University of Arkansas at Little Rock Law Review

Volume 8 | Issue 2 Article 4

1985

Attorney Advertising—Constitutional Right to Advertise in Print Media

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ATTORNEY ADVERTISING—CONSTITUTIONAL RIGHT TO ADVERTISE IN PRINT MEDIA, *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985).

In the spring of 1982, Phillip Q. Zauderer, an attorney practicing in Columbus, Ohio, placed an advertisement in thirty-six Ohio newspapers. The advertisement publicized his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. It also featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The ad concluded with the name of Zauderer's law firm, its address, and a phone number the reader might call for free information. The firm received well over 200 inquiries from this advertisement and initiated lawsuits on behalf of 106 women.

The ad, however, also prompted the Office of Disciplinary Counsel for the state of Ohio to file a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, alleging a number of disciplinary violations. Principally, the complaint alleged that by running the advertisement and accepting the resulting employment, Zauderer had violated the following Disciplinary Rules from the Ohio Code of Professional Responsibility: DR 2-101(B), prohibiting the use of illustrations in ads run by attorneys, requiring that attorney advertisements be "dignified," and limiting the information contained in such advertisements to a list of twenty items;[1] DR 2-103(A), prohibiting an attorney from "recommend[ing] 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;"[2] and DR 2-104(A), providing (with certain exceptions not applicable in this case) that "[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 such advice."[3] The complaint also alleged that the ad violated the disclosure requirements of DR 2-101(B)(15).[4] Moreover, it alleged that the ad's failure to inform clients

1. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982).

2. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1982).

3. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1982). Virtually all states have a similar provision. *See* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2294-95 & nn. 2-4 (1985) (O'Connor, J., dissenting).

4. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(15) (1982), which per-

that they would be liable for costs (as opposed to legal fees), even if their claims were unsuccessful, rendered the advertisement "deceptive" in violation of DR 2-101(A).[5] The complaint did not allege that the advertisement was false or deceptive in any other respect. Indeed, the Office of Disciplinary Counsel stipulated that the information and advice regarding Dalkon Shield litigation was not false, fraudulent, misleading, or deceptive, and that the drawing was an accurate representation of the Dalkon Shield. Notwithstanding the nonmisleading nature of this advertising, the Office argued that the disciplinary rules in question were permissible restrictions on the constitutional right to advertise, even as applied to Zauderer.

A panel of the Board of Commissioners on Grievances and Discipline found that each of the allegations in the complaint was supported by the evidence. The panel made these findings despite the testimony of expert witnesses that unfettered advertising by attorneys was economically beneficial to society. More specifically, these experts testified that the Dalkon Shield ad was socially valuable in informing the public of both the potential hazards of this intrauterine device and their corresponding legal rights. Indeed, two of the women who had responded to the ad testified that they would not have learned of their legal claims had it not been for Zauderer's advertisement. The Ohio Supreme Court adopted the panel's findings and agreed with the panel that the application of Ohio's disciplinary rules to Zauderer's advertisement did not offend the first amendment.[6] The Ohio court pointed out that the United States Supreme Court's decisions in *Bates v. State Bar of Arizona*[7] and *In re R.M.J.*[8] permitted regulations designed to prevent the use of deceptive advertising, and that *R.M.J.* had recognized that even nondeceptive advertising might be restricted if the restriction was narrowly designed to meet a substantial state interest.[9] The Ohio Supreme Court held that, for purposes of clarity, ads mentioning contingent fees should specifically express what those fees are.[10] The Ohio court also found it "reasonable" to prohibit a lawyer from giving legal advice in a specific area and recommending himself for any resulting employ-

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mits an attorney to advertise "[c]ontingent fee rates . . . provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses."

5. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1982).
6. Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984).
7. 433 U.S. 350 (1977).
8. 455 U.S. 191 (1982).
9. Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47-48, 461 N.E.2d 883, 886 (1984).
10. *Id.* at 48, 461 N.E.2d at 886.

ment.[11] Thus, the court held that states may restrict attorneys from accepting employment from such unsolicited advice, although it did not specifically identify the interests served by these restrictions.[12] The court also noted that restrictions are permissible if the advertising is misleading per se, or may be misleading in its reach and interpretation.[13] Apparently this formed the court's basis for disallowing the use of illustrations, but, here again, the court did not give its reasoning. In accordance with these views, the Ohio court accepted and implemented the panel's recommendation that Zauderer's conduct warranted a public reprimand.[14]

The United States Supreme Court affirmed in part and reversed in part. The Supreme Court opinion, authored by Justice White and joined by Justices Blackmun and Stevens, held that Zauderer was properly disciplined for the failure to disclose the client's potential liability for costs as opposed to legal fees. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred in this view in a separate opinion. However, a majority of the Court disapproved of the Ohio court's decision to reprimand Zauderer for the use of a non-deceptive illustration and for soliciting or accepting legal employment through an advertisement containing information or advice regarding a specific legal problem. The separate opinion of Justice Brennan, joined by Justice Marshall, concurred with the majority of the Court on these issues. Justice Powell took no part in the consideration or decision of this case. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985).[15]

The Supreme Court in *Zauderer* balanced an attorney's constitutional right to advertise against a state's power to regulate the legal profession. The birth of the commercial speech doctrine has provided a

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11. *Id.* at 48, 461 N.E.2d at 887.

