labeled 'commercial' threatens to dilute the protection afforded social and political expression." *Id.* at 167.

Other writers observed that the *Central Hudson* formulation shifts a new burden to the state when it wishes to regulate activity:

> [It] shifts to the government the onerous burden of proving that a restriction on truthful commercial advertising concerning lawful activity both directly advances a substantial interest and was selected only after a meticulous appraisal of narrower alternatives.

Fein, *Free Speech in Ads Wins Key Plug From Brethren*, Nat'l L.J., Nov. 17, 1980, at 15, col. 1.

[70]455 U.S. 191 (1982).

[71]433 U.S. 350 (1977).

[72]447 U.S. 557 (1980).

[73]*In re* R.M.J., 455 U.S. 191, 203 (1982).

[74]*Id.*

[75]The revised Missouri rule stated:

(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 respecting the quality of legal services or 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, subject to DR 2-103, the following information in newspapers, periodicals and the yellow pages of telephone directories distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a substantial part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A), and is presented in a dignified manner:

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

(2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by the Advisory Committee;

(3) Date and place of birth;

(4) Schools attended, with dates of graduation and degrees;

(5) Foreign language ability;

(6) Office hours;

he had placed an advertisement in a neighborhood newspaper listing areas

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(7) Fee for an initial 30-minute consultation;
(8) Availability upon request of a schedule of fees;
(9) Credit arrangements for payment of fees will be given consideration;
(10) The fixed fee to be charged for the following specific routine legal services:
1. An uncontested dissolution of marriage;
2. An uncontested adoption;
3. An uncontested personal bankruptcy;
4. An uncomplicated change of name;
5. A simple warranty or quitclaim deed;
6. A simple deed of trust;
7. A simple promissory note;
8. An individual Missouri or federal income tax return;
9. A simple power of attorney;
10. A simple will;
11. Such other services as may be approved by The Advisory Committee, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

(C) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(D) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(E) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:
(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
(3) In routine reports and announcements of a bona fide business, civic professional, or political organization in which he serves as a director or officer.
(4) In and on legal documents prepared by him.
(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

of practice which had not been approved.[76] Second, he had listed courts where he had been admitted to practice. Third, he had not included a required disclaimer of certification to practice in the listed areas of law. Finally, he had sent professional announcement cards announcing the opening of his office to persons other than lawyers, clients, former clients, personal friends, and relatives in violation of DR 2-102(A)(2).

R.M.J. urged the Missouri Supreme Court to modify its standards in accordance with the four-part test enunciated in *Central Hudson*.[77] The court declined to do so and privately reprimanded him, stating that it "respectfully decline[d] to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court."[78]

The Supreme Court reversed and Justice Powell, speaking for a unanimous Court, indicated the Court's intention to apply the *Central Hudson* commercial speech doctrine to professional advertising cases. The Court commented on the state of the commercial speech doctrine as applied to professionals and advertising:

(F) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

MO. ANN. STAT. DR 2-101 (Vernon 1982), *reprinted in In re* R.M.J., 609 S.W.2d 411, 412-13 (Mo. 1980), *rev'd,* 455 U.S. 191 (1982).

[76]*In re* R.M.J., 609 S.W.2d at 411. Strangely, the approved areas of law and terminology did not appear in DR 2-101, but in an Advisory Committee's addendum to DR 2-101(B)(2), published only in the January-February 1978 Journal of the Missouri Bar. *Id.* at 415 (Seiler, J., dissenting).

The addendum listed twenty-three areas of law which could be used in advertising. It permitted no deviation from these phrases. It also required the following disclaimer: "Listing of the above areas of practice does not indicate any certification of expertise therein." *Id.*

[77]447 U.S. 557 (1980).

[78]609 S.W.2d at 412 (emphasis in original). Justices Bardgett and Seiler dissented. Justice Bardgett disagreed first with the requirement in the addendum that only certain boilerplate language describing a field of practice be permitted in an advertisement. The charge had been made that R.M.J. had used phrases contrary to those specified in the addendum such as "contracts," and "personal injury" rather than "tort law" and "Workman's Compensation" rather than "Worker's Compensation Law." Responding to these charges, Justice Bardgett urged that the addendum should "be considered as a guide and that no unethical conduct is committed if the terminology used to describe a field of practice is reasonable and fairly describes to a nonlawyer the field of law spoken of in the advertisement." *Id.* at 414 (Bardgett, J., dissenting). He also found that R.M.J.'s statement that he had been admitted to practice in Missouri, Illinois, and before the United States Supreme Court was not unethical. *Id.* He also rejected the contention that mailing such material constituted unethical behavior. *Id.* Justice Bardgett, however, would not have applied *Central Hudson* in its entirety to lawyer advertising because he believed the court "should continue to exercise responsibility to the public in regulating the practice of law and this includes advertising." *Id.*

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.
>
> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.[79]

Justice Seiler also would have dismissed the charges against R.M.J. As to the disclaimer, Justice Seiler would have dismissed the charge because R.M.J. immediately attempted to change his advertisements upon being notified of the rule. *Id.* at 415-16 (Seiler, J., dissenting). Justice Seiler did not believe listing courts where admitted to practice should be permitted in an advertisement, but he did not feel in this case that the listing warranted discipline. *Id.* at 416. "I doubt that informational value gained by the consumer by advertising the isolated fact of admission to the United States Supreme Court justifies the risk of the false impression that such advertising may convey." *Id.* Justice Bardgett, as noted earlier, would have permitted such a listing. *Id.* at 414 (Bardgett, J., dissenting). Justice Seiler also rejected the requirement of using only the phrases in the addendum to describe the areas of practice. In fact, Justice Seiler acknowledged that some of the phrases used by R.M.J. actually might be more helpful to consumers. *Id.* at 416 (Seiler, J., dissenting). Finally, he regarded the mailing of this information as constitutionally permissible in light of *Central Hudson*. Furthermore, Justice Seiler argued that the disciplinary rules in question violated the free speech clause of the Missouri Constitution. *Id.*

[79]455 U.S. at 203. The Court recognized, however, that the *Central Hudson* test must be applied to professional services advertising in light of the special characteristics that advertising has to "mislead and confuse that are not present when standardized products or services are offered to the public." *Id.* at 204 n.15.

The Court recognized that these general principles do not provide "precise guidance," but as they are applied on a case-by-case basis, more guidance will be available. *Id.* at 204 n.16. The language quoted in the text, therefore, should assuage the fears of commentators that the Court's decision in Friedman v. Rogers, 440 U.S. 1 (1979), where it declined to apply a least restrictive means analysis to the state's prohibition of the use of a trade name in connection with an optometric practice, presaged a movement away from this form of analysis. *See generally* Note, *Reuniting Commercial Speech and Due*

However, when the Court finally got to the facts of the case, it found itself unable to apply the principles which allow the state to regulate in the commercial speech area. As to the reprimand for deviating from the precise areas of practice, the State of Missouri was unable to show that any of the advertising forms used by the appellant were misleading or that any substantial state interest was promoted by the regulations:

> Because the listing [of areas of practice] published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of Rule 4 is an invalid restriction upon speech as applied to appellant's advertisement.[80]

The Court also saw no justification for a rule prohibiting the listing of jurisdictions in which a lawyer is licensed to practice,[81] although it was somewhat troubled by the potentially misleading statement that he was a member of the bar of the Supreme Court of the United States. Even so, it decided to permit such information in light of the absence of information in the record that the material was misleading.[82] The third violation was not addressed because the appellant did not raise it. The Court also rejected the mailing of professional announcement cards as a basis for disciplinary action:

> Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailing and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path.[83]

Thus, the Court found no evidence that any of R.M.J.'s material

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Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers, 57 TEX. L. REV. 1456, 1473 (1979).

[80] 455 U.S. at 205.

[81] *Id.*

[82] *Id.*

[83] *Id.* (footnotes omitted). To alleviate any fears associated with receiving letters from attorneys, the Court suggested that any envelope received from an attorney containing an advertisement must include the statement "This is an Advertisement." 455 U.S. at 206 n.20.

was misleading.[84] In short, *In re R.M.J.* was an easy case. According to the Court, the State of Missouri had not even tried to justify its regulations. Therefore, the Court could not invoke the state's right to regulate as it apparently wanted to do.

III. Trends in State Court Decisions Since *In re R.M.J.*

A. Misleading Advertising in the Wake of R.M.J.

The Supreme Court in *R.M.J.* allowed for the *total prohibition* of "misleading advertising."[85] At the same time, however, the Court barred states from imposing an "absolute prohibition on certain types of *potentially misleading* information . . . if the information also may be presented in a way that is not deceptive."[86] The Court put some flesh on the bones of this distinction. First, it noted "listing of areas of practice" as an example of the "potentially misleading information."[87] Second, the Court echoed the prong of the fourth *Central Hudson* test by stating that allowable restrictions could be "no broader than reasonably necessary to prevent the deception."[88]

Given the lack of detail in such a standard, it is not surprising that the cases decided by state supreme courts after *R.M.J.* raised the issue whether the ads in question were misleading, either actually or potentially. Thus, in *State ex rel. Oklahoma Bar Association v. Schaffer*,[89] the Oklahoma Supreme Court divided lawyer advertising into three categories: (1) inherently misleading or proven to be misleading in practice, (2) potentially misleading, or (3) not misleading.[90] The court analyzed allowable restrictions in each category as follows:

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[84]The Court stated:

> There is no finding that appellant's speech was misleading. Nor can we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proven to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.

Id. at 206-07.

[85]*See supra* text accompanying note 79. It is important to note that the scope of the prohibition relates to both the "content" and "method" of advertising employed. *Id.*

[86]455 U.S at 203 (emphasis added).

[87]*Id.*

[88]*Id.*

[89]648 P.2d 355 (Okla. 1982).

[90]*Id.* at 358.

> The first category may warrant absolute state prohibition. As to the second, the regulatory device, as suggested in *Bates*, is not necessarily a total ban but rather a required disclaimer or explanation. The restriction on potentially misleading advertising may be no broader than reasonably necessary to prevent specific deception. Regulation of the third category must be justified by a showing of substantial state interest. . . . Unless it is shown that the objectionable ads are either misleading or their restriction furthers some substantial state interest, respondent's exercise of commercial speech cannot be subjected to regulation.[91]

Schaffer concerned a disciplinary proceeding for a lawyer's use of two newspaper advertisements. One offered legal services for adopting a step-child and the other promised free legal services if they were not performed within a certain period of time.[92]

Reviewing the prior proceedings on the ads in question, the court found no contention by the Bar or finding by the trial authority that the ads were misleading. The court noted that the "record fail[ed] to reflect that in practice ads of the type here under consideration may be misleading or that somebody has in fact been harmed by them."[93] The court then looked to see if the state's restriction furthered some substantial state interest. Concluding that the "substantial interest interposed by the state in justification of its restrictive policy — as applied to these ads — rests on the need for protecting an unsophisticated lay public from potential harm from lawyer advertising,[94] the court rejected the claim as "unfounded."[95] Specifically, as to the second ad promising free legal services if not performed within five days, the court concluded that the state surely has no interest in suppressing free legal services or in discouraging expeditious performance by a lawyer.[96]

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[91] *Id.*

[92] *Id.* at 356. The first advertisement stated: "adopt: to love and cherish as your own. Perhaps you already love and cherish your step-child . . . . Even so, he may be certain benefits. A legal adoption may give your step-child many of these benefits while telling your step-child you want him as your very own."

The second advertisement stated: "Need a lawyer? 5 days — or free. Within 5 working days after you provide us with the information we need, we will file the necessary court documents, or if filing is not appropriate, begin providing legal services — or our services are free. Good for 30 days. DIVORCE NAME CHANGE WILLS INCORPORATION ADOPTION."

[93] *Id.* at 358.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 359. The second ad was challenged not on the grounds that it was misleading but rather because it was closely akin to a prohibited guarantee of quality. *Id.* For further discussion regarding the second ad see *infra* text accompanying notes 113-17.

As to the first ad, the Bar had argued that its content did not "impart knowledge designed to foster informed and reliable decision making for counsel selection;" rather,

By contrast, the Utah Supreme Court at about the same time voiced a more expansive concept of the state's interests which might underlie allowable restrictions.[97] In the course of approving a set of proposed new disciplinary rules, the court recognized the state's interest in "protecting the public from false, deceptive, or misleading advertising, . . . and from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct."[98] It also indicated that the state has substantial interests in "guarding against advertisements containing common, cheap or undignified claims and in maintaining high standards of dignity and professionalism."[99] It seems fair to characterize the Oklahoma and Utah decisions as representing polar positions adopted by state supreme courts in the wake of *R.M.J.*

Within these conceptual boundaries, the resolution of various cases following *R.M.J.* involved the issues of whether lawyer advertisements regarding fees, claims of expertise in certain areas, or claims of specialization were misleading.[100]

Two cases raised the issue of whether the manner of stating fees in an advertisement had been misleading. In *Kentucky Bar Association v. Gangwish*,[101] a lawyer had authorized or caused the publication of an ad in a chamber of commerce brochure that his law firm "would provide for a period of four months a twenty-percent (20%) discount to members of the Chamber on the cost of legal services."[102] The court read *Bates*

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it appealed "solely to the emotions of the reader." *Id.* The court disagreed and concluded that the ad was a benefit to the public:

> The perils of harm to be dealt by professional advertising must be carefully weighed against the benefits from unimpeded flow of information. Advertising can play a meaningful role in aiding consumers' recognition of a legal problem and in gaining better insight into the economics of the law practice. We find this ad free of any information which could potentially deceive or mislead the public. *Id.* at 359.

[97]*In re* Utah State Bar Petition for Approval of Change in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982).