12. *Id.* at 48-49, 461 N.E.2d at 886-87.

13. *Id.* at 47, 461 N.E.2d at 886 (citing *Bates*, 433 U.S. at 350 (1977) and *R.M.J.*, 455 U.S. at 192 (1982)).

14. 10 Ohio St. 3d at 49, 461 N.E.2d at 887.

15. Also at issue in the case but not germane to this casenote, was a D.W.I. advertisement found deceptive in violation of DR 2-101(A). The United States Supreme Court rejected Zauderer's argument that the discrepancy between the theory asserted by the Office of Disciplinary Counsel in its complaint and the theory ultimately relied on by the Board and the Ohio Supreme Court denied him procedural due process. The Court reasoned that since the Board is only empowered to make recommendations to the Ohio Supreme Court, the fact that it chose to base its recommendation on a different theory than that relied on by the Office of Disciplinary Council was of little moment. Since Zauderer was put on notice of the charges against him, and was given an opportunity to respond to the Board's recommendations, the Court held that the demands of procedural due process were satisfied. *Zauderer*, 105 S. Ct. 2265, 2283-84 (1985).

workable framework for scrutinizing state restrictions on advertising and solicitation by attorneys. The Supreme Court has cited *Bigelow v. Virginia*[16] as its first expression of "dissatisfaction with the then-prevalent approach of resolving a class of first amendment claims simply by categorizing the speech as 'commercial.' "[17] The Court in *Bigelow* stated that, "[r]egardless of the particular label . . .—whether [the state] calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[18] The following term, the Court extinguished any possibility that a "commercial speech" exception to first amendment protection might still exist.[19] After conceding that some fragment of hope for a "commercial speech" exception might have persisted because of the subject matter of the advertisement in *Bigelow*,[20] the opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[21] concluded that commercial speech, like other varieties of speech, is constitutionally protected.[22]

At the same time the Court directly extended this protection to commercial speech, it was quick to point out that its decision did not foreclose any regulation of such speech.[23] As examples of proper state regulation, the Court mentioned the propriety of properly drawn time, place, and manner restrictions, and the ability to deal with deceptive or misleading speech, or speech that concerns illegal activity.[24]

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16. 421 U.S. 809 (1975).

17. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 91 (1977).

18. *Bigelow*, 421 U.S. at 826.

19. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760-61 (1976), the Court stated, "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us."

20. In *Bigelow*, the Court reversed a conviction for violating a statute that made circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. While the advertisement at issue offered the services of a referral agency in New York, it also announced that abortions were legal there. Thus, the advertisement did more than simply propose a commercial transaction. It contained factual information of public interest.

21. 425 U.S. 748 (1976).

22. *Id.* at 770.

23. *Id.*

24. *Id.* at 771-72. Moreover, the Court mentioned that common sense differences between speech that does no more than propose a commercial transaction and other varieties of speech suggest that a different degree of protection is necessary to insure the free flow of truthful and legitimate commercial information. The Court noted that since advertising is indispensable to the realization of commercial profits, commercial speech is less likely than other varieties of speech to be chilled by proper regulation. Thus, the Court suggested that this greater hardiness, coupled with the greater objectivity available in analyzing printed advertising, may make it less necessary to tolerate inaccurate statements and more appropriate to require additional information, warn-

These views ultimately crystallized into a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[25] The initial inquiry focuses on whether the speech concerns lawful activity and is not misleading.[26] If both of these answers are positive, the speech is entitled to first amendment protection. Next, the state is required to show a substantial governmental interest. Once this is established, a court must determine whether the regulation directly advances the governmental interest, and, if so, whether it is no more extensive than necessary to serve that interest.[27] Thus, while the precise bounds of commercial speech are somewhat nebulous,[28] once the speech is determined to be "commercial" the framework for analysis is clear.

Even prior to the crystallization of the *Central Hudson* test, the law regarding attorney advertising and solicitation was forming. In *Bates v. State Bar of Arizona*,[29] the Court invalidated an outright prohibition on attorney advertising and held that a state may not prevent the truthful advertisement of routine legal services.[30] While recognizing the attorney's advertising as a form of protected commercial speech,[31] the Court, consistent with other commercial speech cases,[32] carefully noted that its decision did not foreclose all regulation of attorney adver-

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ings, or disclaimers to prevent deception. *Id.* at 772 n.24.

25. 447 U.S. 557 (1980).

26. *Id.* at 563. "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." *Id.*

27. *Id.* at 566.

28. In *Central Hudson*, Justice Stevens, with whom Justice Brennan joined, criticized both definitions of commercial speech given by the Court. He viewed "expression related solely to the economic interests of the speaker and its audience" as too broad, possibly reaching speech entitled to full first amendment protection, albeit economically motivated. The second definition—"speech proposing a commercial transaction"—he viewed as possibly too narrow, expressing his concern that this definition may encompass only routine price advertising to the exclusion of other communications that merely make the name of the product or service more familiar to the public. *Id.* at 580-81. (Stevens, J., concurring). In *Zauderer*, Justice White stated, "[m]ore subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds." *Zauderer*, 105 S. Ct. at 2275 (1985).

29. 433 U.S. 350 (1977).

30. The Court rejected the following justifications alleged by the Arizona bar: (1) The adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on administration of justice; (4) the undesirable economic effects of advertising; (5) the adverse effect on the quality of legal service; and (6) the difficulties of enforcement. *Id.* at 368-79.

31. *Id.* at 383.

32. *E.g., Virginia Pharmacy Bd.*, 425 U.S. at 770.

tising.[33] The Court in *Bates* also stated that due to the public's lack of sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising might be subject to regulation in the field of attorney advertising.[34] As an example, the Court noted that claims about the quality of legal service are not susceptible of measurement or verification.[35] "In sum, . . . many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved . . . ."[36]

The states' authority to regulate deceptive attorney advertising was refined in *In re R.M.J.*[37] A unanimous Supreme Court indicated that "the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public."[38] Accordingly, the Court stated:

> [W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. 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.[39]

Since the record before the Court failed to show that the attorney's advertisements were misleading, the Court invalidated the following restrictions: (1) listing fields of practice only by the precise terms prescribed in Missouri's disciplinary rules;[40] (2) prohibiting the listing of courts and states the attorney is licensed to practice in;[41] and (3)

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33. *Bates*, 433 U.S. at 383-84. The Court stated that false, deceptive, or misleading advertising was subject to restraint and suggested the possibility that warnings or disclaimers might be justified to insure that the consumer is not misled. Additionally, the Court noted that reasonable time, place, and manner restrictions are permissible and that advertising concerning illegal activities may be supressed. *Id.*

34. *Id.*

35. *Id.* at 383.

36. *Id.* at 384.

37. 455 U.S. 191 (1982).

38. *Id.* at 203 n.15.

39. *Id.* at 203.

40. On this point, the Court said "[t]he use of the words 'real estate' instead of 'property' could scarcely mislead the public." "Indeed, . . . in certain respects appellant's listing is more informative than that provided in the addendum." *Id.* at 205.

41. The Court viewed the attorney's listing, in large capital letters, that he was a member of the Bar of the United States Supreme Court as relatively uninformative and in bad taste. However, since the lower court made no finding that this rendered the ad misleading, the Court invali-

prohibiting the practice of mailing cards to the general public announcing the opening of the attorney's office.[42] It is important to note that in *R.M.J.*, the Court viewed the mass mailing as advertising, as opposed to solicitation.[43] In the solicitation context, significant state interests may be present which justify state regulation.[44]

The solicitation issue, not addressed in *Bates*,[45] was the subject of two cases decided the same day in 1978, *In re Primus*[46] and *Ohralik v. Ohio State Bar Association*.[47] In *In re Primus*,[48] the alleged solicitation took the form of a letter acquainting a woman with the American Civil Liberties Union's (ACLU) offer of free representation. The attorney, an officer and cooperating lawyer with the Columbia, South Carolina branch of the ACLU, had previously discussed with the woman the possibility of seeking redress for an allegedly unconstitutional sterilization. The Court found that the attorney's actions "were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[49] Accordingly, it reversed the South Carolina Supreme Court's holding that the attorney could be disciplined under a broad anti-solicitation rule, rejecting that court's attempt to distinguish *NAACP v. Button*.[50] Given the presence of constitutionally protected associational freedoms, the anti-solicitation regulation "must withstand 'the exacting scrutiny applicable to limitations on core First Amendment rights . . . .' "[51]

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dated the restriction. The Court also noted that the rule itself failed to identify this information as potentially misleading or place a limitation on type size or require an explanation of the nature of the Supreme Court bar. *Id.* at 205-06.

42. *Id.* at 206. On this last issue, the Court found no indication of a failed effort to proceed along a less restrictive path, such as requiring a copy of all general mailings to be filed with the state so that it may exercise reasonable supervision.

43. The split of authority about whether a given mailing will be treated as impermissible solicitation or constitutionally protected advertising is documented in Annot., 5 A.L.R.4th 866 (1981). However, the majority of decisions can be reconciled in light of the distinctions drawn by the Supreme Court in In re Primus, 436 U.S. 412 (1978). In *Primus*, the Court noted the record did not support a finding of undue influence, overreaching, misrepresentation, or invasion of privacy. *Id.* at 434-35. Neither was there "in-person solicitation for pecuniary gain." *Id.* at 422.

44. *See infra* pp. 288-89.

45. 433 U.S. at 384.

46. 436 U.S. 412 (1978).

47. 436 U.S. 447 (1978).

48. 436 U.S. 412 (1978).

49. *Id.* at 422.

50. 371 U.S. 415 (1963). In *Button*, the solicitation of prospective litigants, including many non-NAACP members, for the purpose of furthering the civil-rights objectives of the organization and its members was held to come within the right to engage in association for the advancement of beliefs and ideas. *Id.* at 428-30.

51. *Primus*, at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).