[98]*Id.* at 993.

[99]*Id.*

[100]Courts also adopted a variety of approaches in addressing advertising issues after *R.M.J.* The Mississippi Supreme Court, in McLellan v. Miss. State Bar Ass'n, 413 So. 2d 705 (Miss. 1982), took a very straightforward approach of simply comparing a challenged telephone book ad with that at issue in *Bates*. The ads were reproduced in appendices to the opinion. *Id.* at 709. Finding that the advertisement in *Bates* was "larger in size and more aggressive" than the one it had under consideration, *id.* at 707, the court permitted it and struck down as constitutionally impermissible rules providing for the complete elimination and blanket prohibition of advertising in the yellow pages of a telephone directory. *Id.* at 708. (See the ads involved in *Bates* and *McLellan* in Appendix A.).

[101]630 S.W.2d 66 (Ky. 1982).

[102]*Id.* The brochure had been distributed to 727 member firms of the Northern Kentucky Chamber of Commerce (of which the respondent's law firm was a member), and there were approximately 1,100 assignee members of the Chamber who would have

and *R.M.J.* to say that "advertising as to fees is limited to fees charged for certain *routine* services and that misleading advertising can be prohibited."[103] Without any further explanation, the court concluded that "advertising '20% discount on legal services' is not advertising of fees for routine legal services and is misleading in every respect."[104] Therefore, the attorney was publicly reprimanded.

The Wisconsin Supreme Court in *In re Disciplinary Proceedings Against Marcus* similarly addressed the issue of whether the ads in question were false, misleading, or deceptive.[105] The defendants had placed several ads in local newspapers claiming that fees charged by many attorneys were higher than necessary due, at least in part, to high overhead, inefficiency, and the practice of charging by the hour. The ads listed fees that the firm charged for particular legal services and stated that, on the average, these fees represented savings of fifty percent. In addition, the firm made it a practice to estimate the cost for any legal matter not covered by a fixed fee, and the firm bore the risk of any underestimate.[106] Characterizing the question of whether fixed fees or time charges better serve the public interest as "a matter about which reasonable minds may differ," the court could not say that the ads in question were "inherently misleading."[107] Thus, the court agreed with the referee's finding that "the ads did not create an overall impression which was false, misleading or deceptive."[108]

Another issue appearing with some frequency immediately following *R.M.J.* was that of self-laudatory advertising and the related matter of claims of special skill or expertise. The Mississippi Supreme Court in

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been entitled to the services. *Id.* The court's finding "that such *widespread dissemination* is in fact advertisement as contemplated in SCR 3.135," *id.* (emphasis added), suggests that a less ambitious effort might have yielded a different result. The court's opinion, however, does not discuss the issue in further detail.

[103] *Id.* at 67 (emphasis in original).

[104] *Id.*

[105] 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

[106] *Id.* at 563, 320 N.W.2d at 808-10. The ads were published both as full page ads and in smaller versions in the Milwaukee Journal and Milwaukee Sentinel from August through October, 1978: *Id.* at 564-67, 320 N.W.2d at 809-10. (See Appendices B & C.).

[107] *Id.* at 577, 320 N.W.2d at 815.

[108] *Id.* *Marcus* also considered the procedural question of who should bear the burden of proof regarding whether an ad is false, misleading, or deceptive. In *Marcus*, the Board of Attorneys Professional Responsibility argued that the attorneys, as officers of the court, should be required to prove the veracity of their statements. *Id.* at 576-77, 320 N.W.2d at 811-12. The Board submitted that if it had the burden of proof, it would be required to produce evidence of non-truth, the inherent difficulty of which would have rendered the disciplinary rules against attorney advertising unenforceable. *Id.* at 569-70, 320 N.W.2d at 811. The court imposed the burden on the Board, relying on the general rule in disciplinary proceedings that the state has the burden of showing a violation. *Id.* at 577, 320 N.W.2d at 811.

McLellan v. Mississippi State Bar Association[109] addressed the issue of whether the ad in question was self-laudatory. Comparing the ad in question[110] with those which the Supreme Court had sustained in *Bates* and *R.M.J.*, the court found the latter "far more susceptible of being self-laudatory" and dismissed the complaint.[111] The court struck at the core of the issue by observing that drawing attention to oneself "is the purpose of all advertisements."[112]

In the *Schaffer*[113] case, the Bar attempted to characterize the lawyer's ad assuring prompt legal service (in the form of a promise that there would be no charge for any legal matter neglected for more than five days) as misleading or potentially deceptive. The supreme court rejected this contention and agreed with the lower court that although the ad was closely akin to a prohibited guarantee of quality, the analogy was "inapposite."[114] The court said that "[a] lawyer's product guarantee might be deemed potentially or presumably deceptive if it is in the nature of a promise whose fulfillment is clearly beyond the sole control of the promisor."[115] The court concluded, however, that the respondent's representations could not be considered excessive "because his pledge of prompt-service-delivery-or-free-performance [was] quite well within his own human means to accomplish."[116] Proceeding to an analysis of a possible state interest that the restriction might promote, the court could find none; to the contrary, the court found the challenged ad's content "compatible with public interest."[117] Thus, the disciplinary proceedings were dismissed.

Related to self-laudatory advertising are ads which make claims as to legal expertise. One of the ads in the *Marcus* case had contained the statement: "[W]hen you come to Marcus and Tepper, the first thing you'll notice is the high level of legal expertise."[118] In an apparent attempt at refutation, the Board challenging the ads had adduced evidence that, "aside from Mr. Tepper, who was an experienced attorney, the members of the firm had very little experience practicing law."[119] The Wisconsin Supreme Court, however, upheld the ad, noting the absence of any proof that clients had either complained about the level of representation they had received or the prices charged, or had received less than a high level of legal expertise in the handling of their legal matters.[120]

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[109]413 So. 2d 705 (Miss. 1982).
[110]*See supra* note 100.
[111]413 So. 2d at 708-09.
[112]*Id.* at 709.
[113]648 P.2d 355 (Okla. 1982). *See supra* text accompanying notes 89-96.
[114]*Id.* at 359.
[115]*Id.*
[116]*Id.*
[117]*Id.*
[118]107 Wis. 2d at 579, 320 N.W.2d at 816.
[119]*Id.* at 578-79, 320 N.W.2d at 816.
[120]*Id.* at 580, 320 N.W.2d at 816. The court also noted in support of its conclusion

Speaking directly to the issue of whether lawyer advertising which contains a statement of an attorney's specialization is misleading, the Minnesota Supreme Court in *In re Johnson*[121] vacated an attorney's admonition for making the statement that he was a Civil Trial Specialist certified by the National Board of Trial Advocacy ("NBTA").[122] The lawyer had been licensed in the state since 1952 and had been primarily engaged in civil trial advocacy.[123] The court characterized the NBTA's certification standards as "rigorous" and "exacting."[124] Following extensive citations to *R.M.J.*, the court observed that "[m]embers of the general public could be misled by claims of specialization when *no guidelines* for specialization have been drawn"; however, the panel hearing the complaint had found the ad neither misleading nor deceptive.[125] Moreover, the court regarded as overly broad under *R.M.J.* standards any blanket prohibition on advertising specialization pending the Minnesota Supreme Court's promulgation of rules describing what specialty designations were acceptable and how to get those designations.[126]

Another approach adopted by some courts with respect to the problem of advertising specializations has been to require that such ads contain a disclaimer of any endorsement by the respective state supreme court concerned.[127] The Arkansas Supreme Court, for example, felt that adver-

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the testimony of a prominent consumer interest attorney that "if properly supervised, recent law school graduates could provide a high level of legal expertise." *Id.* at 579, 320 N.W.2d at 816. This seems to constitute an implicit recognition that the competent performance of many routine legal services does not require years of legal experience.

[121]341 N.W.2d 282 (Minn. 1983).

[122]The ad, placed in a community directory and in telephone book yellow pages, provided in part: "Johnson, Richard W., Civil Trial Specialist Certified by the National Board of Trial Advocacy Personal Injury Wrongful Death." *Id.* at 283. It was challenged under Minnesota DR 2-105, which provided:

> (A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firm's practice or in indicating its nature or limitations.
>
> (B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so.

Id. (quoting DR 2-105).

[123]*Id.* at 282.

[124]*Id.* at 283. The NBTA had been formed in 1979; by the spring of 1983, it had certified only 541 lawyers nationwide as trial specialists. Although the state bar association had discussed the question of rules regulating specialization in 1981, it had taken no action pursuant to its discussion. *Id.*

[125]*Id.* at 285 (emphasis added).

[126]*Id.* Where states have a procedure for certifying specialists, however, the Supreme Court appears to have given a green light to rules forbidding lawyers from advertising for any specific type of case unless they have been certified as specialists in that area. *Advertising Challenge Is Dismissed*, Nat'l L.J., Jan. 27, 1986, at 11, col. 1-2.

[127]The Supreme Court in *R.M.J.* had found that the attorney's reference to being "a member of the Bar of the Supreme Court of the United States" could be misleading to the general public unfamiliar with the requirements of admission to its Bar. 455 U.S. at 205. Some state courts have noted the similarity between the lack of guidelines for

tising legal specialties could be misleading if the public believed that a lawyer who advertised as a specialist was in some way endorsed by the court as being competent in that specialty.[128] Thus, it requested the Board of specialization to consider whether the term "Board Recognized Specialist" should contain a disclaimer that the supreme court had not endorsed the lawyers as specialists.[129]

In keeping with this approach, Alabama's disciplinary rules barred publication of any advertisement unless it contained, in legible print, the following disclaimer: "No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services."[130] In *Mezrano v. Alabama State Bar*,[131] the Bar had challenged a lawyer who had advertised routine legal services on several occasions in a newspaper of general circulation without including the disclaimer.[132] The Alabama Supreme Court held that because the state had no rating system or format for identifying attorneys as specialists, the Bar "could reasonably conclude that attorneys should not hold themselves out as being superior to other attorneys."[133] Concluding that "attorneys' representations about the quality of their legal services could very well mislead the public,"[134] the court affirmed a 120-day suspension. Therefore, *Mezrano* is distinguishable from *In re Johnson*, a situation in which the NBTA certification standards were more definite.[135]

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admission to practice before the Supreme Court and the problem of specialization designations. *E.g.*, *In re* Johnson, 341 N.W.2d at 285. The possibility of permissible warning or disclaimer requirements had been suggested in both *Bates*, 433 U.S. at 384, and *R.M.J.*, 455 U.S. at 200 n.11.

[128]*In re* Amendments to the Code of Professional Responsibility and Canons of Judicial Ethics, 637 S.W.2d 589 (Ark. 1982).

[129]637 S.W.2d at 591.

[130]Mezrano v. Alabama State Bar, 434 So. 2d 732, 734 (Ala. 1983) (quoting DR 2-102(A)(7)(f)).

[131]434 So. 2d 732.

[132]*Id.* at 734.

[133]*Id.* at 735. In further support of its conclusion, the court noted that applicants do not receive their bar examination scores if they pass and that "[u]pon passing the bar examination, all attorneys are presumed to be on an equal footing." *Id.* As indistinguishable as newly-admitted lawyers might be from one another, the court did not explain the relationship between these observations and the lawyer in question, who had been licensed for some sixteen years. *Id.* at 733.

[134]*Id.* at 735. The opinion, however, contained no finding that the public had actually been misled. Indeed, it made no reference whatsoever to the language used in the subject ads.

[135]Besides failing to include a required disclaimer, other omissions from lawyer advertising raise similar problems. In *In re* Burgess, 279 S.C. 44, 302 S.E.2d 325 (1983), for example, a lawyer whose ads promised relief from financial difficulty was sanctioned for failing to disclose the nature of the service to be provided as bankruptcy. The disciplinary rule at issue, DR 2-101, provided that an attorney could not use "any public communication which (1) contains a misleading statement, (2) omits a material fact necessary to make the statement not misleading, (3) is intended to attract clients by use of showmanship or garish format, or (4) is presented in an undignified manner." *Id.* at 46, 302 S.E.2d at

B. *Prelude to* Zauderer: *Forms of Advertising*

A state's prohibition of illustrations in lawyer advertising was addressed by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel.*[136] Prior to this most recent pronouncement of the Court on lawyer advertising, several states had addressed the validity of various other forms of advertising, such as the use of trade names, electronic media, and direct mail advertising. In *In re Sekerez*,[137] the Indiana Supreme Court addressed the question whether the prohibition against the use and advertising of trade names was an unconstitutional restraint on commercial speech and thus violative of the first amendment. The court held that it was not.[138]

Sekerez had owned a number of legal clinics, all of which were named for the particular city in which they were located (for instance, "Merrillville Legal Clinic"). These clinics had been advertised in newspapers, telephone directories, and pamphlets. The court noted that in most of the advertising Sekerez had included his name as well as that of the clinic, but his name had always been in much smaller print. The court concluded that the use of a geographic location as part of the name of a law practice constitutes the use of a trade name.[139] Sekerez was consequently charged with improper use and advertisement of a trade name and with advertising his clinics in pamphlets constituting professional notices in violation of Disciplinary Rules 2-101(A) and 2-102(A) and (B).[140]

Sekerez argued that the prohibition against the use of trade names violated the first amendment. The court rejected Sekerez's claim and upheld its disciplinary rules regarding trade names.[141] The court reasoned that the use of a trade name for a legal clinic is inherently misleading because there is often much misunderstanding as to the identity, responsibility, and status of the individuals working in the clinics.[142] This was

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326. The court regarded two ads as violative of the rule. The fact that the lawyer was disbarred, however, probably rested more on his *repeated* neglect of legal matters entrusted to him. *Id.* at 46-47, 302 S.E.2d at 326 (emphasis in original). (See Appendix D.).