These associational freedoms were not present in the companion case of *Ohralik v. Ohio State Bar Association*.[52] In *Ohralik*, the alleged act of solicitation occurred when the attorney personally approached the victims of an auto accident, one as she lay in traction in a hospital, and the other on the day she came home from the hospital. The Ohio Supreme Court indefinitely suspended the attorney's license under two broad anti-solicitation rules.[53] The United States Supreme Court affirmed this decision, rejecting the attorney's assertion that in-person solicitation shared the same first amendment protection as the truthful advertising of routine legal services upheld in *Bates*.[54] "While entitled to some constitutional protection," the Court stated, "appellant's conduct is subject to regulation in furtherance of important state interests."[55] The Court noted that "[t]he interest of the states in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the court.' "[56] Given the states' legitimate interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct, the Court upheld the validity of Ohio's prophylactic rules and their application to the attorney without the necessity of proving actual harm.[57]

Both the solicitation and advertising aspects of state regulation of attorneys were addressed in *Eaton & Benton v. Arkansas Supreme Court Committee on Professional Conduct*,[58] the only reported Arkansas decision on these issues. In *Eaton*, the attorneys had contracted with Val-Pak Advertising to include an advertisement of their firm in a mail-out packet featuring discount coupons for local businesses. The mailing targeted 10,000 households in the North Little Rock area.[59] The ad featured several inquiries concerning specific legal services and concluded with the question "Other legal problems?" The ad also contained the name, address, and phone number of the law firm, stated that the first consultation charge was only $10.00, and indicated that

52. 436 U.S. 447 (1978).

53. The Ohio Supreme Court based its decision on DR 2-103(A), prohibiting self-recommendation, and DR 2-104(A), prohibiting accepting employment from the unsolicited advice that a client should obtain counsel. The complaint in *Zauderer* alleged these same violations.

54. 436 U.S. at 455.

55. *Id.* at 459.

56. *Id.* at 460 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).

57. *Ohralik*, 436 U.S. at 464.

58. 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981).

59. *Id.* at 576, 607 S.W.2d at 56.

there was no time or subject limitation.[60] The Arkansas Supreme Court found "that a combination of the content and the manner of dissemination in this case constitutes a violation of [the Arkansas disciplinary] rules."[61] More specifically, the court found the ad violated DR 2-101(B) for its failure to be informative in nature.[62] Since the ad's "primary purpose was not to inform the consumer to facilitate an informed choice by allowing fee comparison, but rather to urge a group of specific potential consumers to seek [the attorneys'] services," it constituted solicitation.[63] In support of this view, the court noted that the attorneys' contract with Val-Pak provided that no competitors' advertisements would be sent in the same mailing packet without the attorneys' permission.[64] The attorneys contended that they could have produced evidence from satisfied clients and, through cross-examination, could have shown that this advertisement was not misleading, had they known the charges in the complaint in more detail.[65] The court responded by citing *Ohralik*[66] for the proposition that the constitutional validity of the states' decision to discipline the attorneys under its anti-solicitation rules does not depend on proof of actual harm.[67] In support of its finding that the manner of dissemination was also impermissible, the court noted the ad's inclusion with predominantly discount offers and that the front of the mailing packet envelope read, "Valuable coupons from local businesses."[68] Thus, the court concluded that the "advertisement certainly could be understood by a recipient as appearing to be a discount offer and a solicitation of legal services."[69] The court concluded the opinion by finding no violation in the application of its disciplinary rules to the attorneys under the first amendment, nor the similar provision contained in the Arkansas Constitution.[70] The court cited *Bates* and *Ohralik* as specifically allowing the states to regulate

60. The advertisement is reprinted in *Eaton*. *Id.* at 578, 607 S.W.2d at 58.

61. *Id.* at 581-82, 607 S.W.2d at 60.

62. The court indicated that the last query, "Other legal problems?", coupled with the phrase, "There is no time or subject limitation," could indicate that these attorneys were competent to advise and consult on any legal problem. Thus, the court failed to see how this broad invitation without any indication of charges, was sufficient information to assist one in need of legal services to make an informed selection. *Id.* at 580, 607 S.W.2d at 59.

63. *Id.* at 580-81, 607 S.W.2d at 59.

64. *Id.* at 581, 607 S.W.2d at 60.

65. *Id.* at 582, 607 S.W.2d at 60.

66. 436 U.S. 477 (1978).

67. *Eaton*, 270 Ark. at 582-83, 607 S.W.2d at 60-61.

68. *Id.* at 580, 607 S.W.2d at 59.

69. *Id.*

70. *Id.* at 583, 607 S.W.2d at 61. *See also* ARK. CONST. art. II § 6.

the time, place, and manner of advertising.[71]

The three distinct holdings of the United States Supreme Court in *Zauderer*[72] demonstrated that *Bates* and *Ohralik* must be carefully applied in assessing an attorney's first amendment advertising claims. First, a five member majority held "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."[73] The Court reached this decision despite the narrow reading the Ohio Supreme Court had given its broad prohibitions on self-recommendation and solicitation. The Ohio court had held only that its rules forbade these activities with reference to a specific legal problem.[74]

The Supreme Court applied the four-part test enunciated in *Central Hudson*: (1) Does the ad concern lawful activity and is it misleading? (2) Does the state have a substantial interest? (3) Is that interest directly advanced by the regulation? (4) Is the regulation no more extensive than necessary to serve the state interest?[75] The Court not only found the ad was neither false nor deceptive,[76] but also that it was entirely accurate.[77]

The Court noted that the ad did not promise the reader that her lawsuit would be successful, nor did it suggest that Zauderer had any special expertise other than his current employment in other Dalkon Shield litigation.[78] The ad merely reported the indisputable fact that the Dalkon Shield had spawned an impressive number of lawsuits.[79] The Court also noted that advising women not to assume that their claims were time-barred seemed completely unobjectionable in light of the trend in may states towards a "discovery rule" for determining

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71. *Eaton*, 270 Ark. 583, 607 S.W.2d 61. The *Eaton* opinion is criticized in Note, *Eaton and Benton v. Supreme Court of Arkansas Committee on Professional Conduct: Restrictions on Legal Advertising*, 35 ARK. L. REV. 549 (1981). The author also suggest that the ultimate result of the *Eaton* decision will be to discourage the use of alternative methods of advertising, which may be more economically feasible and more efficient in reaching those in need of legal services, to the public's detriment.

72. 105 S. Ct. 2265 (1985).

73. *Id.* at 2280.

74. Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 887 (1984). *See also Zauderer*, 105 S. Ct. at 2276.

75. *See Central Hudson*, 447 U.S. at 566. *See also supra* notes 22-24 and accompanying text.

76. Indeed, the Office of Disciplinary Counsel stipulated to this. *Zauderer*, 105 S. Ct. at 2276.

77. *Id.*

78. *Id.*

79. *Id.*

when a cause of action for latent injury or disease accrues.[80] Thus, the Court stated that "[t]he State's power to prohibit advertising that is 'inherently misleading' . . . cannot justify Ohio's decision to discipline [Zauderer] for running advertising geared to persons with a specific legal problem."[81]

After determining that the first part of the *Central Hudson* test was satisfied, the Court put the burden on the state to establish that prohibiting the use of statements directed at a specific legal problem to solicit or obtain business directly advanced a substantial state interest.[82] The Court first noted that the extensive citations in the Board of Commissioners' opinion to the *Ohralik* case suggested that the Board believed the application of Ohio's rules served the same interests held to justify the ban on in-person solicitation at issue in *Ohralik*.[83] The Supreme Court, however, found that the concerns that moved the Court in *Ohralik* were not present.[84] It emphasized that the *Ohralik* decision was based largely on the differences between face-to-face solicitation—"a practice rife with possibilities for overreaching, invasion of privacy, exercise of undue influence, and outright fraud"—and the advertising upheld in *Bates*.[85] While recognizing that some "sensitive souls" may have found Zauderer's ad in poor taste, the Court rejected any suggestion that it would amount to an invasion of privacy.[86] More significant to the Court in distinguishing *Ohralik* was the lack of coercive force and pressure on the client to make an immediate response to a printed publication.[87] Since printed advertising is more conducive to reflection and the exercise of personal choice by the consumer than in-person solicitation, *Ohralik* could not justify disciplining Zauderer for

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80. *Id.* at 2276-77. The Court noted that,

> [i]n 1983, the Ohio Supreme Court explicitly adopted the rule that "[w]hen an injury does not manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he has been injured, whichever comes first."

Zauderer, 105 S. Ct. at 2277 n.11 (quoting O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 90, 447 N.E.2d 727, 732 (1983)).

81. *Zauderer*, 105 S. Ct. at 2277. The court cited In re R.M.J., 455 U.S. at 203, as authority for the states' ability to prohibit advertising that is inherently misleading.

82. *Zauderer*, 105 S. Ct. at 2277.

83. *Id.*

84. *Id.*

85. *Id.* The Court stated that in *Ohralik* it was "careful to point out that 'in-person solicitation . . . does not stand on a par with truthful advertising about the availability and terms of routine legal services.'" *Id.* (quoting *Ohralik*, 436 U.S. at 455).

86. *Zauderer*, 105 S. Ct. at 2277.

87. *Id.*

the content of his ad.[88]

The Court next addressed what it called "the traditional justification" for restraints on solicitation, i.e., "the fear that lawyers will 'stir up litigation' ":[89]

> That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.[90]

Thus, even if Zauderer's truthful and nondeceptive advertisement in fact encouraged other consumers to file lawsuits, it could not justify disciplining Zauderer.[91]

Next the Court addressed the state's position that the regulatory difficulties inherent in legal advertising made a prophylactic rule necessary. The state argued that the indeterminacy of legal statements distinguished them from statements about most consumer products since the latter are more easily subject to verification. Accordingly, the state argued that the nonfeasibility of weeding out the accurate from the false or misleading statements made a prophylactic rule essential in order to vindicate the state's substantial interest in ensuring that its citizens are not encouraged to litigate by ambiguous or outright false information.[92] The Court noted, however, that the application of a prophylactic rule to Zauderer, notwithstanding that his advertisement contained none of the vices allegedly justifying the anti-solicitation rule, conflicted with the requirement that restrictions on commercial speech be narrowly drawn to serve the state's purposes.[93] Nevertheless, the Court chose not to decide this issue since it was not convinced that the state's rule was necessary to achieve a substantial government interest.[94] The Court was unpersuaded that the problems of distinguishing deceptive from nondeceptive legal advertising were different in kind from those involved in distinguishing between deceptive and nondeceptive advertising generally.[95] Accordingly, the Court expressed its con-

88. *Id.*
89. *Id.*
90. *Id.* at 2278.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 2278-79.
95. *Id.* at 2279. The Court felt that the facts of the case undercut this argument since Zauderer's advertisement was easily verifiable and completely accurate. Furthermore, the Court pointed out that the body of case law that has developed as a result of the Federal Trade Commis-

tinued faith that the free flow of commercial information was important enough to justify the costs of regulating it.[96]