In another case a couple of months later, the court ordered only a public reprimand for advertisements which it characterized as "remarkably similar" to the ones disapproved in *Burgess. In re* Hodges, 279 S.C. 128, 303 S.E.2d 89, *cert. denied*, 464 U.S. 960 (1983).

[136]105 S. Ct. 2265 (1985).

[137]458 N.E.2d 229 (Ind.), *cert. denied*, 105 S. Ct. 182 (1984).

[138]*Id.* at 243.

[139]*Id.* at 242.

[140]*Id.* at 241.

[141]*Id.* at 243. In Friedman v. Rogers, 440 U.S. 1 (1979), the Supreme Court similarly upheld a prohibition on the use of trade names by optometrists. The main objection of the Court to the use of trade names by professionals is that "the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients." *Id.* at 13.

[142]The court in *Sekerez*, in reaching its conclusion, noted that the IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-11 states: "The use of a trade name or an assumed

true in *Sekerez*, where clients had been unaware that employees of the clinic assisting them were law students or secretaries. With respect to the pamphlets distributed by the clinics, the court objected to the pamphlets' failure to mention the name of a lawyer, thus amounting to advertising under a trade name. The court stated that a lawyer cannot accomplish indirectly what is prohibited directly.[143] Thus, the court proscribed the use of trade names in legal clinics as inherently misleading.

The Supreme Court of Oregon in *In re Magar*[144] addressed an issue related to the use of a trade name when it decided whether a lawyer's advertisement that omitted the lawyer's name was in violation of Disciplinary Rule 2-101(A)(1), which prohibits false and misleading communications, including a material omission of fact. The Disciplinary Review Board had found that Magar, in intentionally failing to place his name on his advertising, had violated DR 2-101(A)(1).[145] The court avoided this issue through an artful interpretation of the disciplinary rule. It held that the Bar must prove that the failure to include the name in any given advertisement is misleading.[146] In this case, it found that evidence of a violation had not been established.[147]

Several recent state court decisions have dealt with the issue of attorney advertising in the electronic media. In *Grievance Committee v. Trantolo*,[148] two attorneys had been charged with violations of the Connecticut Code of Professional Responsibility DR 2-101 when they broadcast four television commercials. The trial court ruled that DR 2-101 does not permit televised advertising by attorneys and thus reprimanded the defendants.[149]

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name could mislead laypersons concerning the identity, reponsibility and status of those practicing thereunder." 458 N.E.2d at 243.

[143] *Id.* at 244.

[144] 296 Or. 799, 681 P.2d 93 (1984).

[145] 296 Or. at 813, 681 P.2d at 100. OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(1) provides as follows: "A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading . . . ."

The Disciplinary Review Board in its opinion and the Oregon State Bar, in its brief to the Court, regarded the advertising as misleading because it deprived the reader of the opportunity to check out the lawyer's reputation with friends or relatives before hiring him. 296 Or. at 816, 681 P.2d at 102.

The trouble with this argument is that it ignores the reason for permitting attorney advertising in the first place: people need more information about attorneys. If they are initially familiar with an attorney's reputation or know people who are acquainted with the attorney they certainly will not pay very much attention to an advertisement.

[146] *Id.* at 817, 681 P.2d at 102.

[147] *Id.* at 818, 681 P.2d at 103.

[148] 192 Conn. 15, 470 A.2d 228 (1984).

[149] *Id.* at 20, 470 A.2d at 231. Prior to *Bates*, the Connecticut Code of Professional Responsibility DR 2-101(B) (1972) explicitly prohibited television advertising as well as other forms of advertising. After *Bates*, DR 2-101 was revised as follows:

In overturning the decision of the trial court, the Supreme Court of Connecticut noted that the Connecticut Code does not explicitly prohibit or authorize television advertising by attorneys.[150] Because it did not specifically address this point, the court regarded the rule as ambiguous.[151] It concluded that while the state has a substantial interest in regulating legal advertising, "a blanket restriction on television advertising is not the sort of narrow regulation that the Supreme Court countenanced in *R.M.J.* and *Central Hudson Gas*."[152] Thus, the court permitted attorneys to advertise on television, subject to reasonable regulations.[153]

In *In re Felmeister*,[154] the regulation at issue similarly banned radio and television advertising by lawyers. The defendants Robert A. Felmeister and Hanan M. Isaacs contacted the Supreme Court of New Jersey's Advisory Committee on Professional Ethics and stated that they felt the state's ban on attorney advertising through radio or television was unconstitutionally broad. The Division of Ethics and Professional Services informed the defendants that the matter was presently before New Jersey's Supreme Court Committee on Attorney Advertising and invited the defendants, as interested parties, to testify before the Committee. The defendants, nevertheless, chose not to appear and also allowed their advertisements to be broadcast over radio.

The Division of Ethics and Professional Services then filed charges against them for their willful and deliberate violation of the ban on radio advertising. On review, the court noted that the issue was not the constitutionality of a total ban, but rather whether the court can assure that its rules of conduct are obeyed even when under challenge.[155] The court concluded that even where statutes have been held unconstitutional, enforcement during the challenged period is permissible.[156] The court reasoned

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> (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, nor shall any such communication be in an extravagant format. (B) In order to facilitate the process of informed selection of a lawyer by the public, a lawyer may publish, subject to DR 2-103 and any guidelines adopted by the Superior Court, the following information in *newspapers, periodicals and other printed publications* provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A) and is presented in a dignified manner . . . .

192 Conn. at 18, 470 A.2d at 230 n.3 (emphasis added).

[150] *Id.* at 20, 470 A.2d at 231.

[151] *Id.* at 22, 470 A.2d at 232.

[152] *Id.* at 25, 470 A.2d at 233.

[153] *Id.* at 26, 470 A.2d at 234. The court, however, remanded the case to the trial court to determine if the advertisements in question violated the disciplinary rules in some other way. *Id.* at 26-27, 470 A.2d at 234.

[154] 95 N.J. 431, 471 A.2d 775 (1984).

[155] *Id.* at 442, 471 A.2d at 781.

[156] *Id.* at 444, 471 A.2d at 782.

that the defendants' overbreadth challenge to the rule was not available where commercial, rather than political, speech was at issue.[157]

Of the recent cases that have considered the issue of attorney advertising in the electronic media, perhaps the most consequential is *Committee on Professional Ethics v. Humphrey*.[158] In *Humphrey*, the defendant lawyers Humphrey, Haas, and Gritzner had aired three different advertisements over a Des Moines television station during a three-day period. Each of these advertisements portrayed a dramatic situation emphasizing that persons injured through the negligence of others should consult a lawyer. These dramatizations were followed by a scene depicting the reception area of a law office. Superimposed over this scene were the name, address, phone number, and areas of practice of the defendants' law firm. While this scene was being shown, a voice encouraged persons who felt they had been injured through the negligence of others to call the defendants. The voice also stated that cases would be handled on a percentage basis and that there would be no charge for an initial consultation. The ethics committee subsequently charged the defendants with violations of Iowa's Code of Professional Responsibility DR 2-101. Iowa's DR 2-101 permitted television advertising with several restrictions. The rule provided that only a single, non-dramatic voice, not that of a lawyer, with no other background sound could be communicated on television.[159]

The lawyers contended this rule was unconstitutionally vague and violative of the first amendment.[160] The committee on professional ethics and conduct argued that the defendants' television advertisement could be misleading to the public in two ways: (1) the advertisement could be interpreted as implying it costs nothing to sue,[161] and (2) it included self-

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[157]*Id.* at 446-47, 471 A.2d at 783.

[158]355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 105 S. Ct. 2693 (1985).

[159]IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) lists nineteen items that may be mentioned in advertising. It further provides with respect to television advertising:

> The same information, in words and numbers only, articulated by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated 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 geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

355 N.W.2d at 568-69 (quoting IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)).

[160]The court criticized the lawyers for not availing themselves of the procedure provided in the rules for a reconsideration of the rules, as opposed to rushing out and running the advertisements. "It should be scarcely necessary to point out that any lawyer asserting the wisdom of a rule change, should present the proposal to the committee under the procedure we have provided. The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer involved could think of a better rule." 355 N.W.2d at 569.

[161]The advertisement stated that certain cases were handled on a percentage basis and that there was no other charge for initial consultation. It, however, did not mention

laudatory comments on the advertisers' expertise.[162] The court agreed that these advertisements could mislead the public and therefore issued a writ restraining continued placement of the ads.[163] The court also concluded that Iowa's DR 2-101 was within the area that a state can properly regulate and was not too vague or more expansive than necessary to serve the state's interests.[164] The court reasoned that all the rule prohibited were the tools that would manipulate the viewer's mind and will.[165]

Other state cases have dealt with the issue of whether attorney advertising via direct mail is permissible. In *Spencer v. Honorable Justices of Supreme Court of Pennsylvania*,[166] the plaintiff-attorney sought a declaration that various provisions of the Pennsylvania Code of Professional

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payment of expert witnesses or other costs of litigation. 355 N.W.2d at 570.

[162]In fact, Humphrey had tried six cases, and Haas had virtually no trial experience. *Id.* at 570. The opinion does not state what self-laudatory statement was in question.

[163]The court went on to uphold Iowa's television advertising rule. Justices Larson and McCormick dissented. Larson objected to the "laundry list" of allowable advertising content found in DR 2-101(B), and to the requirements on technique in television advertising. "The combined effect of the rules is to inhibit dissemination of relevant information without a showing of a substantial state interest. This violates the free speech clause of the first amendment." 355 N.W.2d at 572 (Larson, J., dissenting).

Justice Larson noted that the test set forth by the Supreme Court in *Central Hudson* specifies that speech is not protected if it concerns an unlawful activity or is misleading. He observed that the majority objected to the advertising in this case because it *might* be misleading. He noted that this, however, is not the proper test to apply to commercial advertising. *Id.* Furthermore, he felt that these advertisements were not reasonably likely to deceive the public in any event. The Iowa rules do not require the disclosure of costs except when the advertisement mentions a contingent fee rate. *Id.* Here the attorneys merely said the fee would be a percentage. He thought this matter could be resolved at the first conference with the lawyer. *Id.* at 574. He also rejected the conclusion that the advertisements overstated the lawyers' qualifications. *Id.*

Because he viewed the advertisements as concerning a lawful activity and not misleading, Larson reasoned that the advertisements could be restricted only if the state's regulations complied with the balance of the *Central Hudson* test. Larson argued that the restrictions failed in this case because the committee never established a substantial state interest. The Iowa rule restricts the amount of information available to the public. The public would be better off with more information — not less. Larson would have adopted a false and misleading standard in place of Iowa's current version of DR 2-101(B) and its laundry list approach of permissible information that may appear in advertisements. *Id.* at 575-76.

In April, the United States Supreme Court voted 6-3 to dismiss the lawyers' appeal. *Justices Rule on Fees, Advertising*, Nat'l L.J., May 5, 1986, at 27, col. 1. The practical significance of the decision, however, may be limited because only five other states have restrictions at least as severe as Iowa's, and two of them have amendments under consideration to relax their rules. The chairman of the ABA's commission on advertising has expressed doubt that other states would be likely to amend their rules to tighten up on television advertising. *Id.*

[164]355 N.W.2d at 571.

[165]*Id.*

[166]579 F. Supp. 880 (E.D. Pa. 1984).

Responsibility banning all solicitation were unconstitutional.[167] The plaintiff attempted to use direct mail to solicit the business of aircraft owners, pilots, computer users, and others. The defendants contended that direct mailing is permissible to the extent it constitutes advertising, but impermissible to the extent it constitutes solicitation. The court determined that this standard was too vague to be enforceable.[168] In addition, the court held that the absolute ban on direct mail solicitation was unconstitutional in light of the application of the *Central Hudson* test for commercial speech.[169]

The court determined that the regulation failed the first prong of *Central Hudson* which maintains that commercial speech is protected where it is lawful and not misleading.[170] The court determined that the total prohibition on direct mail solicitation inevitably swept within its effect some protected speech.[171] The court also concluded that the second part of the *Central Hudson* test was not met. It requires that where speech is not misleading, the state must assert a substantial interest in regulating the expression.[172] The court rejected all three proferred state interests. As to the state's contention that its regulation protected the public from an invasion of privacy, the court concluded that recipients of direct mail advertising could avoid an affront to their sensitivities by simply throwing the letters away.[173] The court also rejected the state's contention that direct mail solicitation presents evils of undue influence and overreaching because, contrary to in-person solicitation, the recipient of a mailing has time to investigate the lawyer with no pressure to respond.[174] Finally, the court rejected the state's contention that it was protecting the public from conflicts of interest because the state simply failed to prove its contention.[175]

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[167]The Pennsylvania Code of Professional Responsibility provisions at issue were DR 2-103(A) and DR 2-104(A). DR 2-103(A) states: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer." DR-2104(A) provides: "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 . . . ." PA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A); DR 2-104(A) (1974).

[168]579 F. Supp. at 888-89.

[169]*Id.* at 889 (citing *Central Hudson*, 447 U.S. 557, 566 (1980)). Judge Lord noted that direct mail provides the public with useful information. To prohibit such mailings would prevent people from learning about the availability, nature, and price of products and services. *Id.* at 891. Additionally, even if direct mail increased the number of suits, the alternative of more suits would be preferable to letting people suffer in silence. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 364, 376 (1977); *In re* Primus, 433 U.S. 412, 436-37 (1978)).

[170]*Id.* (citing *In re* R.M.J., 455 U.S. 191, 205 (1982)).

[171]*Id.*

[172]*Id.*

[173]*Id.* at 890.

[174]*Id.*

[175]*Id.*

In another case dealing with a state's absolute ban on mailed solicitations, the Connecticut Supreme Court similarly held that the regulation was unconstitutional in light of *Central Hudson*.[176] In *Grievance Committee v. Trantolo*, the defendants had sent printed announcements regarding the opening of their law clinic to people with whom they had had no prior professional or personal relationship. They also included a brochure describing their clinic. They were consequently charged with a violation of DR 2-103(C).[177]

The court determined that this blanket prohibition on direct mail solicitation violated the *Central Hudson* test because the state had failed to prove that its prohibition was not more extensive than necessary to serve its interests.[178] The state contended that its regulation was necessary in order to preserve the personal relationship between a lawyer and client and to prevent the evils of solicitation. Specifically, the court determined that there were less intrusive means of satisfying the state's concerns — such as requiring that a copy of the mailing be filed with the grievance committee.[179]

In *In re von Wiegen*,[180] the New York Court of Appeals similarly held that the state's ban on direct mail solicitation was impermissible in that case.[181] The court focused on whether the defendant attorney's mail solicitation of accident victims implicated more substantial state interests than an attorney's solicitation of other clients, thereby justifying a proscription of such mailings. The Committee on Professional Standards had brought a disciplinary proceeding against the defendant attorney based on his direct mail solicitation of the victims injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, in July, 1981.

As with the two prior cases, the court applied the *Central Hudson* test. Because this direct mail solicitation was not related to an unlawful activity, nor was it inherently misleading, the court examined the governmental interests involved in prohibiting such direct mail. The state had contended that it had interests in preventing over-commercialization of the profession, invasion of privacy, the stirring up of litigation, and the potential for deception. The court concluded that these interests were not of sufficient magnitude to override the public's interest in receiving infor-

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[176]Grievance Committee v. Trantolo, 192 Conn. 27, 470 A.2d 235 (1984).

[177]The mail allegedly violated Connecticut Code of Professional Responsibility DR 2-103(C) (1972). 192 Conn. at 30-31, 470 A.2d at 236-37.

[178]192 Conn. at 35, 470 A.2d at 239.

[179]*Id.*

[180]63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40, *cert. denied*, 105 S. Ct. 2701 (1985).

[181]*Id.* at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47. The court noted, "In sum, the State cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services and the danger of deception presented by the mailing may be controlled by the filing requirement." *Id.*

mation on the availability of legal services.[182] The court also concluded that a complete suppression of direct mail was not justifiable because less drastic alternatives, such as the filing of such letters with the state, could be required.[183] Thus, the charge of direct mail solicitation was dismissed.

In contrast to the above cases, other states have addressed an attorney's use of direct mail advertising by examining whether or not it constituted impermissible solicitation. In *State v. Moses*,[184] a Kansas lawyer had acquired a list of persons in the process of selling their homes and mailed them a letter advertising his services. The attorney was charged with violating Disciplinary Rule 2-103, which prohibits an attorney from recommending himself as a private practitioner to laypersons who have not sought his advice regarding employment. Noting a "distinction between advertising, which may not be prohibited, and direct solicitation, which may," the Kansas Supreme Court said that although the letter was not "of the nature of ambulance chasing and hospital room solicitation," it was nevertheless "directed to a segment of the public which, under present economic conditions, is extremely vulnerable to a suggestion of employment that may or may not be advantageous to the individual homeowner."[185] Without further explanation, the court expressed its opin-

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[182]Specifically, the court noted that over-commercialization is now controlled by the advertising standard in DR 2-101. Furthermore, it did not view the mailings as constituting a substantial invasion of privacy because people could throw the letters away. While the letters might generate suits, the court noted that the victims of this tragedy needed legal counsel. It also conceded that there was a potential for deception — but not as in the case of in-person solicitation. Furthermore, because the court earlier had ruled that such letters must be filed with the state, there would be less likelihood for publication of improper statements. 63 N.Y.2d at 173-75, 470 N.E.2d at 844-45, 481 N.Y.S.2d at 46-47.

[183]*Id.* at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.

[184]231 Kan. 243, 642 P.2d 1004 (1982). Following a personal and individualized salutation, each letter stated:

> As homeowners of today, you are by now well aware of the harsh realities restraining the current real estate market. Inflation, unemployment, and high interest rates all combine to make selling a home a difficult prospect indeed. Selling your home 'By Owner,' will not only save you thousands of dollars, but will increase your chances of selling by offering a lower, but fair, market price. However, many sellers are reluctant to do this — mainly because they feel inexperienced in the legal requirements and technicalities.
>
> As a real estate consultant with 33 years of experience, my $300.00 fee includes all the necessary paperwork, contracts, deeds, and related materials to assist you in selling your home. In addition, you will receive expert advice and any necessary consultations.
>
> If your house is listed, it's easy to terminate the listing contract by simply calling your broker and advising him you want to cancel your listing contract and have him send you the contract marked 'cancelled.'
>
> For additional information, call my office at 273-2392 for an appointment, Monday through Friday.
>
> s/ Earl C. Moses, Jr.
>
> Earl C. Moses, Jr.

Id. at 244-45, 642 P.2d at 1006.

[185]*Id.* at 246, 642 P.2d at 1007. This classification is subject to criticism on two

ion that the regulation and restriction of personal solicitation worked "to the benefit of the general public and to the fair administration of justice" and held that "direct solicitation of a stranger by an attorney for employment for a particular legal matter" violated DR 2-103.[186] Thus, the court proscribed the attorney's use of direct mail as impermissible solicitation.

In *In re Alessi*,[187] the attorneys were similarly charged with a violation of Disciplinary Rule 2-103 prohibiting solicitation when their legal clinic mailed letters, not to homeowners, but to some one hundred realtors in the Albany area quoting fees for listed real estate transactions. The court upheld the finding of professional misconduct and distinguished what types of solicitation are prohibited. The court noted that here the mailings were made to realtors whose interests could be more intertwined with the attorneys' interests than with their clients' interests.[188] The court emphasized that it was *not* imposing a "general ban upon all mailings by attorneys to others than potential clients"; rather, its prohibition was limited to third-party mailings involving a *conflict of interest*.[189] Thus,

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grounds. First, the court seeks to protect persons who would most benefit from additional information. The classification is, in effect, criticizing the defendant for advertising his services in the area of real estate transactions to persons currently selling their homes. Granted, these people are more likely to employ the defendant, but such employment is the purpose of advertising. Furthermore, the services offered in the letter represent a viable option for the recipient. As stated by the Supreme Court in *Bates*, "The bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less." 433 U.S. at 375. The court, in the present case, seems to assume that the recipients of this letter would blindly leap at the opportunity presented merely because the letter is signed by an attorney. Second, by prohibiting advertising to persons "vulnerable to a suggestion of employment," the court has in effect prohibited effective advertising. Such a prohibition, whether achieved directly by express statute or indirectly through similar broad classifications, seems unconstitutionally broad.

[186]231 Kan. at 246, 642 P.2d at 1007. The holding leaves open the question of the extent to which acquaintances or existing clients might permissibly be solicited. *Cf.* Walls v. Miss. State Bar, 437 So. 2d 30 (Miss. 1983) (court declined to discipline two attorneys who had advertised and held an "open house" for their new office, but had not actually solicited clients in any way).

[187]60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983), *cert. denied*, 104 S. Ct. 1599 (1984). Two earlier cases had involved a similar situation. In *In re* Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), the decision was against the lawyer. Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978), had yielded just the opposite result.

[188]60 N.Y.2d at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

[189]*Id.* at 234, 457 N.E.2d at 685-86, 469 N.Y.S.2d at 581 (emphasis added). The court continued:

> What is proscribed is mailing to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result. Wholly unrelated to the content of the letter [*see generally* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983)], the proscription is not against the attorney making known to potential clients the availability of his services or even against his doing so through third parties, but against his doing so in a particular

the New York court's focus on the conflict of interest issue in *Alessi* clearly distinguished its position from the Kansas court's general opposition to solicitation in *Moses*.[190]

IV. The *Zauderer* Case

The Supreme Court issued its most recent clarification of lawyer advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[191] The Court determined whether three forms of Ohio's regulation of lawyer advertising were violative of the first amendment. These regulations included a prohibition on soliciting legal business through advertisements containing advice and information about specific legal problems, restrictions on the use of illustrations, and disclosure requirements regarding contingent fees. The Court held that the first two regulations were violative of first amendment protections under the *Central Hudson* test for commercial speech.[192] The Court held, however, that the state's disclosure requirements regarding contingent fees were reasonably related to the state's interest in preventing consumer deception.[193] The Court also addressed whether Zauderer was denied procedural due process when disciplined in connection with a drunk driving advertisement and concluded that he was not.[194]

There were two advertisements at issue in *Zauderer*. One contained

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manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client.

Id. at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

[190]Indeed, several years earlier the New York Court of Appeals had rejected the "artificial distinction" between advertising and solictation and held that a direct mailing of 7,500 letters by lawyers to individual property owners was constitutionally protected under the first amendment. Koffler v. Joint Bar Association, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981). It must be remembered, of course, that although truthful direct mail advertising cannot be forbidden, lawyers may be disciplined for mass mailings that are deceptive or not identified as pitches for business. Thus, two California lawyers who had sent 250,000 letters to civil defendants over a 1½ year period advising of the legal options available to debtors were sanctioned where the letters were found to be misleading. *Firm's Mass Mailing Held Deceptive*, Nat'l L.J., Sept. 9, 1985, at 6, col. 1-4.

[191]105 S. Ct. 2265 (1985).

[192]*Id.* at 2280.

[193]*Id.* at 2282. *Cf.* Lyons v. Alabama State Bar, 451 So. 2d 1367 (Ala.), *cert. denied*, 105 S. Ct. 385 (1984). The attorneys had been charged with failing to include a reasonably accurate estimate of court costs in their advertisement which stated: "Video Taped Will . . . $250.00 . . . (Above Fees Do Not Include Court Costs)." 451 So. 2d at 1368. In light of the latter statement and in the absence of a substantial state interest in including a list of specific court costs in the advertisement, the court dismissed the charge. *Id.* at 1372. The court noted, "An inclusion of specific costs would have made the advertisement more informative to some, but that, in and of itself, is not enough to cause the advertisement to be misleading. Anyone reading the advertisement would have been aware that the prices did not include court costs and could have taken steps to determine what those costs were." *Id.*

[194]105 S. Ct. at 2284.

an illustration of the Dalkon Shield intrauterine device and stated that it was not too late to take action against the manufacturer for injuries caused by the device. Additionally, the ad stated that the cases would be handled on a contingent fee basis and that if there was no recovery, no "legal fees [would be] owed by our clients."[195] The other ad offered assistance if a defendant was accused of drunk driving and stated that the "[f]ull legal fee [would be] refunded if [the defendant was] convicted of DRUNK DRIVING."[196]

Zauderer had been prompted to institute the Dalkon Shield advertising campaign as a result of *In re Appert*,[197] a Minnesota Supreme Court decision upholding such an advertisement. The Minnesota Supreme Court had examined brochures and circulars used by Appert and his partner concerning the Dalkon Shield intrauterine contraceptive device. It upheld the right of Appert to engage in such advertising in order to locate women interested in bringing suit for injuries sustained by using the Dalkon Shield.

Zauderer had first (before *Appert*) tried to obtain the consent of the Ohio disciplinary authorities to place the Dalkon Shield advertisement in Ohio newspapers. The Office of Disciplinary Counsel of the Supreme Court of Ohio advised him that such an advertisement would violate Disciplinary Rule 2-101(B), which prohibits the use of illustrations, requires that ads be "dignified," and provides a list of what may be included in the ad.[198] Therefore, Zauderer chose not to run any advertising

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[195] *Id.* at 2269. (See Appendix E.).

[196] *Id.* (See Appendix F.).

[197] 315 N.W.2d 204 (Minn. 1981). *See* Stewart, *A Picture Costs Ten Thousand Words*, 71 A.B.A. J. 62, 63 (1985).

The court in *In re Appert* ruled that the state had failed to demonstrate a compelling justification for prohibiting this type of advertising. In light of the substantial interest of the injured women as well as the interest of the public in finding out this information, the court ruled that the state's interest was "not sufficiently compelling" to justify a restriction of the first amendment rights involved. 315 N.W.2d at 212.

Interestingly, Appert and his partner obtained seventy-five new cases as a result of their advertising campaign, thereby suggesting it was a very effective method of advertising. *Id.* at 206.

[198] Ohio's Code of Professional Responsibility DR 2-101(B) reads as follows:

> In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio and 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, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or brodcast:
>
> (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

at that time. Later, however, after the issuance of the Minnesota Supreme

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 used in setting forth the fee information;
(17) Fixed fees for specific legal services;
(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;
(19) Memberships and offices in legal fraternities and legal societies;
(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

Ohio Code of Professional Responsibility DR 2-101(B) (1982).

This so called "laundry list" of permissible advertising is similar to the rules considered by the Supreme Court in *In re* R.M.J. *See supra* note 75. Ohio's version of DR 2-101(B) differs very little from the A.B.A. Model Code of Professional Responsibility. *See infra* text accompanying notes 286-301.

Counsel for the Office of Disciplinary Counsel argued to the Supreme Court that a "laundry list" approach as utilized in Ohio's DR 2-101(B) is the only practical way to police lawyer advertising. A precisely worded rule enables attorneys who see professional advertising to recognize advertising in violation of the rule and thus be in a position to report violations to the Office of Disciplinary Counsel. Consequently, the rules in question are rationally related to the state's compelling interest in preventing misleading advertising by lawyers. *See Court to Deal Again with Lawyer Advertising*, Nat'l L.J., October 15, 1984, at 5, col. 1.