Justice O'Connor, in an opinion joined by Justice Rehnquist and Chief Justice Burger, dissented on this point and expressed the view that "the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's [anti-solicitation] rule."[97] Justice O'Connor advanced a number of justifications for this view. First, she noted the enhanced possibility for confusion and deception in marketing legal services and suggested that state regulation was therefore entitled to greater deference than permitted by the majority's analysis.[98] Second, and more significantly in her view, Justice O'Connor felt that the attorney's personal, pecuniary interest may color the advice offered in soliciting the client. Thus, she reasoned, the consumer's decision to employ an attorney may be based on advice that is neither complete nor disinterested.[99] Consistent with this view, Justice O'Connor's opinion cited the substantial state interest in requiring that lawyers consistently exercise independent professional judgment.[100] Although O'Connor's opinion clearly articulated the states' legitimate interests, it did not purport to show how the regulation directly advanced these interests,[101] and even conceded that it would not require that the least restrictive means be employed.[102]

The Court next held that Zauderer could not be disciplined for using an accurate and nondeceptive illustration in his advertisement.[103] Even the O'Connor opinion concurred on this point, expressing the view

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sion's mandate to eliminate unfair or deceptive practices in commerce tended to show that complex and technical factual issues can be present in many advertisements. *Id.*

96. *Id.* at 2279-80.

97. *Id.* at 2294.

98. *Id.* at 2294-95. The opinion noted repeated acknowledgements by the Court in commercial speech cases that the differences between professional services and other advertised products may justify distinctive state regulation. *Id.* (citing *Virginia Pharmacy Bd.*, 425 U.S. at 773 n.25). *See also Virginia Pharmacy Bd.*, at 773-775 (opinion of Burger, C.J.); *Bates*, 433 U.S. at 383-84; *R.M.J.*, 455 U.S. at 204 n.15.

99. *Zauderer*, 105 S. Ct. at 2294.

100. *Id.* at 2296.

101. The dissent disagreed that the anti-solicitation provision in DR 2-104(A) was "unnecessary" to achieve the state's interests, but stated only that the rule was "appropriate" to assure the exercise of independent professional judgment. The state could "reasonably" determine that unsolicited advice could be used as bait to obtain an agreement to represent a client for a fee. *Id.* at 2296-97.

102. "The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's longstanding and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule." *Id.* at 2297.

103. *Id.* at 2281.

that, at least in the context of print media, the task of monitoring illustrations in attorney advertising is not so unmanageable as to warrant Ohio's prophylactic rule.[104] The majority opinion found that the application of DR 2-101(B)'s ban on illustrations to Zauderer's ad was invalid for many of the same reasons that application of the self-recommendation and solicitation rules were invalid.[105] Noting the important communicative functions illustrations serve, the Court also scrutinized this restriction under the *Central Hudson* test.[106] The illustration was an accurate representation of the Dalkon Shield,[107] and the Court perceived no deceiving, misleading, or confusing features.[108] Thus, the majority opinion put the burden on the state to present a substantial government interest justifying DR 2-101(B)'s application to Zauderer, and to demonstrate that the Rule's ban on illustrations vindicates that interest through the least restrictive available means.[109] The Court noted that the rule itself suggested that it served to ensure that attorneys advertise in a dignified manner.[110] Since no suggestion was made that Zauderer's ad was undignified, the Court failed to see how its application in this case directly advanced the state's interest in preserving the dignity of attorneys.[111]

The state again argued that only a prophylactic rule would serve its purpose of preventing the public from being misled, manipulated, or confused.[112] It argued that the advertiser is skilled in the use of illustrations, which may operate at a subconscious level. Thus, the state would be hard pressed to point to any particular illustration and prove that it was misleading or manipulative.[113] The Court was not convinced. It noted that the state failed to cite any evidence or authority to prove that the potential abuses associated with the use of illustrations

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104. *Id.* at 2294. The Court specifically reserved questions involving " 'the special problems of advertising on the electronic broadcast media . . . .' " *Id.* n.1 (O'Connor, J., concurring in part and dissenting in part) (quoting *Bates*, 433 U.S. at 384).

105. *Zauderer*, 105 S. Ct. at 2280.

106. *Id.*

107. The Office of Disciplinary Counsel of Ohio stipulated that the illustration was accurate. *Id.* at 2276.

108. *Id.* at 2280.

109. *Id.*

110. *Id.*

111. *Id.* The majority opinion expressed doubt about whether the state's desire that attorneys maintain dignity in their communications with the public, as opposed to decorum in the courtroom, was substantial enough to justify the abridgement of their first amendment rights. But even assuming that was the case, the majority was unpersuaded that undignified behavior would occur so often as to warrant a prophylactic rule. *Id.*

112. *Id.* at 2280-81.