One, however, can certainly question the need for practicing attorneys to report advertising violations to the Office of Disciplinary Counsel. The test enunciated in *In re* R.M.J. specifically stated, "[R]estrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." 455 U.S. at 203-04. A less restrictive alternative is available in the case of *all* advertising. As the *R.M.J.* Court noted with

Court's decision in *In re Appert*[199] and the Supreme Court's favorable lawyer advertising decision in *In re R.M.J.*,[200] Zauderer again met with the staff of the Office of Disciplinary Counsel to discuss his proposed advertisement. The parties agreed that the Dalkon Shield advertisement failed to conform to DR 2-101 and that certain aspects of this rule were not touched upon in the *R.M.J.* case. Although the Disciplinary Counsel took no position as to whether the advertisement in question should be published, Zauderer, relying upon the Supreme Court's decision in *R.M.J.* and his belief that Ohio's regulations were unconstitutional,[201] chose to run the advertisement[202] in three dozen Ohio newspapers.[203] He received 234 inquiries and filed ninety-five lawsuits.[204]

After placing the advertisement dealing with drunk driving in *The Columbus Citizen-Journal*,[205] Zauderer received a call from the Office of

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respect to *mailed* advertising, a state may police it "by requiring a filing with the Advisory Committee of a copy of all general mailings, [thus] the State may be able to exercise reasonable supervision over such mailings." *Id.* at 206.

Obviously, the same is true of *all* advertising. The state could require that attorneys file all advertising in a central location. Persons familiar with the state rules with respect to advertising could then review it for compliance with those rules. Thus, there would be no need for members of the practicing bar to be able to spot every advertisement that fails to conform to the rules.

[199]315 N.W.2d 204 (Minn. 1981).

[200]455 U.S. 191 (1982).

[201]105 S. Ct. at 2274. *See also* Stewart, *supra* note 197, at 63.

[202]*In re* Complaint against Philip Q. Zauderer v. Office of Disciplinary Counsel, Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, No. 454 at Exhibit B, Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984), *aff'd in part, rev'd in part*, 105 S. Ct. 2265 (1985) [hereinafter cited as Complaint against Zauderer].

[203]The newspapers had a combined circulation of 1,860,160. This advertisement appeared on those days on which it was most likely to reach the greatest number of women readers. Stewart, *supra* note 197, at 63-64.

[204]Zauderer still has 70 of his cases pending. Stewart, *supra* note 197, at 64. Thus far, he has received more than two million dollars through settlements — all on a contingent fee basis. *Id.* This suggests that placing the advertisements in question has already turned out to be richly rewarding.

In fact, there is a certain advantage to engaging in activities other persons regard as unethical or even illegal. In this case, the advantage is that other people are not going to advertise. One might ask whether placing advertisements such as the one discussed in this case really makes economic sense. As the Supreme Court gradually lowers the inhibitions of other lawyers, more attorneys will advertise. The likely effect of this will be that advertising as a whole will be far less effective — or perhaps not effective at all. It is the *failure of others to advertise*, in the authors' opinion, that results in such advertising being so successful.

[205]Complaint against Zauderer, *supra* note 202, at Exhibit A.

Zauderer's thinking with respect to advertising makes a great deal of sense. He chose not to place a general advertisement, but rather specifically advertised for clients likely to have a particular legal need — namely women injured by the Dalkon Shield and people who had been arrested (or who might be arrested) for driving while intoxicated. Obviously,

Disciplinary Counsel advising him that the advertisement constituted an offer to accept a criminal case on a contingent fee in violation of DR 2-106(C).[206] Zauderer immediately stopped the advertisement. Although he received two inquiries in response to the advertisement, Zauderer declined to represent these callers. In a letter to the Disciplinary Counsel he admitted the advertisement violated the prohibition against contingent fees in criminal cases. His letter indicated that he had merely forgotten about this rule.[207]

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these people have a specific need for legal services while the average person really never needs the services of an attorney. It certainly makes the most sense to try to identify people who actually need the services of an attorney because these people are the most likely to see and respond to the advertisement in question.

Many other attorneys have tried the same strategy of placing advertisements aimed at people with a need for specific legal services. *See, e.g.*, Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978) (attorneys mailed letters to real estate agencies concerning their willingness to engage in real estate law); Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578 (1980) (attorneys sent letters to retired union members concerning workmen's compensation claims); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (attorneys sent letters to real estate owners notifying them of their willingness to perform services with respect to the sale of real property and to real estate brokers asking them to refer clients to the lawyers); *In re* Greene, 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), *aff'd*, 54 N.Y.2d 839, 429 N.E.2d 390, 444 N.Y.S.2d 58 (1981) (lawyer mailed flyers to real estate brokers requesting them to refer individuals to him for legal services in the sale or purchase of real property); Dayton Bar Ass'n v. Herzog, 436 N.E.2d 1037 (Ohio 1982) (lawyer mailed letters to defendants in municipal court cases which were listed in the Daily Court Reporter).

[206]The Ohio Code of Professional Responsbility DR 2-106 reads as follows:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

(C) 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 (1982).

[207]Stewart, *supra* note 197, at 64. The objectionable wording in this advertisement apparently was the phrase, "[f]ull legal fee refunded if convicted of DRUNK DRIVING." This arguably amounts to an offer to take a criminal case on a contingent fee basis.

The Office of Disciplinary Counsel then filed a complaint against Zauderer alleging he had violated the Disciplinary Rules of the Ohio Code of Professional Responsibility by placing the Dalkon Shield and drunken driving advertisements.[208] There were a number of charges against Zauderer concerning the Dalkon Shield advertisement. He was charged with violating the prohibition against the use of illustrations in advertisements,[209] failing to advertise in a dignified manner,[210] and violating his oath of office.[211] In an amended complaint, the state added two new counts. It asserted that Zauderer had not properly disclosed in the advertisement whether contingent fee percentages would be computed before or after the deduction of court costs and expenses.[212] Finally, the state charged that by placing these advertisements he had violated the rule that prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer[213] and the rule that prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.[214] The complaint also charged that Zauderer's drunk driving advertisement violated the prohibition against handling criminal cases on a con-

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[208]Interestingly, the Office of Disciplinary Counsel did not base its decision to proceed in this matter on complaints instituted by persons who had contacted Zauderer as a result of his advertisement. It did receive complaints, however, from the local counsel for A.H. Robins Co., the manufacturer of the Dalkon Shield, and from other lawyers. Stewart, *supra* note 197, at 64.

[209]Complaint aganst Zauderer, *supra* note 202, at 2, Count VI. It should be noted that neither the Board nor the Ohio Supreme Court found a violation based on this charge.

[210]*Id.* at 2, Count V.

[211]*Id.* at 2, Count VII.

[212]*Id.* at 3, Count VIII. This allegedly violated DR 2-101(B)(15) of the Ohio Code of Professional Responsibility: "Only the following information may be published or broadcast . . . (15) [c]ontingent 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." This also was alleged to violate DR 2-101(A) based on the theory that leaving this information out was deceptive.

[213]Complaint against Zauderer, *supra* note 202, at 3, Count IX. DR 2-103(A) of the Ohio Code of Professional Responsibility reads: "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) (1982).

Zauderer violated this provision because the advertisement by implication recommended his own employment: "Our law firm is presently representing women on such cases . . . ." *See supra* note 202.

[214]Complaint against Zauderer, *supra* note 202, at 3, Count IX. DR 2-104(A) of the Ohio Code of Professional Responsibility states:

> (A) 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, except that:

tingent fee basis.[215] Subsequently, a hearing was held before a three-member panel of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. Zauderer contended that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel rejected these contentions, noting that neither *Bates*[216] nor *In re R.M.J.*[217] had forbidden all regulation of lawyer advertising.[218] In addition, the panel found that the state's interests in prohibiting advertising which solicited clients to pursue a particular legal claim were as substantial as the state's interests in prohibiting in-person solicita-

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(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 3-103(D)(1) through (5), to the extent and under the conditions prescribed therein.
(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
(5) If success in asserting rights or defenses of his client in ligitation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Ohio Code of Professional Responsibility DR 2-104 (1982).

This charge is presumably based upon the statement in the advertisement that the reader should not "assume it is too late to take legal action against the Shield's manufacturer." *See supra* note 202.

[215]Complaint against Zauderer, *supra* note 202, at 2, Counts II and III. It was alleged that he had violated DR 2-l0l(B)(l5) and DR 2-101(A) of the Ohio Code of Professional Responsibility.

Only the following information may be published or broadcast . . .
(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.

DR 2-101(A) states:

(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 ublic communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

Ohio Code of Professional Responsibility DR 2-101(B)(15); DR 2-101(A) (1982).

[216]433 U.S. 350 (1977).

[217]455 U.S. 191 (1982).

[218]*Zauderer*, 105 S. Ct. at 2274.

tion as expressed in *Ohralik*.[219] Specifically, the panel concluded that as to the Dalkon Shield advertisement, Zauderer breached Ohio's prohibition against the use of illustrations, deceptive advertising, self-recommendation, and accepting employment resulting from unsolicited advice.[220] The panel concluded that the ad was deceptive and misleading because it failed to disclose a client's potential liability for costs even if her suit was unsuccessful.[221] As to the drunken driving advertisement, the panel concluded that it was deceptive.[222] The panel found it deceptive because the ad stated "[f]ull legal fee refunded if convicted of DRUNK DRIVING," and a person who pleads guilty to a lesser charge may not be convicted, but his legal fee would not be refunded.[223] Thus, the ad was misleading, and the panel consequently recommended that Zauderer be publicly reprimanded.

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio reviewed the decision of the three-member panel of the Board. The Board adopted the panel's findings in full, but recommended that the sanction of a public reprimand be increased to indefinite suspension from the practice of law.[224]

The decision of the Board was then reviewed by the Supreme Court of Ohio.[225] It affirmed the findings of the panel and the Board,[226] but reduced the penalty to a public reprimand.[227] The court observed that the Supreme Court has recognized the power of the states to regulate attorney advertising.[228] The court then ruled that its Disciplinary Rules

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[219]*Id.* (citing *Ohralik*, 436 U.S. 447 (1978)).

[220]*Id.* at 2273.

[221]*Id.*

[222]*Id.*

[223]*Id.*

[224]*Id.* at 2274.

[225]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984).

[226]The Ohio Supreme Court ruled:

> As to the Dalkon Shield advertisement we agree with the findings of the panel and board that respondent violated DR 2-101(B), prohibiting illustrations in an advertisement; DR 2-104(A), in accepting employment resulting from unsolicited advice given by him to a non-lawyer; DR 2-101(A), in publishing communications which were misleading; DR 2-101(B)(15), by failing fully to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement; and DR 2-103(A), in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer.

10 Ohio St. 3d at 47, 461 N.E.2d at 886.

These sections which the Panel and Board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility.

[227]10 Ohio St. 3d at 48-49, 461 N.E.2d at 887.

[228]See *In re* R.M.J., 455 U.S. 191, 203 (1982), in which the United States Supreme Court indicated that the states retain some authority to regulate advertising although it

regarding lawyer advertising complied with those set forth by the Supreme Court.[229] Specifically, the court noted that the state's disclosure requirements concerning ads that mention contingent fees are permissible.[230] The court reasoned that for purposes of clarity, people reading an advertisement that mentions a contingent fee need to know what the fees are as well as any additional costs that might be assessed against them.[231] The court also thought it reasonable for the state to restrict lawyers from accepting employment resulting from unsolicited advice.[232] The court also agreed with the panel's conclusion and reasoning that the drunken driving advertisement was misleading.[233]

On appeal, the United States Supreme Court, in an opinion by Justice White, affirmed the decision of the Ohio Supreme Court in part and reversed it in part.[234] The Court noted that its approach to commercial speech is well settled.[235] According to the *Central Hudson* test, where com-

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is speech protected to some extent by the first amendment of the United States Constitution, and Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977).

[229]10 Ohio St. 3d at 48, 461 N.E.2d at 886.

[230]*Id.*

[231]*Id.* Zauderer never stated the exact percentage charged in contingent fee cases, nor did he state in his drunk driving advertisement that the client would be responsible to pay certain costs of litigation.

The failure to mention the costs does seem somewhat misleading as persons reading the advertisement might falsely conclude it would cost them nothing to litigate a suit. On the other hand, this matter could be explained by an attorney to prospective clients at the first interview. If a person did not wish to proceed after learning this information, he would be free to drop the matter.

[232]10 Ohio St. 3d at 48, 461 N.E.2d at 886-87. The Ohio Supreme Court did not specify any reasons why it thought an attorney should be prohibited from accepting such employment. If this rule were to be upheld with respect to lawyer advertisements, it would in effect prohibit the use of any advertisements by attorneys. The Ohio Supreme Court is attempting through this rule to enforce a *total ban* on attorney advertising because all advertisements are intended to promote the services of the advertiser and to result eventually in the employment of the advertiser. No one would waste money advertising if he did not expect to generate eventually some additional business as a result of the advertisement. Because this in effect amounts to a total ban on advertising, it clearly cannot be reconciled with the United States Supreme Court's prior decisions in this area.

One might also argue that the advertisement did not recommend Zauderer's employment in any event. *See supra* notes 202 and 205. The drunk driving advertisement does not recommend his employment in any way. The Dalkon Shield advertisement merely states: "Our law firm is presently representing women on such cases . . . . For free information call 1-614-444-1113." One could argue that he was merely stating facts, not recommending that readers employ him.

[233]10 Ohio St. 3d at 48, 461 N.E.2d at 887.

[234]Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). Justice Powell took no part in the consideration or decision of the case.

[235]The Court stated:

> The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive, and

mercial speech is neither false nor deceptive, the state must prove that its restrictions directly advance a substantial government interest.[236] The Court divided its analysis of Ohio's advertising regulations into three parts: prohibition of advertisements that contain legal advice on specific legal problems, prohibitions on the use of illustrations, and the obligation of advertising attorneys to disclose the terms of contingent fees in their advertising. The Court held that an attorney may not be disciplined for soliciting business through advertisements which contain legal advice on specific legal problems,[237] or for using accurate, nondeceptive illustrations.[238] The Court held, however, that the state's requirement that ads which refer to contingent-fee arrangements contain information regarding a client's liability for costs was reasonable.[239]

With respect to Ohio's rules prohibiting self-recommendation and prohibiting the acceptance of employment resulting from unsolicited legal advice, the Court ruled for Zauderer.[240] It noted that because Zauderer's statements about the Dalkon Shield were neither false nor deceptive, Ohio must establish that "prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest."[241] The Court rejected three proferred state interests. First, it rejected the argument that this ban served the same purposes as a ban on in-person solicitation previously upheld by the Court in the *Ohralik* case.[242] The Court reasoned that in-person solicitation is a practice rife with possibilities for overreaching, invasion of privacy, fraud, and undue influence, whereas, a printed advertisement containing advice about a specific legal problem does not involve the same pressure on a potential client for an immediate yes or no answer to the offer of representation.[243] Second, the Court disapproved of the argument that because Zauderer's

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> does not concern unlawful activities, however, may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest.

105 S. Ct. at 2275 (citing Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)).

[236] 447 U.S. at 566.

[237] 105 S. Ct. at 2280.

[238] *Id.* at 2281.

[239] *Id.* at 2283.

[240] *Id.* at 2280. White was joined by Brennan and Marshall on this point. *Id.* at 2284 (Brennan, J., concurring in part and dissenting in part).

[241] *Id.* at 2277.

[242] *Id.* White specifically rejected the application of Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), to this set of facts. White quoted from *Ohralik*: "[I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." 105 S. Ct. at 2277 (quoting *Ohralik*, 436 U.S. at 455).

[243] 105 S. Ct. at 2277.

advertisement might promote lawsuits, the advertisement should be banned.[244] The Court reasoned that a state cannot interfere with a citizen's right of access to the courts.[245] Finally, the state argued that it needed a prophylactic rule, even if Zauderer's advertisement was harmless, because advertising by attorneys presents unique regulatory difficulties. The Court, however, did not answer the question of whether a prophylactic rule is ever permissible in this area. Instead, it found that the state had failed to establish that such a rule was necessary in this case to achieve a substantial governmental interest.[246] The Court noted that it is often difficult to determine whether advertisements for both legal services and products are deceptive. Therefore, the Court found no basis for the state's argument that such advertising by attorneys should be subject to a blanket prohibition.

With respect to Ohio's rule that prohibited the use of illustrations in attorney advertising, the Court applied the *Central Hudson* test and found that the state had failed to present a substantial state interest which justified its restriction.[247] The Court rejected the state's argument that the restriction was justified as a means of ensuring that attorneys maintain their dignity. The Court stated that this interest was not substantial enough to justify abridging an attorney's first amendment rights.[248] The Court also rejected the state's argument that any possible abuses could only be combatted through the use of a blanket ban on illustrations since it would be difficult to prove which illustrations were misleading.[249] The Court reasoned that consumers rarely base decisions about legal services on visual illustrations in advertisements.[250] Also, because the advertisements could be policed on a case-by-case basis, the Court concluded that the prophylactic approach taken by Ohio was invalid.[251] Thus, Zauderer could not be disciplined for his use of an accurate and nondeceptive illustration.

Zauderer lost on the issue of the right of Ohio to discipline attorneys who fail to disclose the terms of any contingent fees mentioned in their advertising.[252] The Court held that an advertiser's rights are adequately

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[244] *Id.* at 2278. The Court noted, "[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* (quoting *Bates*, 433 U.S. at 376).

[245] *Id.*

[246] *Id.* at 2278-79.

[247] *Id.* at 2281. White was joined by Brennan and Marshall on this point. *Id.* at 2284 (Brennan, J., concurring in part and dissenting in part). Justices O'Connor, Burger, and Rehnquist concurred in the Court's judgment on this point. *Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part). The Court was thus unanimous in its rejection of Ohio's rule prohibiting the use of illustrations.

[248] *Id.* at 2280.

[249] *Id.* at 2281.

[250] *Id.*

[251] *Id.*

[252] *Id.* at 2282. White was joined by Justices O'Connor, Burger, and Rehnquist on this point. *Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part).

protected as long as a state's disclosure requirements are reasonably related to its interest in preventing consumer deception.[253] The Court distinguished rules that prohibit speech from those that require disclosure. Because first amendment interests implicated by disclosure requirements are substantially less than those at stake when speech is suppressed, the Court reasoned that the state's rule should not fail just because the state did not employ the least restrictive means of regulation available.[254] Specifically, the Court found that the advertisement in question that stated if there was no recovery, no legal fees would be owed would mislead readers into believing it would cost them nothing to file suit.[255] In reality they would still be liable for the *costs* of the actions even if they lost. Presumably because the possibility of deception was so obvious, the state did not have to present evidence to support its position that such an advertisement is deceptive.[256]

The final issue in this case was whether Zauderer had been denied procedural due process with respect to his drunk driving advertisement. Zauderer contended that because the Ohio Supreme Court and the Board of Commissioners had determined that Zauderer's advertisement was misleading and deceptive on a completely new theory than that asserted against him by the Office of Disciplinary Counsel, he had been denied

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[253]*Id.* at 2282. White stated, "[T]he requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard." *Id.* at 2283. White is not saying that the first amendment does not apply to disclosure requirements. Rather, under certain circumstances, he recognizes that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* at 2282.

[254]*Id.* at 2282 n.14.

[255]*Id.* at 2283.

[256]The Court stated, "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 2283.

White does concede that it is difficult to tell how burdensome the disclosures requested by the Ohio Supreme Court are in light of the Ohio court's failure to specify precisely what disclosures were required. *Id.* at 2283 n.15. The report of the Board of Bar Commissioners "at a minimum suggests that an attorney advertising a contingent fee must disclose that a client may be liable for costs even if the lawsuit is unsuccessful. The report and the opinion of the Ohio Supreme Court also suggest that the attorney's contingent-fee rate must be disclosed. Neither requirement seems intrinsically burdensome . . . ." *Id.* (citing Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984)). White admits that the Ohio Supreme Court's opinion regarding precisely what must be disclosed is vague, and that Ohio's DR 2-101(B)(15) really only mandated disclosure of contingent fee *rates*. He then noted that Zauderer's advertisement did not refer to rates. Therefore, White concluded it might be improper to attempt to *disbar* an attorney on the basis of this rule as it would raise "significant due process concerns." *Id.* Nonetheless, because only a public reprimand was issued here, he saw no problem with the application of this rule to Zauderer's advertisement. *Id.*

due process. The Court found that because the decision of the Board of Bar Commissioners had put Zauderer on notice of the charges he had to answer before the Supreme Court of Ohio, he had been afforded notice and an opportunity to respond. Thus, there had been no violation of due process.[257]

Justice Brennan, who was joined by Justice Marshall, filed a separate opinion, concurring in part and dissenting in part. The Justices agreed with the majority that a state may not discipline an attorney for publishing advertisements that contain truthful and nondeceptive advice about specific legal problems and accurate illustrations.[258] The Justices dissented primarily on two points. First, they stated that Ohio's vague disclosure requirements regarding contingent fees were not reasonably related to the state's interest in preventing consumer deception.[259] Second, they found that Ohio's punishment of Zauderer violated his due process rights.[260]

With respect to Ohio's disclosure requirements, Brennan agreed with the majority that disclosure requirements must be reasonably related to a state's interest in preventing consumer deception, but only to the extent that this "reasonable relationship" inquiry is consistent with the *Central Hudson* test.[261] Therefore, the state must demonstrate that its regulation directly advances a substantial state interest. Brennan observed that it was difficult to determine precisely what disclosure requirements the majority had approved.[262] He concluded that the Supreme Court of Ohio had imposed three requirements with respect to disclosures: first, if an advertisement refers to contingent fees, it should indicate whether additional costs might be assessed to the client; second, that an attorney advertising a contingent fee must specifically express his rates; and third, that an attorney must *fully* disclose the terms of a contingent fee contract in his advertising.[263] Brennan proceeded to analyze these requirements in light of the first amendment standard set forth above.

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[257]105 S. Ct. at 2284. Zauderer also contended that he was prejudiced because he could not present evidence before the Ohio Supreme Court concerning the Board's conclusion that drunken driving cases are often plea bargained to a lesser offense. However, White noted Zauderer probably could not argue that plea bargaining is not common in such cases. Furthermore, Zauderer never argued before the Ohio Supreme Court that it was improper for the Board to take judicial notice of such pleas. *Id.* at 2284 n.17.

[258]*Id.* at 2284 (Brennan, J., concurring in part and dissenting in part).

[259]*Id.* at 2285.

[260]*Id.*

[261]*Id.* Brennan agreed that the distinction between suppression and disclosure in the commercial speech context merits some differences in analysis. *Id.* at 2285 n.1. "Nevertheless, disclosure requirements must satisfy the basic tenets of commercial-speech doctrine: they must demonstrably and directly advance substantial state interests, and they may extend no further than 'reasonably necessary' to serve those interests." *Id.*

[262]*Id.* at 2286.

[263]*Id.* at 2286-88.

With respect to the first point, the Ohio Supreme Court had ruled that an advertisement mentioning contingent fees should indicate whether "additional costs . . . might be assessed the client."[264] Brennan agreed that because of the public's general unfamiliarity with the difference between fees and costs, a state may require an advertisement to include a costs disclaimer.[265] He added a proviso, however, that the disclaimer should not be broader than is reasonably necessary to prevent the deception.[266]

Second, the Ohio Supreme Court required that an attorney offering services on a contingent fee basis must specifically express his rates.[267] The majority upheld this requirement provided it is not unduly burdensome.[268] Brennan stated that whether such a requirement is burdensome or not is irrelevant unless the state can demonstrate that its requirement directly and proportionately furthers a substantial state interest.[269] Brennan concluded that Ohio had failed to demonstrate such evidence.

Third, Brennan noted that Ohio had found that Zauderer had acted unethically by failing to disclose *fully* the terms of his offer to represent people on a contingent fee basis.[270] Brennan concluded that such a requirement compelling the publication of detailed fee information that would fill more space than the ad itself was unduly burdensome and would chill protected commercial speech.[270] Brennan also concluded that because Ohio did not precisely specify what disclosures Zauderer was required to include in his advertisements, the rule failed to provide Zauderer with sufficient notice of what he should have included in his advertisements and therefore violated basic due process and first amendment guarantees.[272]

Brennan's second major point in dissent dealt with the issue of procedural due process. Brennan argued that it was improper for the Board of Commissioners to find that Zauderer's drunk driving advertisement

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[264]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984).

[265]105 S. Ct. at 2287. (Brennan, J., concurring in part and dissenting in part). *See also In re* R.M.J., 455 U.S. at 203.

[266]*Id.*

[267]10 Ohio St. 3d at 48, 461 N.E.2d at 886.

[268]105 S. Ct. at 2283 n.15.

[269]*Id.* at 2287. (Brennan, J., concurring in part and dissenting in part).

[270]*Id.* at 2287-88 (citing Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d. at 47, 461 N.E.2d at 886) (emphasis in original).

[271]*Id.* Furthermore, such a requirement might clutter up an advertisement, causing it to be far less effective. Such information easily can be disclosed to clients on their first visit to an attorney's office.

[272]*Id.* at 2289. Brennan agreed that a state may require an advertising attorney to include a costs disclaimer, but he felt Ohio had not created a clear rule at the time Zauderer ran his advertisement. *Id.* Brennan worried that because the Ohio rules are so vague, they are a trap if attorneys even mention contingent fees. *Id.* However, White clearly indicated that a state could not disbar an attorney based upon such advertising and that Ohio should draft clearer rules. *Id.* at 2283 n.15.

was misleading and deceptive on a completely new theory that had not been brought up in the original complaint filed against him.[273] Because Zauderer was not given fair notice of the precise nature of the charges against him, and because on appeal the Ohio Supreme Court would be limited to reviewing whether the findings were against the weight of the evidence, Brennan concluded that the proceedings violated due process.[274]

Justice O'Connor, who was joined by Chief Justice Burger and Justice Rehnquist, also filed a separate opinion concurring in part and dissenting in part. Justice O'Connor concurred with the majority's conclusion that accurate illustrations in lawyer advertising cannot be prohibited, that the state's disclosure requirements concerning contingent fees should be upheld, and that Zauderer had not been denied due process.[275] O'Connor dissented from the majority's conclusion that Ohio's prohibition of soliciting business through legal advice in advertisements violated the first amendment.[276] She concluded for two reasons that the use of unsolicited legal advice poses enough risk of overreaching to justify its ban.[277]

First, because consumers are especially susceptible to confusion and deception when a professional markets his services, the ban is justified.[278] Second, an attorney's personal interest in securing new business may color the advice rendered in an advertisement.[279] The Justice found that the Dalkon Shield advertisement presented a risk of overreaching, but to a lesser degree than that incident to in-person solicitation.[280] This is true because where the legal advice is phrased in uncertain terms it induces a client to seek further legal advice in person where in-person solicitation can occur.[281] Thus, Justice O'Connor determined that Ohio's prohibition on soliciting business through legal advice in advertisements should have been upheld.