113. *Id.*

in attorney ads could not be combatted without imposing a blanket ban.[114] The Court also noted that since decisions regarding the use of legal services are not likely to be based on qualities that can be visually represented, illustrations in lawyers' advertisements will be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.[115] Thus, the Court would not allow the state to forego the task of monitoring visual representations in favor of the more convenient, but far more restrictive, alternative of a blanket ban.[116]

The third and final issue regarding state regulation of attorney advertising the Court addressed was the decision to discipline Zauderer for his failure to disclose in his ad that clients might be liable for costs, as opposed to legal fees, even if their litigation proved unsuccessful. On this point, the Court affirmed the Ohio decision.[117] The Court noted that the extension of first amendment protection to commercial speech is principally justified by the value to consumers such commercial information provides.[118] Thus, it found Zauderer's constitutionally protected interest in *not* providing any particular information in his advertising to be minimal.[119] The Court noted that since disclosure requirements trench much more narrowly on free speech than outright prohibitions, its commercial speech decisions have emphasized that warnings or disclaimers might be appropriately required to protect consumers from confusion or deception.[120] But the Court also recognized that unjustified or unduly burdensome disclosure requirements might chill protected commercial speech.[121] Balancing these interests, the Court arrived at a test for disclosure requirements. "[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of

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114. *Id.* at 2281.

115. *Id.*

116. *Id.* Again the Court pointed to the experience of the F.T.C., this time to show that the elimination of deceptive uses of the visual media has not proven to be an insurmountable task. *Id.*

117. *Id.* at 2283.

118. *Id.* at 2282.

119. *Id.* The Court distinguished its decisions holding that compulsion to speak may be as violative of the first amendment as outright prohibitions on speech. It reasoned that interests are at stake in pure speech cases that are not present in commercial speech cases. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1975) (Jehovah Witnesses' conviction for knowingly obscuring on his license plate the state motto, "Live Free or Die," reversed); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Florida statute requiring newspaper editors to grant political candidates equal space to reply to criticism and attacks on their character by newspapers held unconstitutional).

120. 105 S. Ct. at 2282 (citing *R.M.J.*, 455 U.S. at 201).

121. 105 S. Ct. at 2282.

consumers."[122] Since Zauderer's ad made no mention of the distinction between "legal fees" and "costs," the Court found that the ad would suggest a no-lose proposition to a layman not accustomed to the technical legal meaning of these words.[123] Thus, the Court found a reasonable relationship to the state's interest by this "self-evident" possibility of deception.[124]

The majority's analysis on the disclosure issue troubled Justices Brennan and Marshall, who dissented from this holding.[125] In an opinion written by Justice Brennan, they expressed the view that disclosure requirements are "reasonably related" only if they fully comply with the four-part *Central Hudson* test.[126] Finding this approach more consistent with past decisions, Justices Brennan and Marshall would require the state to demonstrate a legitimate and substantial state interest that is directly advanced by the regulation and no broader than necessary to prevent the deception.[127] These two Justices, however, were unconvinced that this standard was met by the record before them.[128] They pointed out that the failure of an attorney advertising his availability on a contingent-fee basis to publish his rates was not "inherently likely to deceive," nor did the record reveal any actual proof of deception.[129] They also noted that the Ohio decision found unethical conduct in Zauderer's failure to *fully* disclose the terms of the contingent fee arrangements.[130] Since the record indicated that Zauderer entered into a comprehensive contract with personal injury clients, Justice Brennan stated that requiring full disclosure would obviously fit the majority's definition of an "unduly burdensome requirement" that would violate the first amendment.[131]

The significance of *Zauderer* lies in the guidelines it has given to both the practicing attorney and the states in this evolving area of the law. The four-part *Central Hudson* test is the standard for scrutinizing attorney solicitation through printed advertisements containing information, advice on specific legal issues, or illustrations.[132] The blanket

122. *Id.* The Court also rejected the suggestion that the disclosure requirements were unduly burdensome. *Id.* at 2283 n.15.

123. *Id.* at 2283.

124. *Id.*

125. *Id.* at 2285 (Brennan, J., concurring in part, dissenting in part).

126. *Id.* at 2285-86.

127. *Id.*

128. *Id.* at 2285.

129. *Id.* at 2287 (quoting *R.M.J.*, 455 U.S. at 202).

130. *Zauderer*, 105 S. Ct. at 2287-88 (Brennnan, J., concurring) (emphasis in original).

131. *Id.* at 2288.

132. *R.M.J.* indicated that the *Central Hudson* formulation must be applied to advertising

bans on solicitation contained in virtually all states' disciplinary rules have not been declared to be unconstitutional per se.[133] However, their application to specific forms of nondeceptive advertising will probably be upheld only in situations involving possibilities for overreaching, invasion of privacy, and the exercise of undue influence, which justified their application to in-person solicitation in *Ohralik*.[134] However, note that Justice O'Connor, also expressing the views of Justice Rehnquist and Chief Justice Burger, would uphold merely "reasonable" or "appropriate" regulation of attorney solicitation.[135]

More subject to refinement, perhaps, is the Court's standard for analyzing the validity of disclosure requirements in attorney advertising. Six members of the Court would "hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[136] The majority's concession that unjustified or unduly burdensome disclosure requirements might offend the first amendment by chilling commercial speech[137] presumably refines what is "reasonable." This concession somewhat coincides with the insistence of Justices Brennan and Marshall that all parts of the *Central Hudson* test be satisfied.[138] Under Justice Brennan's analysis, an unjustified or unduly burdensome restriction, even if pursuant to a substantial state interest, is not likely to be the least restrictive available means of regulation. But since a majority of the Court explicitly rejected the use of a "least restrictive means" analysis, it is likely that state disclosure requirements will be upheld unless a litigant can show that the restriction is

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for professional services. *R.M.J.*, 455 U.S. at 203 n.15. Moreover, in *Zauderer*, the Court stated that application of the *Central Hudson* factors led to the conclusion in *Bates* that truthful price advertising of routine legal services was permissible, although *Bates* itself was decided three years before the *Central Hudson* test crystallized. *Zauderer*, 105 S. Ct. at 2275.