V. Implications of *Zauderer*

The Supreme Court's opinion in *Zauderer* has clarified various points concerning lawyer advertising that will have an impact on an attorney's practice. A central provision of the Code of Professional Responsibility at issue in *Zauderer* was DR 2-101(B),[282] which requires that advertisements

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[273]*Id.* at 2292-93 (Brennan, J., concurring in part and dissenting in part).

[274]*Id.* at 2293 (citing *In re* Ruffalo, 390 U.S. 544, 552 (1968)).

[275]*Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part).

[276]*Id.*

[277]*Id.*

[278]*Id.* Specifically, she stated, "the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of lay people who have not sought their advice." *Id.* at 2296.

[279]*Id.* at 2294.

[280]*Id.* at 2296.

[281]*Id.*

[282]Model Code of Professional Responsibility DR 2-101(B) (1979).

be presented in a dignified manner without the use of illustrations and which provides a "laundry list" of information that can be published. Zauderer initially had been charged with including information in his advertisements that had not been authorized by the "laundry list" and with failing to advertise in a dignified manner.[283] Although neither the Board of Commissioners on Grievances and Discipline nor the Ohio Supreme Court found Zauderer guilty on these counts, they did find he had failed to comply with DR 2-101(B) by including an illustration[284] and by failing to disclose all the necessary information relating to contingent fees in his Dalkon Shield advertisement.[285]

Before considering the Supreme Court's treatment of these specific points in DR 2-101(B), the propriety of retaining the rule's "laundry list" approach to the regulation of attorney advertising will be considered.[286]

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[283]*See supra* notes 209-15.

[284]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47, 461 N.E.2d 883, 885-86.

[285]*Id.*

[286]The rule states:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio brodcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or brodcast complies with DR 2-101(A), and is presented in a dignified manner:

(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 practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;

States vary considerably in the extent to which they have adopted the precise language used in the American Bar Association's Model Code of Professional Responsibility — with some states following the Model Code very closely and other states deviating from the language quite substantially.[287] For the most part, Ohio's version of DR 2-101(B), at issue in *Zauderer*, differed very little from the Model Code.[288] It should be noted that in place of DR 2-101(B), the American Bar Association's new Model Rules of Professional Conduct, adopted by the House of Delegates of the American Bar Association on August 2, 1983, does away with the "laundry list" approach and essentially replaces it with a false and misleading standard.[289] In other words, lawyers may include any information in their ads so long as it is not false, fraudulent, or misleading.

In considering the constitutionality of Ohio's version of DR 2-101(B), it should be borne in mind that this rule restricts the free flow of infor-

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(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) 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 to without obligation an estimate of the fee likely to be charged in print size at least equivalent ot the largest print used in setting forth the fee information;
(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the service described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1979).

[287] *See* Andrews, *Lawyer Advertising and the First Amendment*, AM. B. FOUND. RESEARCH J. 967, 986-88 (1981).

[288] *See supra* note 198 and accompanying text.

[289] *See supra* note 19. Under a false and deceptive standard, the public would receive more information than that permitted by the "laundry list."

One could argue that the false and deceptive standard requires more of an enforcement effort than rules that state exactly what may appear in an advertisement. However, when weighing the need of the public for more information against the possible extra enforcement effort that might be needed to police a false and deceptive standard, the need for information seems to suggest a false and deceptive standard should be the rule.

mation between attorneys and prospective clients in contradiction to the right of the public to receive such information, a point enunciated in *Bates v. State Bar of Arizona*.[290] Such information assists the public in learning about the legal system.[291] When a state limits the speech of lawyers to the categories mentioned in DR 2-101(B), according to the *Central Hudson* test, it must assert a substantial state interest that directly supports the restriction and is drawn in the least restrictive manner possible.[292] A number of possible state interests could be asserted in defense of such a regulation. The state has an interest in ensuring that the public receives adequate and accurate information concerning legal services. However, this rule unnecessarily restricts the quantity of information available to the public.[293] Alternatively, the rule could be viewed as a way of maintaining high professional standards. In fact, as the Court enunciated in *Bates*, such a rule is a poor way to deter shoddy work.[294] It might also

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[290]433 U.S. 350, 364 (1977). *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[291]Bates v. State Bar of Arizona, 433 U.S. 350, 364. The Court recognized the interest of consumers in learning as much as possible about all types of commercial speech:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system.

Id. (citing Bigelow v. Virginia, 421 U.S. 809 (1975)).

[292]Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

[293]There are less restrictive means of regulation that make certain the public receives accurate information — such as a false or deceptive standard of regulating advertising.

In her opinion in the *Zauderer* case, Justice O'Connor noted that the public does not have to rely upon legal advertising as its exclusive source of information about the law. "Ohio and other states afford attorneys ample opportunities to inform members of the public of their legal rights. *See, e.g.*, Ohio DR 2-104(A)(4) (permitting attorneys to speak and write publicly on legal topics as long as they do not emphasize their own experience or reputation)." 105 S. Ct. at 2297 (O'Connor, J., concurring in part and dissenting in part).

[294]*See* Bates v. State Bar of Arizona, 433 U.S. 350, 378 (1977). "Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Id.*

In essence, the state argued that the public should be protected from its lack of sophistication about legal matters. The Court rejected this argument in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . ." *Id.* at 770.

prevent attorneys from promoting litigation. In *Bates*, however, the Court rejected the argument that it is improper to advise people via advertising of their right to sue.[295] Furthermore, it could be argued that advertising should be informational and not promotional. The Court, however, has ruled that commercial speech cannot be regulated merely because it is promotional.[296] Arguably, DR 2-101(B) prevents deception, which the state has a substantial interest in preventing. However, Ohio's rule, by limiting the type of information that can be advertised, may result in deceptive advertising nonetheless.[297] Furthermore, the rule arguably advances the state's interest in preventing an adverse effect on the professionalism of attorneys. The Supreme Court, however, rejected in *Bates* the argument that the regulation of advertising promotes this goal.[298] DR 2-101(B) therefore violates the *Central Hudson* test because it does not directly advance any substantial governmental interest.

Further, DR 2-101(B) fails the second part of the *Central Hudson* test because the "laundry list" approach to regulating advertising clearly is not the least restrictive means of accomplishing any of the above-mentioned state interests. The states using DR 2-101(B) could easily adopt other rules that impinge upon an attorney's free speech in a more limited manner, as required by *In re R.M.J.*[299] and *Central Hudson*.[300] For example, the false and misleading standard adopted by the American Bar Association accomplishes the same ends as DR 2-101(B), but gives attorneys greater latitude in designing their advertising.[301]

As mentioned previously, the Court did not consider the "laundry list" aspect of Ohio's DR 2-101(B) in the *Zauderer* case. At some point in the future, the Court should reconsider this rule and insist that states adopt the false and deceptive standard enunciated in the American Bar Association's Model Code of Professional Conduct. This rule is more beneficial because it permits attorneys to provide more information to the public.

Indirectly, of course, the Supreme Court has invalidated Ohio's DR 2-101(B) because the rule does not specifically permit attorneys to include

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[295]"Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." 433 U.S. at 376. *See supra* note 243 and accompanying text. Justice White in *Zauderer* specifically ruled an attorney may advise people of their legal rights in advertising. 105 S. Ct. at 2280.

[296]Bates v. State Bar of Arizona, 433 U.S. 350, 371-72 (1977).

[297]For example, if a rule permits a lawyer to state the areas in which he is available to practice, such a rule would permit a lawyer to advertise he is available to practice in an area in which he has no experience.

[298]433 U.S. at 368-69.

[299]455 U.S. 191, 206 (1982).

[300]447 U.S. 557, 571 (1980).

[301]*See supra* note 198 and accompanying text.

legal advice in their advertising, as required by *Zauderer*. However, about all one can say at this point is that Ohio must add the right to include legal advice in advertising to the list of other permissible information to be included in legal advertising.

With respect to the specific violations of DR 2-101(B) assessed against Zauderer, the rule limiting illustrations to those of a picture of the advertising lawyer or the scales of justice should next be considered.[302] Obviously, one of the goals of an advertising campaign is to catch the attention of the reader. The reader who skims through a paper will not consciously notice many of its articles and advertisements. To be worthwhile, the advertisement must cause a few readers to stop and at least glance at the advertisement. Zauderer advertised both with and without the illustration of the Dalkon Shield. The advertisement without the illustration produced no response.[303]

Even in the seminal case, *Bates v. State Bar of Arizona*, the plaintiffs had used an illustration of the scales of justice.[304] Likewise, R.M.J. had used an illustration of the scales of justice.[305] Presumably, a rule that prohibits the use of illustrations is motivated by a desire that the advertisements be dignified.[306] However, the Supreme Court has rejected a distaste for advertising as a basis for suppressing it.[307] Furthermore,

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[302]DR 2-101(B) prohibits all illustrations except for a picture of the lawyer or a portrayal of the scales of justice. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1979).

[303]*See* Brief for Appellant at 14-15, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). In contrast, he received 95 responses to the advertisement with the illustration. Brief for Appellant at 5. *See supra* note 204. Presumably, the advertisement without the illustration did not catch the attention of women reading the newspapers. The women very possibly had no idea what type of intrauterine device they had been using. The illustration of the very distinctive I.U.D. in this case obviously caught the attention of many readers. What is the point in placing an advertisement that no one reads?

[304]433 U.S. at 385. Presumably, Ohio permitted the use of such an illustration because the Court upheld the right of Bates to place such an advertisement in a newspaper. It is interesting to note that many of the rules adopted by the states after *Bates* did not permit the advertisement in the *Bates* case. *See* Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967, 971 (1981).

[305]*In re* R.M.J., 455 U.S. 191, 207. The Court did not comment on this illustration but upheld his right to place the advertisement thus implicitly permitting the illustration. *Id.* (See Appendix G.).

[306]Ohio Code of Professional Responsibility DR 2-101(B) reads in part: "The information disclosed by the lawyer in such publication or broadcast shall . . . be presented in a dignified manner . . . ." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982). *See supra* note 198.

[307]*See* Bates v. State Bar of Arizona, 433 U.S. at 368, where the Court discusses the argument that advertising allegedly diminishes the dignity of the profession. The Court in *Bates* noted that the bar on advertising originated as a rule of etiquette, and that the view that lawyers are "above" trade has become an anachronism. *Id.* at 371-72. *See also* Carey v. Population Services Int'l, 431 U.S. 678, 701 (1977), where the Court remarked

there is no substantial governmental interest advanced by a rule that permits some types of illustrations but prohibits all others. The Ohio Supreme Court never indicated what governmental interest was advanced by such a rule, but instead merely indicated that illustrations in general may be misleading.[308] This is particularly important because this rule clearly interferes with the right of the public to receive information to assist in selecting a lawyer. This rule fails to comport with the requirement articulated in *In re R.M.J.* that speech must be regulated "with care and in a manner no more extensive than reasonably necessary to further substantial interests."[307]

Clearly, the Supreme Court was correct in striking down Ohio's blanket ban on the use of illustrations in advertisements. So long as the illustration used by an attorney is accurate and not deceptive, an attorney will be able to use it. It is doubtful, however, that extensive use of illustrations will appear in advertising. The Dalkon Shield's unique design made it particularly useful in the advertising to alert readers to the product in question. Illustrations in general, however, probably will not be all that useful for attorneys to include in their advertising.

Zauderer had been charged with violating DR 2-101(B) by offering to represent women in Dalkon Shield cases on a contingency basis without first disclosing how the fees would be computed.[310] No real substantial governmental interest was asserted to support this rule,[311] as required by *Central Hudson*.[312] Even so, the Court ruled against Zauderer because

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that offensiveness is not a justification for suppressing expression.

Justice White in *Zauderer* acknowledged that this was probably the reason for the rule prohibiting the use of other illustrations. 105 S. Ct. at 2280. White also observed, "[A]lthough the State undoubtedly has a substantial interest in ensuring that the attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights." *Id.*

[308]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47, 461 N.E.2d 883, 886 (1984). *Cf. In re* R.M.J., 455 U.S. 191, 202, 205-06 (where the Court indicated that the state must offer evidence that the challenged advertising is in fact deceptive or misleading).

[309]455 U.S. at 207.

[310]*See supra* notes 198, 231 and accompanying text. DR 2-101(B) permits the publication of such information. "Only the following information may be published or broadcast . . . [c]ontingent 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." Zauderer failed to disclose this information in his advertisement.

[311]The Ohio Supreme Court merely noted with respect to this issue: "Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client." Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984).

[312]447 U.S. at 566.

it felt that the *Central Hudson* test should *not* be applied to an offer to represent women on a contingent fee basis.[313] Instead, the Court created a new rule — that the disclosure requirements must be "reasonably related to the State's interest in preventing deception of consumers."[314] While everyone on the Court agreed that the advertisement in question could be misleading, Brennan and Marshall in their separate opinion correctly pointed out that it was not at all clear what rule had been approved by the Court.[315] There is no doubt that states must clearly specify what must be disclosed in an advertisement with respect to the costs of litigation and the rates an attorney charges. Any rule that is not drafted clearly probably will not receive the approval of the Supreme Court.[316] States will need to check their disclosure requirements to make certain they are clearly stated in order to give notice of what must be disclosed.

Zauderer had also been charged with violating DR 2-103(A), which prohibits a lawyer from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer,[317] and with violating DR 2-104(A), which prohibits a lawyer from accepting employment after giving unsolicited advice to an individual to obtain counsel or to take legal action.[318] The Ohio disciplinary authorities felt that his Dalkon Shield advertisement constituted solicitation by recommending that readers employ him. This is perhaps the most absurd point with respect to this case, for it is the purpose of all advertising to generate business for the advertiser.

It is in the best interest of the public to receive as much information about lawyers as possible.[319] A rule that prohibits lawyers from taking cases that result from an advertisement would discourage any lawyer from ever placing an advertisement. This would consequently decrease the amount of information provided to the public about lawyers.[320]

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[313] *See supra* note 252.

[314] 105 S. Ct. at 2282.

[315] *Id.* at 2286 (Brennan, J., concurring in part and dissenting in part).

[316] *See supra* note 256.

[317] *See supra* note 213.

[318] *See supra* note 214.

[319] Ohio Code of Professional Responsibility Ethical Consideration 2-1 states: "The need of members of the public for legal services is met only if they recognize their legal problem, 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 legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1982).

Canon 2 of the American Bar Association Model Code of Professional Responsibility states: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979).

[320] The public desperately needs information concerning lawyers. One study has indicated that the vast majority of the people have no way of knowing which lawyers are competent

The Court was correct in striking Ohio's prohibition on soliciting business through advice in advertisements. The Ohio authorities confused the distinction between advertising and solicitation, a distinction previously recognized by the Supreme Court.[321] Furthermore, the state failed to advance any substantial state interest to support its position. Clearly, the need of the public for such information is very great and would require that the state assert a very substantial interest to merit banning such advertising.

In sum, the Supreme Court created a good rule that will enable attorneys to include more information concerning legal matters in their advertising. This will be beneficial to the public because many people do not understand the law and very often do not realize when they have a right to bring suit. The decision in the *Zauderer* case on this point is likely to have the greatest impact on legal advertising of all the issues discussed in this case. It is quite likely that attorneys will include such material in their advertisements in the future.

VI. Conclusion

The United States Supreme Court, starting with the decision in *Bates v. State Bar of Arizona* in 1977, began to open the doors to legal advertising. It has since that time ruled in three other relevant cases: *In re Primus, Ohralik v. Ohio State Bar Association*, and *In re R.M.J.* Its most recent pronouncement in this area, *Zauderer v. Office of Disciplinary Counsel*, has further clarified various issues regarding attorney advertising.[322]

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to handle their legal problems. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 228 (1977). Perhaps even more shocking is the fact that many *attorneys* do not know how to locate an attorney with expertise in a certain field. Stern, *Dabbling is Dangerous*, J. Mo. B. 121, 122 (March, 1985).

At one time many people believed that an attorney obtained business by developing a reputation in the community. The Supreme Court questioned the value of a reputation in securing new business in *Bates v. State Bar of Arizona*. "Although the system may have worked when the typical lawyer practiced in a small homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy." 433 U.S. at 374 n.30.

One might question in any event whether a personal reputation or personal contacts with lawyers and the business community is more helpful in securing new business. It is far more likely that people will hire an attorney whom they know, as opposed to basing their hiring decision strictly on a lawyer's reputation.

[321]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460, 462 n.20 (1978). The Court noted in this case that while advertising "simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457.

[322]Along with this line of cases has come an increase in the incidence of advertising by lawyers. The percentage of lawyers who have tried advertising has grown from 3% in 1978 to 24% in 1985. Recent increases are especially noticeable. The percentage of lawyers

Bates established that attorneys unquestionably have a right to advertise, and the public has a right to receive this information. *Primus* and *Ohralik*, however, established that attorneys may not directly solicit clients; *In re R.M.J.* moved the law a giant leap forward by adopting the *Central Hudson* test for legal advertising. That test states that commercial speech concerning a lawful activity and not false, deceptive, or misleading is protected by the first amendment. If a state attempts to regulate such speech, the regulation must directly advance a substantial state interest, and the regulation must be no more extensive than is necessary.

Justice White, in *Zauderer v. Office of Disciplinary Counsel*, applied the *Central Hudson* test in arriving at the conclusion that an attorney cannot be disciplined for soliciting legal business through advertising that contains truthful and nondeceptive information and advice regarding the legal rights of potential clients. He also relied upon the *Central Hudson* test in striking down Ohio's rules prohibiting the use of illustrations in advertising. Justice White, however, rejected the application of the *Central Hudson* test with respect to Ohio's requirement that certain information be disclosed in advertising mentioning contingent fees. Instead, the Court held that an advertiser's rights are adequately protected as long as the state's disclosure requirements are reasonably related to its interest in preventing consumer deception.

Perhaps it is regrettable that the Court did not continue to adhere to the *Central Hudson* test on the disclosure issue. At least adhering to the same rule adds some consistency to the law and makes it more predictable. On the other hand, the Court certainly did not clarify exactly what disclosure requirements it was upholding. Nevertheless, it is clear that if states wish to require that certain matters be disclosed in advertising, the rules must be stated in such a manner that attorneys are put on notice as to what information must be disclosed in the advertising.

On the whole, the Court has made it clear that it wants to encourage dissemination of information in legal advertising. It is likely that we will see further clarifications regarding the ability of lawyers to advertise as courts continue to address this timely issue.

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who have advertised has almost doubled since 1983. *Lawyer Advertising Is on the Rise*, ABA Journal, Apr., 1986, at 44, col. 1. The use of television advertising has been growing, particularly among multi-office legal clinics and personal injury firms. Expenditures on television advertising for legal services totaled $38,261,600 for 1985, a 36% increase over 1984. *Lawyers Spending More on TV Ads*, Nat'l L.J., Apr. 7, 1986, at 32, col. 3-4.

Appendix A

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- **Divorce or legal separation--uncontested (both spouses sign papers)**

  $175 00 plus $20 00 court filing fee

- **Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

  $100 00

- **Adoption--uncontested severance proceeding**

  $225 00 plus approximately $10 00 publication cost

- **Bankruptcy--non-business, no contested proceedings**

  Individual
  $250 00 plus $55 00 court filing fee

  Wife and Husband
  $300 00 plus $110 00 court filing fee

- **Change of Name**

  $95 00 plus $20 00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-8888

CONSULTATIONS

4 TO 6 P.M.
MON. WED. FRI.
WILLIAM E. McLELLAN III
ATTORNEY-AT-LAW
THE FIRST CONFERENCE IS FREE
LICENSED IN MISSISSIPPI
SINCE 1968

969-6751

SUITE 420 BARNETT BLDG
220 S. PRESIDENT ST
JACKSON MISSISSIPPI

A 2462

Appendix B

WHEN IT COMES TO LOWERING THEIR PRICES, MOST LAWYERS' HANDS ARE TIED.

When it comes to lowering the prices they charge, most lawyers' hands are tied.

Their rent is high. Their volume is low. And their overhead is almost out of sight. Which means that when you retain a regular attorney, one way or another you're going to pay the price.

It isn't fair. But since law firms traditionally charge by time and expenses, it's little wonder they're so expensive.

Are you paying for your law firm's mistakes?

Simply put, we believe that one reason some lawyers' fees are so great, is because their overhead is so high.

We're smart enough to know that there's no way to keep your prices in check, when your expenses are way out of line. So before we ever opened our doors, we decided to open our eyes.

We took a look at the extra cost of downtown rents. We looked at the extravagance of client entertainment. And after we saw all the fancy desks and the overstuffed chairs, we knew how we could trim the rates. And trim our rates we did.

Competent work at competitive prices.

When you come to Marcus and Tepper, the first thing you'll find is a competent lawyer. The second is competitive prices.

In most cases, fixed fees determined by the task at hand. Not by the hands of a clock. At an average saving which is quite substantial.

To be specific, our fee for an uncontested Divorce is $275. An Adoption is $150. And a simple Will is a mere $30. (Exclusive of normal court costs, of course.) And if you're buying a house, the closing cost is $100, regardless of the cost of the home.

In short, anything a regular-priced lawyer does, Marcus and Tepper will do. And we'll do it for a good deal less.

Why some lawyers are fit to be tied.

If there's one thing some lawyers resent more than our reasonable rates, it's the way we promote them in full page ads. What's more they'd like to put an end to this practice.

At Marcus and Tepper, we strongly disagree.

We believe in aggressively advertising to generate a high volume of work. And staying open evenings and Saturdays to see it gets done.

And the more business we tend to do, the lower the price we can afford to charge. Which makes it more equitable for all.

After all, justice may be blind in the eyes of the law. But it's expensive in the hands of a lawyer.

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Marcus & Tepper Attorneys, Milwaukee, Wisconsin.
All rights reserved

Marcus & Tepper Attorneys At Law

8326 W. Burleigh, Milwaukee, Wis. 449-9700

Hours: Mon. and Thurs., 8:30 until 8 PM;
Tues., Wed., and Fri., 8:30 to 5. Saturday til Noon.

Appendix C

HOW TO HIRE A LAWYER WITHOUT GETTING TAKEN FOR A RIDE.

Few things are as frustrating as retaining an attorney.

Because the minute you walk into their office the meter starts to run. And since the wheels of justice can turn exceedingly slow, your bill can start to spiral fast.

It isn't fair. But since lawyers traditionally charge by the hour, until recently you had little choice.

Our lawyers practice what we preach.

In all candor, we believe the high cost of justice today is anything but just.

We believe lawyers should be compensated on the basis of what they do. Not how long it takes them to do it. We believe clients should be told what their case is going to cost. Long before they receive a statement. And we believe that a good law firm can afford to charge inexpensive fees, and still be financially rewarding.

What's more, we're willing to put our beliefs into practice.

Copyright Reproduction 1978
Marcus & Tepper Attorneys, Milwaukee, Wisconsin
All rights reserved

Why other lawyers will hate this ad.

When you come to Marcus and Tepper, the first thing you'll notice is the high level of professionalism. The second is our schedule of prices.

In most cases, fixed fees determined by the task at hand. Not by the hands of a clock. At an average saving of one-half, and more.

To be specific, our fee for an uncontested Divorce is $275. An Adoption is $150. And a simple Will is a mere $30. (Exclusive of normal court costs, of course.) And if you're buying a house, the closing cost is $100, regardless of the cost of the home. A saving quite substantial.

In short, anything a regular-priced lawyer does, Marcus and Tepper will do. And we'll do it for a good deal less.

The more we do, the less we charge.

If you're wondering how we can maintain such a high standard of work at such unstandard rates, there's a simple explanation

Most lawyers are content to wait for unsolicited clients to come to them. So their clients have to pay for the time they spend waiting.

Not so with Marcus and Tepper.

We believe in aggressively advertising to generate a high volume of work. And staying open evenings and Saturdays to get it done.

And the more business we tend to do, the lower the price we can afford to charge. Which makes it more equitable for all.

Because when it comes to the law, your biggest legal problem shouldn't be your lawyer.

Marcus & Tepper Attorneys At Law

5325 W. Burleigh, Milwaukee, Wis. 449-9700
Hours: Mon. and Thurs., 8:30 to 8 PM,
Tues., Wed. and Fri. 8:30 to 5 PM,
Saturdays until Noon.

Appendix D

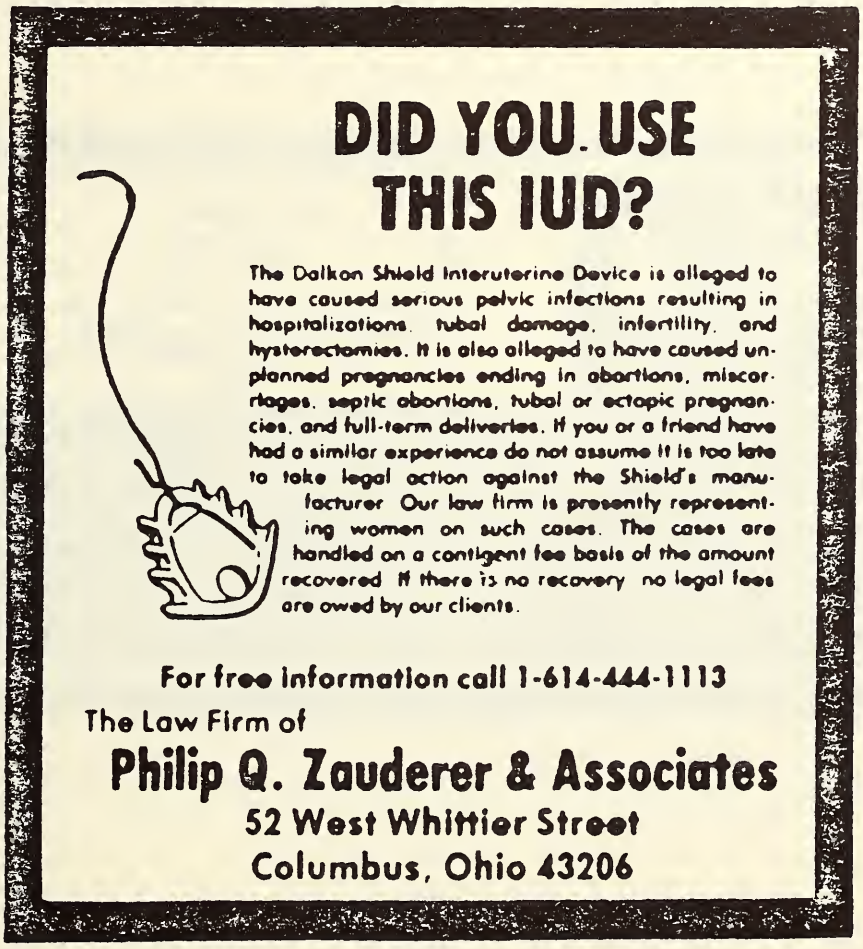
ATTACHMENT A

/Columbia, S.C., Thursday, July 16, 1981 9-B

STOP FORECLOSURE

Repossession, Creditor Harassment,
Consolidate or Get Out of Debt.
Call:
Harvey W. Burgess
1417 Gregg St. Columbia, S.C.
In Columbia Call: 254-2006
In Charleston Call: 571-3642

Appendix E



Appendix F

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

Appendix G