133. In *Zauderer*, the Court stated, "[w]e need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area . . . ." 105 S. Ct. at 2278. The Court did state, however, that such a rule was "in tension" with its requirement that restrictions on commercial speech that is not deceptive be narrowly drawn to serve the state's purposes. The Court also noted that in *R.M.J.*, 455 U.S. at 203, it went so far as to state that "the states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." 105 S. Ct. at 2278.

134. *See Zauderer*, 105 S. Ct. at 2277-80. *But cf.* In re Primus, 436 U.S. at 434 (showing of potential, but not actual harm, will not justify application of a prophylactic anti-solicitation rule if freedoms of expression and association are present).

135. *See supra* notes 99-100 and accompanying text.

136. *Zauderer*, 105 S. Ct. at 2282.

137. *Id.*

138. *See supra* text accompanying notes 124-25. Justice Brennan insists that this line of analysis is most consistent with prior commercial speech decisions.

not justified or is unduly burdensome.

The *Zauderer* opinion also indicates that some of the language in the Arkansas case of *Eaton v. Supreme Court of Arkansas Committee on Professional Conduct*[139] is dead law. The Arkansas Supreme Court cited *Ohralik* for the proposition that application of a prophylactic anti-solicitation rule was warranted without proof of actual harm, although it conceded that the case did not involve in-person solicitation.[140] Noting important distinctions between in-person solicitation and advertising through the print media, the Supreme Court in *Zauderer* would not allow the states to forego the task of monitoring printed advertising in favor of the far more restrictive ban on solicitation.[141] Thus, advertising by mail in Arkansas has been afforded greater protection than a reading of the *Eaton* case would suggest.

The *Zauderer* case did not, however, completely overrule *Eaton.* Implicit in the *Eaton* court's decision that a combination of the content and manner of dissemination violated Arkansas' disciplinary rules was the finding that the ad was misleading.[142] The United States Supreme Court has often recognized the authority of the states to prevent the dissemination of commercial speech that is false, deceptive, or misleading.[143]

In *Eaton*, the Arkansas Supreme Court interpreted DR 2-101(B) to require that attorney advertising be informative in nature.[144] Such a restriction is consistent with the United States Supreme Court's statement that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the informa-

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139. 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 996 (1981).

140. *Id.* at 582-83, 607 S.W.2d at 60-61. One casenote suggests that *Ohralik* was misapplied and that the Val-Pak advertisement in *Eaton* offended the Arkansas court's notions of tradition. *See* Note, *supra* note 69, at 44.

141. *Zauderer*, 105 S. Ct. at 2279. More directly on point, in *R.M.J.*, the Court, in response to the Missouri Supreme Court's decision to discipline an attorney for sending mailing cards to the general public, suggested the less restrictive means of requiring that a copy of such advertising be filed with the state. *R.M.J.*, 455 U.S. at 206. It also noted that Rule 7.2(b) of the proposed Model Rules of Professional Conduct of the American Bar Association requires that "[a] copy or recording of an advertisement or written communication shall be kept for one year after its dissemination." *R.M.J.*, 455 U.S. at 206 n.19.

142. With regard to content, the Arkansas Supreme Court felt the ad's last query, "Other legal problems?", could indicate to the lay person that the attorneys were competent to consult and advise on any legal problem. With regard to the manner of dissemination, the court felt the inclusion of the ad with discount coupons for local business could be understood as a discount offer. *Eaton*, 270 Ark. at 580, 607 S.W.2d at 59.

143. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 9-10 (1979).

144. *Eaton*, 270 Ark. at 580, 607 S.W.2d at 59.

tion such speech provides . . . ."[145] Although an "informative" requirement directly advances the state's interest in ensuring informed selection of lawyers, state-imposed disclosure requirements are a less restrictive means to serve this interest than prohibiting accurate yet uninformative advertising.

One other aspect of *Zauderer's* impact on the *Eaton* case deserves mention. The dissemination of the attorney's ad in a Val-Pak mailing packet may infringe upon the state's interest in preserving the dignity of attorneys. In *Zauderer*, the Court recognized the state had a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, but was unsure whether the states had a substantial interest in requiring attorneys to maintain dignity in their communications with the public.[146] The Supreme Court was unpersuaded that undignified behavior would occur so often as to warrant a prophylactic rule.[147] However, the Court was not presented with a situation in which the manner of dissemination itself could be viewed as downgrading the profession.[148] Perhaps the fact situation presented in *Eaton* would lead the Court to conclude that the state's interest in preventing such advertising is substantial. However, arguments can also be made that the benefits of accurate and informative advertising far outweigh any adverse inferences that may be drawn from the manner in which it is received. Whether the continued use of advertising by attorneys will require the recognition of this state interest as substantial must await future litigation.

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145. *Zauderer*, 105 S. Ct. at 2282 (citing *Virginia Pharmacy Bd.*, 425 U.S. 748 (1976)).

146. *Zauderer*, 105 S. Ct. at 2280.

147. *Id.*

148. In *Zauderer*, the attorney was expressly authorized by Ohio DR 2-101(B) to place his ad in a regularly published newspaper, which he did.